

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

SAN ALLEN)	CASE NO. CV 07 644950
dba Corky & Lenny's, et al.)	
)	
Plaintiffs,)	
)	JUDGE RICHARD McMONAGLE
vs.)	
)	<u>POST HEARING</u>
MARSHA P. RYAN)	<u>BRIEF IN SUPPORT OF</u>
Adm., Ohio BWC,)	<u>PLAINTIFFS' MOTION FOR</u>
)	<u>PRELIMINARY INJUNCTION</u>
Defendants.)	
)	

INTRODUCTION

The evidence presented at the preliminary injunction hearing proves beyond any doubt that the present inequitable group rating system violates the Ohio Revised Code and the Ohio Constitution. In the face of overwhelming evidence that it is hurting Ohio's economy, the BWC continues to defend a group rating plan that it knows to be inconsistent with the basic principles underlying the concept of workers' compensation insurance. The BWC knows that the workers' compensation system is supposed to be based on the insurance principles of shared liability and hazard-based premium assessments. The premium charged to each employer, whether the base rate or some modification of the base rate, is supposed to be tied to the degree of hazard presented to the State Fund by that employer. Each employer is supposed to be required to pay that employer's fair share of the needed premium, and it is the BWC's statutory duty to develop equitable rules designed to divide the bill on that basis. ORC § 4123.34. By the BWC's own admission the current group rating plan violates that statutory duty.

Outside the context of this litigation, the BWC agrees with the Plaintiffs' position, to such an extent that it is difficult to understand why the BWC is even fighting this case. Examples of this include:

- The BWC concedes that “the law requires the use of actuarial principles,”¹ and the head of the BWC’s actuarial department admits that the rates generated by the current group rating plan are “actuarially unsound.”²
- The BWC concedes that it “has a fiduciary responsibility to ensure rates are fair and equitable to all employers per the Actuarial Standards and the Ohio Revised Code,” and the BWC admits that “Group rated credits are too extreme [and] Ohio BWC must correct to have actuarially sound premium rates.”³
- The BWC concedes that the total required annual premium “must be equitably divided among all employers,”⁴ and the BWC admits that the “premium collected [under the current group rating program] led to inequity.”⁵
- The BWC concedes that it is required to “divide the bill equitably so each employer pays the correct premium” and that rate-making must “spread[] costs equitably,”⁶ and the BWC admits that from the outset the group rating program had “unsound features” that cause “pricing inequity between group employers and non-group employers.”⁷

¹ Plaintiffs’ Exhibits (“PX”) 18 (referring to ORC § 4123.34(C)).

² Testimony of Elizabeth Bravender, Transcript of Hearing on Plaintiff’s Motion for Preliminary Injunction (“Tr.”) p. 127.

³ PX 19.

⁴ PX 17.

⁵ PX 23.

⁶ Defendant’s Exhibit (“DX”) 31.

⁷ PX 20.

- The BWC concedes that it “has a fiduciary responsibility to be fair to all [employers] (group/non-group),”⁸ and the BWC admits that excessive group discounts force “non-group employers to pay more than their fair share.”⁹
- The BWC concedes that the group rating program was designed “as an economic development tool,” and that today “group rating is not fulfilling its promise as an economic development tool [because it] inflates premium rates costing Ohio business development opportunities.”¹⁰

In its attempt to justify its admittedly inequitable rating system, the BWC relies almost exclusively on three pages of the 1989 final report of the House Select Committee to Study Workers’ Compensation Insurance,¹¹ a nearly twenty year old report that the Court need not even consider until after applying normal rules of statutory construction and finding that the actual statutory language is ambiguous. The BWC extrapolates from those three pages of the forty-one page committee report an intent on the part of the entire General Assembly to cast aside insurance principles of equitable rate-making in favor of a system that grants undeserved discounts to some employers funded by excessive premiums charged to others.¹² According to the BWC, the General Assembly supposedly determined, without saying it, that encouraging safety through wildly inequitable premium rates was a good thing for the State of Ohio. According to the BWC’s counsel, only “really big” premium increases or discounts incentivize safety, so

⁸ DX 21.

⁹ PX 25.

¹⁰ PX 25.

¹¹ DX 3.

¹² Of course, the BWC’s own witness Preston Garvin admitted the obvious—that “the Committee’s recommendation isn’t the law.” Tr. p. 515.

the BWC was supposedly authorized to implement a group rating system that annually sacrifices a portion of the employer population on the altar of safety (approximately 6,100 in 2006 by Administrator Ryan's estimation).¹³

Yet there is no indication in House Bill 222 or Ohio Revised Code § 4123.29 – the actual law of this State – that the BWC was authorized to set up a system that grants excessive discounts to group rated employers and forces non-group rated employers to pay inflated premium rates. There is no reason to believe that the General Assembly authorized the BWC to establish a group rating system that so skews rates that the consequences of losing the discounts are penal in nature, forcing employers to violate the law to hide claims¹⁴ or file bankruptcy.¹⁵ There is no evidence that the General Assembly intended the group rating plan to inflate Ohio's base rates, making Ohio less competitive in terms of attracting or keeping businesses.¹⁶ All of these consequences – which the BWC has the audacity to call “side effects” – flow directly from the “unsound” group rating plan that the BWC attempts to defend in this case. The rejected employers who suffered an average premium increase of 697 percent in 2006 would hardly characterize their resulting insolvency as a “side effect.”¹⁷ The non-group employers who are going to pay a \$200 million unlawful subsidy again this year would hardly characterize that as a mere “side effect.”

In the end, the BWC failed to present any evidence that the group rating plan was exempted from ORC § 4123.34(C) – most notably the requirement that the rating

¹³ PX 1.

¹⁴ Testimony of Phillip Parker, Tr. p. 13.

¹⁵ PX 1.

¹⁶ PX 20 p. 37.

¹⁷ PX 1.

rules be “equitable” –in a supposed effort to encourage safety. The group rating plan authorized by Ohio Revised Code § 4123.29 was not intended to be a cost-shifting mechanism that intentionally undercharges one group of employers at the expense of others. The BWC has never before characterized group rating as deviating from the recognized purpose of experience rating, which is to accurately estimate an employer’s potential cost to the system and adjust the premium charged that employer on that basis. The BWC has always publically touted its rate-setting procedures, both base rate development and experience rate calculations, as being based on an equitable division of the premium bill tied to the risk presented by each employer. Privately the BWC has known since at least 1993 that its rate-setting procedures produce inequitable rates, charging some inadequate rates and others excessive rates in violation of ORC § 4123.34(C).

Premium rates are not a reward or penalty, and have never been characterized by the BWC as a reward or penalty prior to the injunction hearing in this case. Instead, the BWC has always told employers that experience modifications to the base rate reflect material differences in the risk to which the State Fund is exposed by an employer.¹⁸ The BWC never informed the employer community that the group rating plan is an intentional deviation from long-established rating principles. The BWC never informed the employer community that the BWC was so concerned with safety that it set the group discounts so that those who did not participate would suffer an

¹⁸ Testimony of Terresse Gallagher, Tr. p. 756-57 (the BWC consistently tells the employer community that experience modifications are not a reward or penalty); PX 21 (Pedrick Project Plan Proposal p. 11: “Experience rating is a method of predicting an employer’s potential for incurring losses. It provides a prospective look at the risk level of an individual employer and is not a reward or penalty.”).

overcharge. The BWC never told the employer community that it was intentionally undercharging group rated employers and inflating base rates to make up the difference. There is no statutory basis for the BWC to use inflated base rates to encourage safety, but that is precisely what the BWC conceded it is doing in this case.

There is no doubt that the BWC grants excessive, actuarially unsound discounts to the privileged employers chosen by group sponsors, and forces those without a seat at the table to pay the inflated bill. The BWC failed to point to any statutory basis for this inequitable rating system, which violates the mandate in Ohio Revised Code § 4123.34(C) that the BWC “develop fixed and equitable rules controlling the rating system, which rules shall conserve to each [employer] the basic principles of workers’ compensation insurance.” (emphasis added). The current system may be “fixed” but it is by no means “equitable.” As the Ohio Inspector General observed, it is long past time for the BWC to listen to its consultants and actually fix the inequitable group rating system.¹⁹ This inequitable system should not be allowed to continue for even one more year.

FACTS PROVEN AT THE HEARING

1. House Bill 222 Required Pooling Risk “Within the Group” and Group “Retrospective Rating”

The present group rating system followed the passage of House Bill 222 by the General Assembly in 1989. Although the BWC tries to characterize the group rating program as a panacea that solved all of the problems with the workers’ compensation system, HB 222 was a 212 page bill that made countless improvements to the Ohio

¹⁹ PX 16.

workers' compensation system which were designed to solve those very same problems. The first witness called at the hearing, Elizabeth Bravender, conceded that there is no analysis that demonstrates the effect of group rating on claim frequency or claims costs.²⁰ She conceded that there are many likely explanations for injury claim reduction (loss of manufacturing jobs, wage continuation, etc.), and that the BWC has no study tying it to group rating.²¹ This testimony was consistent with the study by Aon Risk Consultants, which found no evidence that group rating has any positive effect on claim frequency or severity.²²

So while the BWC paraded group sponsor lobbyists into court to provide self-serving anecdotal testimony about how wonderful the group rating system is, that testimony is virtually worthless without a competent study isolating the effect of group rating from the myriad of other potential causes for claims reduction. Just because the group rating system is popular, not surprising given that it gives privileged participants huge discounts that someone else pays for, does not mean that it is serving any purpose other than inequitable cost-shifting. Moreover, the last witness at the hearing, John Pedrick, the Chief Actuarial Officer of the BWC, testified that safety could be encouraged without giving actuarially unsound discounts.²³ So the BWC's "ends justify the means" safety argument is a canard designed to distract rather than enlighten. The "ends" do not justify the "means" when the "means" violate the Ohio Revised Code and the Ohio Constitution.

²⁰ Transcript p. 113-14.

²¹ *Id.* p. 113.

²² PX 15 p. 15.

²³ Tr. p. 914.

In any event, the HB 222 amendments to ORC § 4123.29 required the BWC to offer a group rating option that “pools the risk of the group rated employers within the group,” and treats them as a single employer for purposes of “retrospective rating.” Elizabeth Bravender testified that group rated employers’ risk is pooled with all other State Fund employers, and is not pooled “within the group.”²⁴ It is also undisputed that the present group rating plan is not a retrospective rating plan. So besides being inequitable, the present group rating plan plainly violates the express requirements of ORC § 4123.29.

The BWC argues that retrospective rating is not required, despite what the statute actually says, relying on the Committee report instead of the language of the statute. Although the House Committee report discussed a desire to allow smaller employers to qualify for merit discounts even though they did not qualify for experience rating, the actual law passed by the General Assembly did not even mention group experience rating. Rather, the actual law only authorized group retrospective rating, having omitted the Committee’s only reference to experience rating.

The BWC half-heartedly argued that the reference to retrospective rating was a typographical error, an apparent concession that the statute as written does not support the BWC’s position. However, the BWC appears to have abandoned that silly argument, in light of the fact that the use of the word “retrospective” in the statute actually corrected a typographical error in the Committee report, which erroneously used the word “retroactive.” That correction in the statute evidences a clear intent by

²⁴ Tr. p. 124.

someone who understood insurance to require retrospective group rating in the law as enacted.

When the BWC implemented the group rating rule in Ohio Administrative Code 4123-17-61, however, it dropped the word “retrospective” and substituted the word “group.” (DX 5) The BWC later recognized that the regulation was inconsistent with the statute, and attempted to have a “technical correction” made to the statute, changing the word “retrospective” to “group.” (DX 19) That again is a tacit admission that what the BWC is doing is not consistent with the requirements of ORC § 4123.29. The purported “technical correction” was never made by the General Assembly, despite numerous workers compensation bills having been passed since then, again evidencing a clear intent to retain the retrospective requirement.

What is equally clear from the Committee’s report is that it was very concerned with premium volatility. The Committee criticized a 30% increase in rates that followed several years of decreasing rates.²⁵ The Committee also recommended that the BWC perform longer term projections so that Ohio businesses could better budget for the long term, and have more confidence that they could estimate future rates.²⁶ It is difficult to conceive of any basis upon which the BWC could argue that the current group rating plan, with its extreme premium rate volatility, could have even been contemplated by the Committee, let alone intended. In fact, the BWC’s primary argument – that the extreme rate increases suffered by those rejected from the group program are an intentional effort to encourage safety – is plainly refuted by the

²⁵ DX 3 p. 8.

²⁶ *Id.* p. 7-8.

Committee Report. The Committee wanted greater rate stability, not less. So in the end the BWC's statutory construction argument is even inconsistent with the Committee Report that the BWC exclusively relies upon to support it.

2. The BWC Implements a Group Experience Rating Plan That Violates The Ohio Revised Code

Following passage of HB 222, the BWC formed a Group Rating Advisory Committee, consisting primarily of trade association representatives, that designed the group rating plan. The group experiencing rating plan ultimately recommended and adopted cedes complete control of group formation to the group sponsors who form the groups without any input for the BWC. Group sponsors select group members based on lower than average claims history in the four year experience period, which is not particularly difficult given that approximately 75% of small employers would be expected not to have a claim during the experience period.²⁷ As shown at the hearing, the plan as adopted is susceptible to manipulation by the plan sponsors,²⁸ and they took full advantage to maximize the undeserved discounts. Small employers presenting average risk who fortuitously had no claims in the experience period received huge discounts, and the resulting premium shortfall is passed on to non-group employers through inflated base rates.

Very early on, the BWC knew that the premium collected from the group members was inadequate to cover their claims costs and that the group rating methodology was fundamentally flawed. One of the consulting actuaries retained by

²⁷ PX 8.

²⁸ See, e.g., PX 5 (the 1991 Finger report).

the BWC, James Inkrott, continued to sound the alarm to the advisory committee, and lobby for a group retrospective rating or safety dividend program. (DX 13). He explained that when group rating had been done in other states, it was done on a retrospective basis. (DX 13). He also recommended a group safety dividend program that encouraged safety but was not susceptible to manipulation through rearranging groups. (DX 14). His pleas fell on deaf ears, even when he warned that it would be difficult to go back and lower the discounts in the future. (DX 14). Even after it became crystal clear in October of 1993 that the discounts granted to group rated employers were excessive and the premium collected “considerably inadequate to cover their losses” (DX 21), nothing was done by the BWC to correct the inequity. Base rates continued to rise and non-group rated employers continued to subsidize the excessive discounts.

3. The BWC Has Known About the Fundamental Flaws in the Present Group Rating Plan Since at Least 1993

In 1993 then BWC Administrator Wes Trimble identified underlying flaws in the group rating methodology that were echoed in 2008 by Oliver Wyman consulting and Deloitte Consulting, demonstrating without question that the BWC is incapable of fixing the group rating mess it created. Trimble observed:

[T]he inadequacy of [group rated employers'] premiums results from applying the same formula approach to determine the discount for the group as a whole as if it were one big company... the good experience of employers pooled into a group is more likely to be due to random good fortune among those employers selected than to their active and conscious activities to prevent accidents and to manage claims

costs... In contrast a single large employer who exhibits better than average claims experience is more likely to have achieved that result through conscious effort and consistent application of good safety and loss control practices.²⁹

Similarly, Deloitte Consulting stated in its 2008 report:

“A group of employers will not have the same management influencing [risk control] behavior, and therefore an individual experience rating formula applied to a group is not generally predictive of future losses for that group ... The poor performance of the individual experience rating formula when applied to groups is evidence of the flaws in the current approach to group rating, and indicates a need for a different approach to group rating.”³⁰

The BWC has had ample warnings that the system that they have implemented, group experience rating, simply cannot work, yet they continue to cling to their broken system.

In 1993, Trimble observed that the problem with the present group rating approach stemmed from the fact that the group sponsors hand-pick employers with good experience, because “the experience period used to determine the discount relates to a time period before the group was even formed.”³¹ Similarly, Oliver Wyman explained in 2008 that group sponsors “can predetermine a key rating component, the experience modification [EM], before the actual group is formed... In essence, because they already know the loss result of the members they are choosing, it is more like having a fantasy [baseball] league where the players are chosen after the season has

²⁹ PX 8.

³⁰ PX 22.

³¹ PX 8.

ended.”³² Fifteen years should have been enough time for the BWC to correct the problem if it were capable of doing so. Balance and equity will never be restored to the system absent action by the Court.

The BWC argues that it is working on the group rating problem, and that the court should give the BWC the benefit of the doubt and deny the requested injunction. The BWC admits that it plans to undercharge group rated employers again this year, at the expense of non-group rated employers. The BWC admits that the current system is subject to manipulation by the group sponsors, but it has no plan to correct that flaw. The BWC admits that applying an experience modification formula to groups does not result in accurate rates, yet the BWC has no plan to address that flaw either.

The BWC admits that movement between groups from year to year contributes to the inadequate premium rates charged group members, but its only answer to that problem at present is that it plans to work with the group sponsors who are doing the manipulation to somehow solve the problem. The BWC staff met with group sponsors like Phil Parker of the Dayton Chamber of Commerce, who is only interested in maximizing the group discount regardless of the resulting inequity,³³ at least 40 times since February, 2008. Yet the BWC presently has no proposed solution to fix the dysfunctional group rating plan. When the BWC implements even a modest step toward restoring equity, the group sponsors scream foul and mount extreme opposition.³⁴ Yet the BWC inexplicably anointed the group sponsors as “stakeholders,”

³² PX 36.

³³ Tr. p. 672.

³⁴ See DX 60-68, 69-71 (letters and testimony pressuring the BWC and elected officials to avoid changing the

despite the fact that Ohio Revised Code § 4123.30 plainly states that the State Fund constitutes “a trust fund for the benefit of employers and employees.” ORC § 4123.30. The only “stake” that the group sponsors have in this process is to preserve the status quo for their own self-interest, because the excessive group discounts drive increased membership and revenue.

The BWC’s own documents show that non-group rated employers have subsidized the premium discounts given to group rated employers by over \$2.1 billion through policy year 2004 alone. (PX 3). The evidence shows that the very same defects indentified by Administrator Trimble in 1993 remain in 2008, and the BWC has no real plan to fix the problem, only more of the same lip service while the unlawful subsidy continues. Why the BWC thinks that it is entitled to the benefit of the doubt in light of its atrocious record is baffling. The BWC does not deserve the benefit of the doubt – it is time for the inequity to end.

ARGUMENT

I. Likelihood of Success on the Merits

A. The Present Group Rating Plan Violates Ohio Revised Code Section 4123.34.

The whole purpose of experience rating is to generate rates that are more equitable than base rating alone, by tailoring the premium charged employers to a more accurate estimate of the potential costs to the system.³⁵ The BWC Actuarial Director, Ms. Bravender, agreed that the reason for experience rating is to better match the

system).

³⁵ PX 21 (John Pedrick Project Plan Proposal p.11)

premium charged to the risk presented by the employer, in order to reach a more equitable result as compared to manual rating alone.³⁶ This is consistent with the requirements of Ohio law set forth in ORC § 4123.34, which provides that the Administrator “shall observe all of the following requirements in fixing the rates of premium for the risks of occupations or industries.” Ohio Revised Code § 4123.34(C) further provides that the Administrator “may apply that form of rating system that the administrator finds is best calculated to merit rate or individually rate the risk more equitably, predicated upon the basis of its individual industrial accident and occupational disease experience .”(Emphasis added). Thus, under the “may” clause in the first sentence of § 4123.34(C) the Administrator is authorized to apply a form of merit rating that is “best calculated” to rate Ohio employers “more equitably.” Needless to say, ORC § 4123.34(C) nowhere authorizes the Administrator to apply a form of merit rating that rates Ohio employers less equitably. The group experience rating plan violates the “may” clause in ORC § 4123.34(C). The BWC completely ignored the requirements of ORC § 4123.34 during the hearing, and offered no testimony that the group rating plan rates employers more equitably.

The second sentence of Ohio Revised Code § 4123.34(C) also expressly limits the discretion granted to the Administrator in applying merit rating, specifying that the Administrator “shall develop fixed and equitable rules controlling the rating system, which rules shall conserve to each [employer] the basic principles of workers’ compensation insurance.” ORC § 4123.34(C) (emphasis added). The “shall” clause in

³⁶ Tr. p. 54.

the second sentence of ORC § 4123.34(C) plainly and unambiguously requires the rating rules to be “equitable.”

The BWC Chief Actuarial Officer, John Pedrick, openly equated the requirements of § 4123.34(C) with time-tested actuarial rate making principles, which define an equitable rating system as one that bases differences in rates on material differences in the expected cost for an employer.³⁷ In order to maintain equity between employers, the rating system must be designed to rate employers consistent with the risk that they transfer to the State Fund.³⁸ If a group of employers is being charged discounted rates that do not accurately reflect the risk that they are transferring to the State Fund, other employers pay the difference in the form of inflated rates.

It is beyond dispute that the present group rating plan is not calculated to rate employers “more equitably,” let alone best calculated to do so; rather it was designed and implemented to rate employers less equitably. The group experience rating plan, by the BWC’s own admission, is not calculated to better align the premium charged group rated employers with the risk that they transfer to the system. In fact, CAO Pedrick admitted that the “current experience rating plan does not effectively align premiums with an employer’s costs.”³⁹ Similarly, CAO Pedrick told the actuarial committee of the BWC Board of Directors that the “premium collected [under the current group rating plan] led to inequity.”⁴⁰ The BWC admitted in a widely disseminated brochure that unsound features of the current group rating system cause

³⁷ DX 18.

³⁸ DX 18.

³⁹ DX 55 (Pedrick Project Plan Proposal p. 12).

⁴⁰ PX 19 p. 5.

“pricing inequity between group employers and non-group employers.”⁴¹

If there was any doubt that the present group rating plan blatantly violates § 4123.34(C) prior to the hearing, the sworn testimony of BWC representative Therese Gallagher and her explanation of Plaintiff’s Exhibit 13 certainly removed that doubt. Ms. Gallagher explained that Exhibit 13 was a slide presentation designed by the BWC in Columbus and shown at safety council meetings throughout the State.⁴² The BWC held a statewide teleconference during which several officials from the BWC headquarters, including officials from the actuarial department, explained the presentation and the significance of each slide.⁴³ The slides were not presented as vague or inaccurate in any way, rather they were widely disseminated through responsible representatives of the BWC, like Ms. Gallagher, in order to convey accurate information to the Ohio employer community.⁴⁴ As confirmed by Ms. Gallagher:⁴⁵

- Slide 3 shows “the premium inequity between a group employer versus non-group employer.” The “current situation” shown on slide 3 is precisely what is still in place for the year 2008 and what Plaintiffs are seeking to enjoin.
- Slide 4 shows “what has gone wrong” and confirms that “85,000 non-group employers pay more than \$200 million annually to subsidize 98,000 group-rated employers.” Ms. Gallagher interpreted this slide to convey to

⁴¹ PX 20 p. 36.

⁴² Tr. p. 744-46.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See generally id.* p. 746-53.

the employer community that non-group employers were paying more premium than they should because group employers were paying too little premium.

- Slide 5, under the heading “**Who’s being hurt by group rating right now,**” compares the base rates in Ohio to surrounding States, and was meant to convey that because Ohio’s base rates are being inflated by the group rating program they are higher than surrounding states. The BWC told the employer community in this slide that the entire State of Ohio was being hurt by the base rate inflation caused by the group rating program.
- Slide 6 shows what amount the “average mom and pop” non-group employer has to pay out of their pocket before paying one dime of their own premium, in order to make up the short-fall created by the group rating program.
- Slide 8 was provided by the BWC actuarial department to explain to the Ohio employer community what the BWC considers necessary in order to have fair (i.e. equitable) rates. The criterion on the slide are the very same four actuarial rate making principles that CAO Pedrick identified as being consistent with the requirements of Ohio law, before this case was filed and it became convenient to backtrack from that position. Interestingly, no one from the BWC ever told Ms. Gallagher to retract the information that she presented at the safety council meeting.

Ohio Revised Code § 4123.34 requires that the BWC “make an equitable distribution of losses” and “develop fixed and equitable rules controlling the rating system.” ORC § 4123.34 (emphasis added). Ms. Gallagher’s testimony and the BWC’s numerous admissions, from which the BWC can only now attempt to run, prove beyond any doubt that the present group rating plan is inequitable, and for that reason violates ORC § 4123.34(C).

In its pre-hearing brief, the BWC misconstrues the Plaintiffs’ position with respect to ORC § 4123.34(C), in order to set up a “straw man” to attack. The BWC portrays Plaintiffs are arguing that ORC § 4123.34(C) requires the BWC “to establish for each employer a customized rate reflecting the actual risk of each individual employer presents to the system (which Plaintiffs wrongly assert may be achieved only using retrospective rating principles).” BWC Pre-Hearing Brief p. 21. Of course, Plaintiffs have never argued that ORC § 4123.34(C) requires a “customized rate” or that all rates must be set on a retrospective basis. Rather, Plaintiffs have consistently argued, and have now proven: (1) that the BWC is required to develop “equitable rules controlling the rating system”; (2) that the present rules are not “equitable” in violation of ORC § 4123.34(C); (3) that ORC § 4123.29(A)(4)(c) requires group rating plans to be retrospective; and (4) if the BWC had not violated that requirement, then the present inequity would not exist. The BWC cannot defeat Plaintiffs’ argument by completely mischaracterizing it, and then attacking the mischaracterized argument.

The BWC also confuses Plaintiffs’ statutory argument with their Constitutional argument. The BWC attempts to excuse its violation of ORC § 4123.34(C) by referring

to supposed legitimate state interests, but those interests have no bearing on the issue of whether the BWC is violating the statute. While legitimate state interests may have a bearing on the equal protection claim, they have nothing whatever to do with Plaintiffs' statutory claim.

In the end, the BWC cannot even argue that it is complying with ORC § 4123.34(C), because the BWC has repeatedly admitted that the current rules are inequitable. In light of the BWC's admitted violation of ORC § 4123.34(C), Plaintiffs' success on that claim is not only likely, but a virtual certainty.

B. The Present Group Rating Plan Violates Ohio Revised Code Section 4123.29.

Plaintiffs previously briefed the issue of statutory construction in Plaintiffs' Reply Brief in Support of Motion for Preliminary Injunction, explaining that every established rule of statutory construction supports Plaintiffs' interpretation of ORC § 4123.29.⁴⁶ Plaintiffs incorporate herein their prior arguments in that regard, and limit this brief to a discussion of new evidence presented at the hearing that confirms Plaintiffs' statutory interpretation.

First, the BWC relies upon the 1989 Committee report as the only evidence supporting its statutory construction argument. Yet the BWC neglected to establish a predicate for even considering that document, as the BWC failed to establish that the statute itself can not be readily interpreted. Absent a finding that ORC § 4123.29 is not susceptible to ready interpretation, there is no basis to even refer to the Committee

⁴⁶ Plaintiffs incorporate herein their prior briefing on their preliminary injunction motion, Plaintiffs' Proposed Findings of Fact and Conclusions of Law, and Plaintiffs' Brief In Opposition to Defendant's Motion for Summary Judgment (addressing Defendant's meritless failure to exhaust administrative remedy argument).

report. *Shover v. Cordis Corp.*, 61 Ohio St.3d 213, 218 (1991)(“ A court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretive effort is at an end, and the statute must be applied accordingly.”).

Moreover, the Committee report itself only made general recommendations with respect to statutory changes, and left it up to the General Assembly to craft an appropriate bill. House Bill 222 makes no reference group experience rating, and requires that employer groups be treated as a single employer for purposes of retrospective rating. Indeed, HB 222 omitted the Committee’s only recommended reference to experience rating. (Compare DX 3 Committee report p. 16 [referring to experience rating in subparagraph (3)], with DX 4 HB 222 p. 120 [omitting the reference to experience rating]).

Second, the only testimony presented at the hearing with respect to the meaning of the phrase “pools the risk within the group” was Elizabeth Bravender’s testimony on cross-examination. Ms. Bravender confirmed that under the current group rating plan, once group rated employers are rated by aggregating their experience and applying the experience rating formula, their risk is actually pooled within the entire State Fund along with all other State Fund employers.⁴⁷ There is no separate risk pool for the group members, so their risk is not pooled “within the group” as required by ORC § 4123.29.

⁴⁷ Tr. p. 124.

On that same point, CAO Pedrick confirmed during his testimony that *Foundations of Casualty Actuarial Science, Fourth Edition*, CASUALTY ACTUARIAL SOCIETY (2001), is a recognized treatise relied upon by professional actuaries.⁴⁸ As pointed out in Plaintiffs' Reply Brief, that treatise defines risk pooling as a type of risk retention in which "entities get together and share their exposures to possible loss." *Foundations*, p. 49. Because retrospective rating involves a partial risk retention by the retrospectively rated employers, such a plan would necessarily entail the pooling of group rated employers' risk "within the group," as required by ORC § 4123.29(A)(4)(a). Under a retrospective plan, group rated employers retain a portion of their own risk of loss and also accept some of the other pool members' exposures to possible loss, which is the essence of risk pooling in the insurance context. *See Foundations*, pp. 49-50. The current plan simply does not pool the risk of group rated employers "within the group."

In its pre-hearing brief the BWC promised to offer testimony from "actuarial experts" purportedly refuting Plaintiffs' interpretation of the language "pools the risk within the group."⁴⁹ Yet the BWC offered no such testimony at the hearing. Instead, the testimony of Ms. Bravender, the head of the BWC's actuarial department, and the testimony of CAO Pedrick supported Plaintiffs' position on that issue. The BWC's promised expert testimony never materialized.

Finally, the evidence presented at the hearing demonstrated that group retrospective rating is the only option that complies with the language of both 4123.29 and 4123.34. Group retrospective rating would pool the risk of the group employers

⁴⁸ Tr. p. 253.

⁴⁹ See Defendant's Pre-Hearing Brief, footnote 9 on page 11.

“within the group.” Group retrospective rating would encourage safety practices and claims handling because the group members would be charged based on their current experience. Group retrospective rating would comply with the 4123.34(C) by removing the unlawful subsidy, thereby making the rating rules “equitable.” Group retrospective rating would remove the off-balance that presently inflates Ohio’s base rates, returning the base rates to the lowest level needed to maintain a solvent State Fund. Group retrospective rating would provide deserved discounts to group members that actually reflect their good safety records, instead of giving them undeserved discounts derived through group sponsor manipulation. Clearly, group retrospective rating is the only system that complies with all of the requirements of the Ohio Revised Code.

The BWC also challenged the potential efficacy of a group retrospective rating plan, by questioning employers’ willingness to participate in such a plan. Leaving aside the fact that the questions were completely out of context, the fact of the matter is that the BWC has never even attempted to design a group retrospective plan and offer it to the employer community. So there is no basis to conclude that such a plan would not be successful, especially if it were the only group plan available. In fact, the only competent evidence presented at the hearing proved that such a plan would be successful. CAO Pedrick researched the Washington State group retrospective plan prior to the filing of this lawsuit and received a report from an official from the Washington State Bureau of Labor and Industries.⁵⁰ The Washington State plan gives the group rated employers a discounted rate up front, and then assesses additional

⁵⁰ Tr. p. 307-08.

premiums for three years based on actual loss experience.⁵¹ CAO Pedrick confirmed that under the Washington State plan the group rated employers' loss ratio is the same as the non-group employers, so there is no subsidy between the two groups.⁵² There did not appear to be any problem with the operation of the Washington State group retrospective rating plan.

When CAO Pedrick reported his findings concerning the Washington group retro plan to the Board of Directors, one of the directors commented that the wording of ORC § 4123.29 appears to require Ohio to follow the Washington model.⁵³ This presentation occurred before this lawsuit was even filed, confirming that the BWC really knows that the Plaintiffs are correct in arguing that group retrospective rating is required by ORC § 4123.29.⁵⁴ While the BWC ridicules Plaintiffs' proposed interpretation of the statute in this lawsuit, at least one of the BWC Board members agrees with Plaintiffs' interpretation. In contrast, the BWC's proposed interpretation violates basic tenets of statutory construction and has led to the absurd results challenged in this lawsuit.

C. The Present Group Rating Plan Violates the Equal Protection Guarantee.

1. *Non-Group Employers Are Similarly Situated to Group Employers in all Relevant Respects.*

The BWC's claim that non-group employers are not similarly situated to group employers, for purposes of assessing whether they should be charged excessive

⁵¹ *Id.* p. 309.

⁵² *Id.* p. 310.

⁵³ Tr. p. 311.

⁵⁴ This presentation occurred on November 20, 2007. *Id.* p. 308.

premiums, is a specious argument. Article II, § 35 of the Ohio Constitution specifies that employers in the same occupational classification are considered to be similarly situated for purposes of workers' compensation insurance. Article II, § 35 provides that rates of contribution to the State Fund are to be fixed according to the occupational classification and says nothing about establishing preferred sub-classes within the occupational classifications.

Moreover, in determining whether the two classifications – group rated employers and non-group rated employers – are similarly situated in relevant respects, the Court must consider the nature of the discrimination at issue. The differing treatment challenged here is the BWC's policy of charging inadequate premiums to group rated employers and charging excessive premiums to non-group rated employers. For purposes of that unfair discrimination, the only relevant attribute pertinent to determining whether the two groups are similarly situated is whether they are subscribing participants in the State Fund. It is beyond legitimate dispute that all Ohio employers are similarly situated in their right to be charged accurate rates reflecting their equitable share of the required premium for their manual class. Whether they have an average, above average, or below average claims history, all employers in this State have a right to pay their fair share, and to not fund excessive discounts granted other employers in the same manual class.

The BWC also fails to consider that the Ohio workers' compensation system is a monopolistic system in which contributions are compelled, similar to a business tax. Most Ohio employers have no choice but to pay premiums into the State Fund in return

for coverage. Because of the compulsory nature of the system, the most analogous equal protection cases involve discriminatory tax assessments. For example, in *Boothe Financial Corp. v. Lindley* (1983), 6 Ohio St.3d 247, a taxpayer that leased equipment argued that it was denied equal protection because another taxpayer that manufactured and leased similar equipment was permitted to undervalue its property for tax purposes. In ruling in favor of the taxpayer on equal protection grounds, the *Boothe* court quoted the United States Supreme Court: "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment." *Id.* at 249 (quoting *Southern Railway Co. v. Watts* (1926), 260 U.S. 519).

Even though the taxpayer in *Boothe* did not argue that it was over-assessed, the *Boothe* court held that the discriminatory treatment violated the equal protection clause of the Ohio Constitution. The court held that because the State "intentionally and systematically" treated "members of the same class, lessors of equipment, differently, it denied the taxpayer equal treatment under the law." *Id.* at 249-50. This same result was reached in *Allegheny Pitt. Coal Co. v. County Comm'n of Webster County, W. Va.* (1989), 488 U.S. 336 (holding that a state's systematic undervaluation of property in the same class for tax purposes denies taxpayers' right to equal protection) and *MCI Telecom. Corp. v. Limbach* (1994), 68 Ohio St.3d 195 (holding that state's overvaluation of property for tax purpose as compared to similarly situated competitors denied taxpayer's right to equal protection). In short, the State is not permitted to assess differing burdens on citizens

who are in all relevant respects similarly situated. Imposing excessive premiums on a sub-class of employers in the same manual classification, regardless of their prior loss history, in order to compensate for excessive, undeserved discounts given to another sub-class of employers in the same manual classification, plainly violates the equal protection guarantee.

The BWC has admitted that it is intentionally and systematically giving excessive discounts to group rated employers and inflating the premiums paid by non-group rated employers in the same manual class in order to make up the difference. The spreadsheet showing the effect of the group rating plan on the premiums paid by manual class 5645-carpentry (PX 18) is a perfect example. On slide 39 the breakdown of the manual class count before and after group rating is shown, indicating that 4,839 carpenters were classified as group rated and 27,010 were classified as non-group rated. All of the 31,849 carpenters belong to the same hazard group and they all have an equal right to pay an equitable portion of the total premium required for their manual class. However, because of the extreme discounts given to the group rated carpenters, the base rate is inflated from \$9.61 to \$21.10, and all of the carpenters who subscribe to the State Fund except the group rated carpenters pay greatly inflated premiums (Plaintiff D&J Structural Contracting is in this disadvantaged group for policy year 2008). Conversely, the group rated employers receive excessive discounts and pay less than their fair share. This is a perfect example of similarly situated employers being treated inequitably under the present dysfunctional group rating plan.

The BWC's argument that the group rated and non-group rated employers are

not similarly situated is disingenuous and simply false. The BWC's interpretation of what it means to be similarly situated is a poor attempt to pigeonhole the Plaintiffs into such a narrow sub-category of industry as to make any Equal Protection argument fail, as there can be no similarly situated employers under this definition. Furthermore, the BWC's argument that Plaintiffs are not similarly situated requires a strained and acrobatic interpretation of cases that clearly do not stand for the propositions cited by the BWC.

The proper inquiry when examining the Equal Protection argument made by Plaintiffs in this case is not, as the BWC asserts, whether the Plaintiffs were treated differently "from any other employer with similar claims histories in a similar industry and with similar payroll or that otherwise present similar risks to the system." (Defendant's Pre-Hearing Brief in Opposition to Plaintiff's Motion for Preliminary Injunction at p. 18). This definition so pigeonholes an employer as to make it impossible for any employers to be considered similarly situated. Yet the BWC concedes that the question should be whether the Plaintiffs were treated differently than other employers "who are in all relevant respects alike." *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St. 3d 195, 199 (emphasis added).

The BWC's definition of a similarly situated employer has ventured into far too many irrelevant characteristics to qualify under this standard. What is relevant is the effect that the group rating system has on base rates, which the Plaintiffs allege, and have proven, causes non-group employers to subsidize \$200 million annually of the group employers' premiums. Base rates are determined at the manual classification

level by the industry in which the employer is involved. Thus, the only relevant inquiry is, to put it succinctly, whether the Plaintiffs were treated differently from any other employers in the same manual classification.⁵⁵

The manual classification is the proper level of inquiry for a number of reasons. First, the manual classification determines the base rates and the base rates are where the BWC charges a subsidy to all non-group employers for the undeserved discounts given to group employers. Furthermore, the Ohio Constitution at Article II, § 35 requires the classification at this level: “Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, [and] to fix rates of contribution to such fund according to such classification.” Additionally, the General Assembly enacted a provision in furtherance of this section, requiring the BWC to: “Classify occupations or industries with respect to their degree of hazard and determine the risks of the different classes according to the categories the national council on compensation insurance establishes that are applicable to employers in this state.” R.C. § 4123.29(A)(1). Finally, R.C. § 4123.34 requires the BWC to set rates “for each class of occupation or industry.” These provision call for the setting of base rates at the manual classification level; they do not allow a further sub-classification of group rated employers or employers “with similar claims histories... with similar payroll.” Plaintiffs complaint is with inflated base rates. The BWC does not even dispute that the Plaintiffs, and thousands of other businesses throughout the State of

⁵⁵ Plaintiffs do not argue that they should not pay higher premiums where they present a higher risk to the system, but only that their higher premiums should be a reflection of their higher risk, not a subsidization of the group employers’ undeservedly low premiums. Thus, the Plaintiffs complaint is with the inflated base rates at the manual classification level.

Ohio, are treated differently than other employers in their manual classification and are forced to subsidize the undeservedly low premiums paid by the employers who by luck have made it into a group.

The cases relied upon by the BWC are either inapplicable to the facts of this case or actually serve to bolster the Plaintiffs' position. The BWC appears to place great weight upon *Shockley v. Ohio Department of Job and Family Services (Franklin Cty.)*, 2005-Ohio-4674, a case that is completely inapplicable to the facts of this case. The court in *Shockley* ruled that there is no Equal Protection violation, "so long as the laws are applicable to all persons under like circumstances *** and operate alike upon all persons similarly situated." *Id.* at ¶ 19 (quoting *Conley v. Shearer* (1992), 64 Ohio St. 3d 284, 288) (internal quotation marks removed). In light of this requirement, the *Shockley* court found no violation of Equal Protection where the state made eligibility for one program, the Transition Waiver program ("TW"), dependant upon a sick person's current enrollment in another program, the Ohio Home Care Waiver program ("OHCW"). *Id.* Even though a sick person who was currently enrolled in OHCW was treated differently than a sick person who was not so enrolled, there was no violation of Equal Protection because the sick persons were not similarly situated – one was enrolled in the OHCW program, while the other was not.

Here, Plaintiffs and the other employers all subscribe to the State Fund, they all pay premiums to the BWC, and they all have been assigned a manual classification by the BWC. The only difference is that some employers have been given an undeserved premium discount, while others have been required to subsidize those low premiums.

They are, however, all part of the same workers' compensation program and they all subscribe to the State Fund for the exact same insurance coverage. The *Shockley* case is plainly inapplicable.⁵⁶

According to the BWC, "The Ohio Supreme Court rejected the very same argument that Plaintiffs make here in *State ex rel. Webber v. Felton* (1908), 77 Ohio St. 554, 572." However, *Webber* was an Equal Protection challenge to a statute that allowed only large political parties, based upon votes cast in the previous election, to hold primaries for party nominations in state facilities and with state oversight, an option which was not afforded to political parties that had not garnered enough votes in the previous election. This was found to be Constitutional because the statute was "not restricted to any part of the state, but operate[d] uniformly throughout the state, and operate[d] uniformly upon all under the same conditions." *Id.* at 572. Furthermore, the Court included the following in its opinion: "The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions." *Id.* at 574 (quoting *Soon Hing v. Crowley*, 113 U.S. 703, 708) (internal quotation marks removed). The Court also agreed with Plaintiffs, stating "we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties, engaged in the same kind of business and under the same conditions, burdens are cast which are not cast upon the

⁵⁶ However, if Plaintiffs were complaining about the requirement that an "employer must be in active status as of the group rating application deadline and be in an active status at the beginning of the rating year" found in OAC § 4123-17-61(B)(6)(d), then this case would be highly relevant.

other." *Id.* at 575 (quoting *Cotting v. Kansas City Stockyard Co.*, 183 U.S. 79, 111) (internal quotation marks removed).

Clearly, the *Webber* Court did not reject the Plaintiffs' argument; in fact, it supported Plaintiffs' position. The BWC group rating system discriminates against employers who are similarly situated in all relevant respects and are in the same manual class. Some employers in a given manual class are forced to subsidize the undeservedly low premiums of other employers in the manual class. In other words, one competitor is burdened, while the other is given a benefit, which is exactly the sort of situation that the *Webber* Court held violates the Equal Protection guarantee.

The BWC also cites three other cases in support of its Equal Protection argument, none of which are analogous to this case. In one of these cases, the plaintiff was not similarly situated to another business because the second business had requested and received a permit to obstruct the public right-of-way, whereas the Plaintiff had not applied for or received such a permit, so it was not allowed to obstruct the public right-of-way. *See Mega Outdoor, L.L.C. v. Dayton* (2007), 173 Ohio App. 3d 359.

In another case cited by the BWC, the court upheld a taxing statute that provided for a different taxing structure for a sole proprietor of multiple businesses compared to a person who owns one umbrella corporation under which each of his businesses are held as one. *See City of Sandusky Division of Income Tax v. Rengel Law Office (Erie Cty.)*, 2004-Ohio-6467. The *Rengel* court noted that the Plaintiff's argument was that he would have reaped a tax benefit had he incorporated, a voluntary decision on the Plaintiff's part, thus pointing out that his business was not similarly situated to those corporations

enjoying the benefit and this necessarily undermined his argument. *Id.* at ¶ 16. The *Rengel* opinion fails to help the Defendant as the Plaintiffs have not made a voluntary choice to participate in the BWC. All employers are required to participate in the BWC and pay premiums, and the Plaintiffs certainly never voluntarily undertook an obligation to pay the premiums of their competitors.

Finally, the Defendant relies upon *State v. Merriweather* (Wayne Cty. Dec. 16, 1998), 1998 WL 887197. *Merriweather* is a criminal case in which a defendant argued that a sentencing statute violated the Equal Protection guarantee because the punishment that he received for his commission of a crime was not the same as the punishment received by another perpetrator who committed the same crime on a different day. The *Merriweather* opinion is irrelevant because the Plaintiffs, as well as all other non-group employers, were charged their rates at the same time as the group employers.

2. ***No Evidence Exists That Excessive Discounts and Inflated Base Rates Are Required to Encourage Safety.***

The BWC argues that its inequitable group rating plan can survive equal protection review because it may encourage safety. The BWC offered anecdotal evidence of this supposed rational basis for the current group rating plan, by presenting testimony from group sponsors lobbyists carping about how great group rating is and how much they do to improve safety. Of course, neither the BWC nor the group sponsor witnesses paraded into court offered any actual study evidencing a safety improvement caused by the group rating plan. In fact, one of the consultants hired by the BWC, Aon Consulting, opined that they could not find any evidence that the group

rating plan had any positive effect on claim frequency or severity.⁵⁷

More importantly, the BWC's safety argument completely misses the mark because the BWC did not offer any evidence that it needs to offer excessive discounts and impose inflated premiums in order to incentivize safety. To the contrary, the BWC's Chief Actuarial Officer, Mr. Pedrick, testified that the BWC could encourage and stimulate safety without the premium rate inequity that is an attribute of the present system.⁵⁸ The BWC is required to point to a rational basis for what it is actually doing, not a rational basis for a system that it has not implemented. There can be no rational basis for giving group rated employers excessive discounts and charging non-group employers in the same manual class excessive premiums if safety can be incentivized by equitable rules that instead grant deserved discounts. The Plaintiffs do not challenge the concept of group rating on equal protection grounds, but rather challenge the inequitable premiums imposed under the current plan. The BWC failed to present a rational basis for the inequitable system challenged in this lawsuit.

D. The Group Rating Plan Violates Article II, Section 35 of the Ohio Constitution.

The BWC has abdicated the rate-setting duties conserved to it under Article II, § 35 of the Ohio Constitution. The evidence presented at the hearing proved that the BWC has implemented group rating rules that cede extraordinary power to the group sponsors to manipulate the experience modifier received by group rated employers, and ultimately manipulate the base rates assigned to the various manual classifications.

⁵⁷ PX 15; *see also* Testimony of John Pedrick at Tr. p. 320-21 (confirming Aon's findings).

⁵⁸ Tr. p. 914.

The BWC concedes that group sponsors have the ability to use the claims experience of potential group members to target in advance the credit experience modifier received by the group members. By selecting group members with good claims history the group sponsors obtain the most advantageous experience modifier for the group members. In other words, group sponsors “today can predetermine a key rating component, the experience modification [EM], before the actual group is formed.”⁵⁹ The resulting huge discounts, which CAO Pedrick admitted did not represent more accurate rates for the group members,⁶⁰ drive down the amount of premium collected from the group members, increase the off-balance for their manual classes, and drive up base rates. In essence, the BWC has given the group sponsors *de facto* control of the rate setting process, by formulating rules that grant the group sponsors authority to manipulate in advance the rates paid by the group members.

Article II, § 35 states that the BWC “may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification.” The Ohio Constitution explicitly states that the BWC may be empowered by the General Assembly to set rates of contribution according to the degree of hazard for each of the manual classifications, and says nothing about the BWC ceding its authority to third parties like the group sponsors. Neither ORC § 4123.29 nor ORC § 4123.34, which were passed in order to implement Article II, § 35, grant the BWC authority to empower group sponsors to control the rate setting process and in particular manipulate base rates. Even if the Court accepts the

⁵⁹ PX 36 p. 8.

⁶⁰ Tr. p. 944.

BWC's interpretation of ORC § 4123.29, the statute would permit the BWC to implement either a group experience rating plan or a group retrospective rating plan. But that provision does not authorize the BWC to select a group rating method that permits group sponsors to effectively control the rate setting process so that the outcome is undeniably inequitable rates. The BWC selected a group rating plan that perverts the rate setting process, creating a tremendous off-balance for most manual classifications and inflating base rates.

Ohio Revised Code § 4123.34 also indicates that fixing the lowest possible base rates is consistent with the public policy of this State. Ohio Revised Code § 4123.34 provides that the BWC "shall fix and maintain, with the advice and consent of the board, for each class of occupation or industry, the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus." (emphasis added). The group rating plan violates this strong public policy by inflating the base rates for most manual classifications. If the BWC had implemented a group retrospective rating plan, the discounts granted to group rated employers would have been consistent with their losses, would have been deserved from an actuarial standpoint, and would not have inflated Ohio's base rates. The BWC does not have discretion to implement a group experience rating plan that violates its statutory and Constitutional rate setting duties.

II. The Public Interest Will Be Served by the Issuance of Injunctive Relief.

The Ohio economy is being harmed by the base rate inflation that is caused by the group rating program. According to the BWC, the "\$200 million subsidy paid by

non-group employers inflates Ohio's workers compensation base rates." ⁶¹ When a business is considering whether to move to or expand operations in Ohio, and compares the cost of workers' compensation, "Ohio's base rates appear to be the 12th highest in the country (\$3 per \$100 of payroll) and one of the highest in the Midwest."⁶² The bottom line is that "Ohio's base rate is artificially higher making **Ohio uncompetitive and unattractive.**"⁶³ This problem is especially acute in manufacturing businesses, because the workers' compensation rates are naturally higher in these riskier manual classifications. Ohioans have a substantial interest in growing a strong economy, yet by its own admission the BWC's group rating system is currently part of the economic problem rather than the part of the solution.

The overriding public policy in maintaining the lowest possible base rates is also reflected in ORC § 4123.34, which instructs the BWC to set base rates at the lowest level sufficient to maintain a solvent State Fund. The whole point of having a State run workers' compensation system is to maintain lower rates by removing the profit motive that would exist in a privatized system. The BWC is supposed to be in a better position to set low workers' compensation rates because it is revenue neutral and it not looking to make a profit for shareholders, unlike a private insurer. Yet, through the group rating system, the BWC has relinquished partial control of the rate setting process to the group sponsors, whose only interest is in maximizing the discount enjoyed by group members and ensuring their own revenue through the group rating program. The

⁶¹ PX 20 p. 37.

⁶² Ibid.

⁶³ Ibid.

group sponsors compete for employer participation and membership by offering the largest possible discounts because they enjoy financial benefits from the group rating system. So in essence the group rating system has introduced a profit-driven motive into the Ohio system that violates the public policy of this State. The group rating system destroys the advantages of a monopolistic state system by inflating base rates and driving businesses out of the state.

It is also undisputed that Ohio is the only state that uses the dysfunctional group experience rating system,⁶⁴ and so Ohio is the only state that suffers from the perverse “side effects” such as base rate inflation and extreme rate volatility. In 2006, 1 in 3 employers who were excluded from the group rating plan by their group sponsors either filed for bankruptcy or cancelled their workers’ compensation coverage.⁶⁵ The message that this sends to the business community is that Ohio is a good place to play “Russian Roulette” with your company, a very unfriendly message that further imperils Ohio’s struggling economy.

The group sponsor talking-heads who the BWC rounded up for the hearing (Preston Garvin, Roger Geiger, and Phil Parker) touted the group rating plan as the greatest reform since workers’ compensation was adopted, yet none of them offered anything other than their personal opinions on the issue. For all of their talk, none of those self-interested witnesses offered a single shred of actual evidence demonstrating that the group rating plan has a positive impact on the Ohio economy. They love the program because the huge undeserved discounts drive employers into their arms,

⁶⁴ PX 22 p. 32.

⁶⁵ PX 1.

increasing membership and membership dues, yet that has nothing to do with the public interest. The BWC itself offers for free all of the safety programs that the group sponsors supposedly offer for a fee.⁶⁶ Therese Gallagher testified about all of the safety programs run by the BWC that will more than fill the need if the group sponsors cut back on the programs that they offer.⁶⁷ The BWC offers industry specific safety guidelines that can be downloaded from the internet that are the same as those offered by the group sponsors.⁶⁸ In short, the BWC's reliance on the group sponsors' alleged safety related activities as a reason to preserve the present inequitable group rating system is a farce.

In the end, the BWC's own representatives conceded that the effect of the requested injunction is that the group rated employers will pay a little more, and the non-group rated employers will pay a little less.⁶⁹ The group rated employers will be treated the same as the non-group, in the sense that they will pay premiums that actually reflect the risk that they present to the system. For the BWC to suggest that treating group rated employers exactly the same as non-group will somehow create chaos is nonsense. In fact, for all of its histrionics about statewide chaos, the BWC conveniently failed to inform the court what the actual premium impact will be on the group rated population, after the decrease in base rates and other available discounts are considered. Therese Gallagher testified that their rates could be lowered by as much as 30%, considering the average 5% decrease in base rates already implemented for this

⁶⁶ Testimony of Therese Gallagher, Tr. p. 735.

⁶⁷ *See generally* *Id.* p. 716-61.

⁶⁸ *Id.* p. 719.

⁶⁹ *See, e.g.*, Testimony of CAO John Pedrick, *Id.* p. 916-17; Testimony of Therese Gallagher, *Id.* p. 737-38.

year and the other available discount programs.⁷⁰ Thus, the actual evidence contradicts the BWC's over-blown "chaos" argument.

III. Plaintiffs Will Suffer Irreparable Harm

As previously explained in Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, the court in *Ohio Hospital Assoc. v. Bureau of Workers' Comp.* ("OHA") (Franklin Cty.), 2007-Ohio-1499 held that the lack of a legal remedy in this circumstance by its very nature establishes that Plaintiffs lack an adequate remedy at law. The BWC criticizes the OHA decision, but offers no authority contrary to its holding. Moreover, the OHA holding is consistent with the Ohio Supreme Court's decision in *Mid-America Tire, Inc. v. PTZ Trading Ltd.* (2002), 95 Ohio St.3d 367. In *Mid-America* the court described the type of available remedy that would be considered "adequate" in order to defeat a request for injunctive relief, stating: "In order to be considered adequate, the legal remedy must be of such a nature that full indemnity may be recovered without a multiplicity of suits. It is not enough that there is a remedy at law; it must be plain, adequate and complete; or in other words, as practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity."

Although the BWC appears to suggest that the Plaintiffs have an adequate remedy at law in the absence of the requested injunction, it completely failed to identify what that remedy might be. Obviously, having failed to identify an alternative remedy, the BWC also failed to show that it is as "practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity." If the BWC really believes that

⁷⁰ *Id.* p. 750-51.

the Plaintiffs have a remedy available to recover the overcharges that the BWC admits they face again this year, then the BWC was required to produce a witness to testify that the BWC is capable of paying adequate compensation to Plaintiffs. The BWC failed to offer any such testimony.

In the complete absence of any evidence that an adequate legal remedy exists and that the BWC is capable of paying complete monetary relief, there is no basis to conclude that Plaintiffs will not suffer irreparable injury if the BWC is not enjoined from forcing them to pay the unlawful subsidy again this year. Injunctive relief preventing imposition of the \$200 million subsidy on the non-group employers is the only relief presently available, and it is the most practical and efficient means to the ends of justice.

IV. ORC § 4123.21 Does Not Bar the Issuance of a Preliminary Injunction in Favor of the Plaintiffs.

The BWC argues that this Court is barred from granting the injunction sought by Plaintiffs by the following statutory provision:

No injunction shall issue suspending or restraining any order, classification, or rate adopted by the industrial commission or the bureau of workers' compensation, or any action of the auditor of state, treasurer of state, attorney general, or the county auditor or county treasurer of any county, required to be taken by them or any of them by this chapter. This section does not affect any right or defense in any action brought by the commission, the bureau, or the state in pursuance of authority contained in this chapter.

ORC § 4123.21. The BWC's assertion that this provision bars the injunction sought by the Plaintiffs is indicative of the BWC's utter lack of understanding of the Plaintiffs' lawsuit and prayer for relief.

BWC's sole case in support of their contention that this Court is not permitted to grant the injunction sought by Plaintiffs falls short on multiple levels. To begin with, the case deals with mandamus actions and is decided on that ground; the reference to injunctions was merely in passing. See *State ex rel. H.K. Porter Co. v. Klapp* (Franklin Cty. 1958), 107 Ohio App. 486 at 492, 494. Furthermore, this case dealt with an individual employer's action to have its own personal rate enjoined, not to have an illegally enacted rule enjoined. *Id.* at 491.

Plaintiffs do not seek an order enjoining their rates. Plaintiffs seek an order enjoining the BWC from enforcing a system of rules that violates multiple sections of the Ohio Revised Code and the Ohio Constitution. Plaintiffs have not asked this Court for an order prohibiting the BWC from charging their premiums at the current level. Plaintiffs ask this Court for an order prohibiting the BWC from forcing an inequitable system of subsidies on the backs of two-thirds of Ohio's businesses, while hiding behind the guise of promoting safety.

Furthermore, BWC's assertion that R.C. 4123.21 "prohibits suspending or restraining any action required by the Bureau under Chapter 4123" is a blatant distortion of the statutory language.⁷¹ The first part of R.C. § 4123.21 describes what actions by the BWC may not be enjoined: "No injunction shall issue suspending or restraining any order, classification, or rate adopted by the industrial commission or the bureau of workers' compensation." Nowhere does this language indicate that it prohibits enjoining "any action" that the BWC is required to do under Chapter 4123; in

⁷¹ Defendants Pre-Hearing Brief at p. 6).

fact, it specifically names three particular actions that may not be enjoined, namely orders, classifications, and rates. Section 4123.21 then goes on to describe what other actions and actors may not be enjoined: “[O]r any action of the auditor of state, treasurer of state, attorney general, or the county auditor or county treasurer of any county, required to be taken by them or any of them by this chapter.” This more expansive “or any action” language is limited to those actors following it in the statute and does not apply to the BWC. To read this “or any action” phrase to include the BWC would to render the first half of the sentence meaningless. Such an interpretation is inconsistent with principles of grammar, which are paramount guiding principles of statutory instruction. BWC is attempting to expand this language far beyond the intention of the legislature that is evident in the words chosen by the legislature.

Because the Plaintiffs are not asking the Court to enjoin “any order, classification, or rate” adopted by the BWC, the anti-injunction statute does not apply. This is consistent with the obvious purpose of the statute, which is to prevent a court from enjoining the collection of premium needed to sustain the system. The BWC has conceded that the injunction sought by the Plaintiffs will not prevent the BWC from collecting all required premium in a timely and efficient manner.⁷²

⁷² See, e.g., Testimony of CAO John Pedrick, Tr. p. 190-93.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully urge this Court to grant the requested injunctive relief enjoining the BWC from implementing its unlawful group rating plan for the policy year commencing July 1, 2008 or any policy year thereafter during the pendency of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Post Hearing Brief in Support of Plaintiffs' Motion for Preliminary Injunction has been sent by ordinary U.S. mail on this ____ day of September, 2008 to the following:

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