54644432

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SAN ALLEN INC. ET AL
Plaintiff

BUREAU OF WORKERS COMPENSATION-ET AL
Defendant

Case No: CV-07-644950

Judge: RICHARD J MCMONAGLE

JOURNAL ENTRY

JUDGMENT ENTRY. Ø.S.J.

Judge Signature

11/18/08
Date

11/18/2008

STATE OF OHIO	)	IN THE COURT OF COMMON PLEAS
	) SS:	
CUYAHOGA COUNTY	)	CASE NO. CV 07-644950

SAN ALLEN, INC., *et al.*	)	
	)	
Plaintiffs	)	
	)	
vs.	)	**JUDGMENT ENTRY**
	)	
MARSHA P. RYAN, ADMINISTRATOR OHIO BUREAU OF WORKERS' COMPENSATION	)	
	)	
Defendant	)	

RICHARD J. MCMONAGLE, JUDGE:

This case is before the Court on plaintiffs' motion for a Preliminary Injunction. Plaintiffs seek to enjoin the BWC (the Bureau) from: 1) instituting a group-rating plan, and 2) instituting a group experience-rating plan. In seeking a Preliminary Injunction, the plaintiffs must establish the following: 1) probability of success on the merits, 2) balance of harm weighs in favor of granting preliminary relief, 3) plaintiffs will suffer irreparable harm, and 4) granting preliminary relief will serve the public interest. *KLN Logistics Corp. v. Norton*, 174 Ohio App. 3d 712, 2008-Ohio-212 at ¶8.

I. PROBABILITY OF SUCCESS ON THE MERITS

Plaintiffs assert three grounds for relief: 1) R.C. 4123.29 requires retrospective rating, 2) the current group rating plan is not equitable in violation of R.C. 4123.34, and 3) the group rating plan violates the equal protection clause. The BWC argues that plaintiffs are barred from

bringing their claims because R.C. 4123.21 prohibits a court from enjoining the setting of the Bureau's rates, and because plaintiffs failed to exhaust their administrative remedies. Plaintiffs do not seek an injunction against their rates, rather a court order seeking an injunction against the manner in which the rates are set. Plaintiffs do not have an administrative remedy for having the Bureau redo the manner in which they set their rates. Therefore, this Court can reach the merits of plaintiffs' claims.

Plaintiffs argue that the Bureau's current group rating plan violates R.C. 4123.29 because it is not a retrospective rating plan. R.C. 4123.29(A)(4)(c) states:

> "In providing employer group plans under division (A)(4) of this section, the administrator shall consider an employer group as a single employing entity for purposes of **retrospective rating**. No employer may be a member of more than one group for the purpose of obtaining workers' compensation coverage under this division."

R.C. 4123.29(A)(4)(c) (emphasis added).

This portion of the statute clearly calls for group plans to be retrospective. The Bureau, however, argues that the retrospective rating portion of the statute is a typo, and that the legislature intended the group plan to be **prospective**. The Bureau's position is exemplified by the fact the relevant portion of the administrative code, enacted by the Bureau, which states:

> "In providing employer group plans under section 4123.29 of the Revised Code, the Bureau shall consider an employer group as a single employing entity for purposes of **group rating**. No employer may be a member of more than one group for the purpose of obtaining workers' compensation coverage. Applying for more than one group on a valid application for

group rating will result in rejection of the employer from all groups for which the employer applied."

OAC 4123-17-61(C) (emphasis added)

However, in interpreting a statute, if the statute is clear on its face, the court must apply what the statute says. *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 218, 574 N.E.2d 457. R.C. 4123.29(A) is clear on its face in that group rating plans are required to be retrospective. If the statutory language was a typo, then the legislature is responsible for fixing it. The fact that it has not done so shows that the legislature intended what the statute currently says. The Bureau simply cannot rewrite the statute. Therefore, plaintiffs have established a probability of success that the group prospective rating plan violates R.C. 4123.29(A).

Plaintiffs argue that the group-rating plan violates R.C. 4123.34(C). That section requires the Bureau to set its rates in an equitable manner. Plaintiffs argue that the group-rating plan is not equitable in that the non-group employers subsidize the claims costs of the group employers. While this may be true, it is up to the Bureau to decide how to properly deal with the equity issues. Even if the court were to strike down the current group rating method, the Bureau would have to come up with another rating method as the statute specifically directs the Bureau to enact a group rating plan, not the court. Furthermore, there was testimony that the Bureau is working on eliminating the subsidies that the non-group employers pay. Therefore, the Court should defer to the Bureau to determine how to set the rates in an equitable manner pursuant to R.C. 4123.34(C).

Finally, plaintiffs argue that the group-rating plan violates the equal protection clause of the U.S. and the Ohio Constitutions. When a challenge is made on equal protection grounds, and is not based on a suspect class, rational basis review applies to determine the

constitutionality of the enactment. *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546 at ¶82, 883 N.E.2d 377. The group-rating plan will survive constitutional scrutiny if the group rating rationally relates to a legitimate government safety. *Groch*, 117 Ohio St.3d 192, 2008-Ohio0546 at ¶82, 883 N.E.2d 377.

The group-rating plan satisfies rational basis review. Workplace safety is a legitimate governmental interest. The group-rating plan rationally relates to workplace safety in that the plan encourages employers to get into, and stay in group plans. The only way to do so is to maintain a safe workplace. Therefore, plaintiffs cannot establish a substantial likelihood of succeeding on their equal protection claim.

II. IRREPARABLE HARM

Plaintiffs will suffer irreparable harm if the preliminary relief is not granted. Restitution is practically impossible in that statutory changes may be required. Even if restitution was possible, the Bureau owes over one million dollars to the non-group employers. Since the Bureau cannot collect this money from the group employers, the Bureau would not have sources to collect the money. The only way to prevent further damage to the non-group employers is to prevent the Bureau from instituting its current group rating plain for the policy year beginning July 1, 2009.

III. BALANCE OF HARM

The balance of harm favors granting preliminary relief. Plaintiffs will pay an unfair amount of premium in order to subsidize the group employers. If relief is granted, the Bureau's revenue from the premiums will not be affected as the bureau is a revenue neutral organization. In fact, the only people that would be negatively affected by a court order granting plaintiffs'

prayer for relief would be the group employers in that their premiums would likely go up. However, as discussed above, the group premiums were based on an unlawful enactment by the Bureau. The group employers should have been paying higher rates than they have paid since group rating was enacted.

IV. PUBLIC INTEREST

Finally, the public interest would be served by a court order granting preliminary relief. The Bureau argues that the group rating system serves the public interest in two ways: 1) it encourages workplace safety, and 2) the discounts given to group employers encourage those employers to come into and stay in Ohio. However, workplace safety would not be harmed by a group plan that was retrospective. It would still encourage employers to be safe for fear of paying more premium at the end of the policy year, as well as being excluded from a group before the next policy year. The discounts given to group employers are unlawful, and should not be relied upon as to what employers should actually be paying in premiums. On the other hand, the non-group premiums have forced certain business to either file for bankruptcy, or to cancel their workers' compensation policies. Furthermore, the base rates in Ohio are higher than most of the neighboring states. Lowering the base rates would likely encourage more business to move into Ohio.

V. CONCLUSION

Plaintiffs have satisfied all four requirements for preliminary relief. The Bureau is restrained from enacting its current group-rating plan for the policy year beginning July 1, 2009. Furthermore, the bureau shall enact a group retrospective rating plan for the policy year beginning July 1, 2009.

IT IS SO ORDERED.

RICHARD J. MCMONAGLE, JUDGE

November 18, 2008

COPIES TO:

James A. DeRoche, Esq.
Garson & Assoc. Co., LPA
614 West Superior Ave., Suite 1600
Cleveland, OH 44113
Attorney for Plaintiffs

Steven J. Miller, Esq.
Drew A. Carson, Esq.
Deborah J. Michelson, Esq.
Miller Goler Faeges, LLP
100 Erieview Plaza, 27th Fl.
Cleveland, OH 44114-1835

Mark E. Mastrangelo, Esq.
Jeffrey B. Duber, Esq.
Asst. Attorneys General
615 West Superior Ave.
State Office Bldg., 11th Fl.
Cleveland, OH 44113-1899

Eric C. Harrell, Esq.
Gerald H. Waterman, Esq.
Elise W. Porter, Esq.
Asst. Attorneys General
150 East Gay St., 22nd Fl.
Columbus, OH 43215-3130
Counsel for Defendant, Administrator,
Ohio Bureau of Workers' Compensation