

## Workers' comp suit hinges on group cut

*Plaintiffs say substantial discount was subsidized by their high rates*

By JAY MILLER

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A class action lawsuit that, if successful, could end up paying more than \$1 billion to employers who believe they overpaid for workers' compensation insurance opens today, Aug. 20, in Cuyahoga County Common Pleas Court.



In *San Allen et al v. Stephen Buehrer*, attorneys for the class argue that employers who qualified for membership in groups that received workers' comp premium discounts of as much as 90% did so at the expense of employers who did not qualify for a group. The plaintiffs say the high rates class members paid subsidized the group-rating discount, which went to companies with no injury claims against them, usually for five years.

Mr. Buehrer is administrator of the Ohio Bureau of Workers' Compensation; San Allen is the corporate name of Corky & Lenny's restaurant in Woodmere, one of seven original plaintiffs in the lawsuit filed in April 2008. The case will be tried without a jury before Cuyahoga County Common Pleas Court Judge Richard McMonagle.

"It's a case of great interest to all of us" who represent employers for workers' compensation, said David McCarty, director of the workers'

compensation practice at Kegler, Brown, Hill & Ritter, a Columbus law firm. "It's about a lot of money."

Because the workers' comp bureau is financed by employers' insurance premiums, a victory for the class could force the bureau either to raise insurance rates or to dip into its reserves to pay damages.

Attorneys James DeRoche and Stuart Garson, who represent the plaintiffs, said they believe more than 100,000 employers may be eligible for \$1.27 billion in restitution.

The bureau has argued in filings that its rate structure was not unfair to employers who were not group members. A bureau spokesperson last week declined to comment on the coming trial.

Ohio, unlike most states, operates a state-run workers' compensation insurance pool. Many other states allow companies to buy private insurance.

When they filed their lawsuit in 2008, the plaintiffs' attorneys sought an injunction to force the bureau to adjust its rates immediately to better reflect the cost of actual claims made against employers; they contended that the actuarial technique the bureau was using to set the rates violates the Ohio Constitution. They also sought to turn the case into a class action suit.

Among the evidence presented by the plaintiffs to Judge McMonagle was a 2007 investigation by the Ohio inspector general that found the premiums paid by the groups that received discounts were not high enough to cover the losses they generated. A 2009 study done for the bureau by the Deloitte Touche LLC consulting firm came to the same conclusion.

In addition, the judge heard from several plaintiffs, including Aladdin Baking Co. of Cleveland. In July 2006, after two of its 48 employees were injured on the job, Aladdin saw its premiums rise to \$55,000 a year from \$12,000 after it was dropped from its group.

### Legislature steps in

Judge McMonagle granted that injunction in November 2008, ordering the bureau to change its rate structure by July 2009. Judge McMonagle also agreed to turn the lawsuit into a class action. The bureau unsuccessfully challenged both those decisions in appeals court.

However, a month after the November 2008 court decision, the Ohio General Assembly changed the workers' compensation law to make the existing rating system legal and postponed the rate changes ordered by Judge McMonagle. The bureau since has reworked its premium structure to reduce the discount to group-rated employers.

Because of the change in the law, the class action lawsuit is seeking restitution only for premiums charged from 2001 until 2009.

The history of the last five years suggests to Kegler Brown's Mr. McCarty that the class action will succeed and that the fight is over how much will be paid out. He cited in particular Judge McMonagle's opinion calling the bureau's group rating program illegal.

"The plaintiffs here are seeking restitution for those years, 2001 to 2009, when non-group rated employers were overcharged premiums to the benefit of group-rated employers," Mr. McCarty said. "So there are 100,000 or more employers who are not in group."

Mr. McCarty said the outcome of the case likely will be appealed to the Ohio Supreme Court.