STATE OF MICHIGAN

COURT OF APPEALS

MIDWEST RUBBER COMPANY,

Appellee,

v

STATE OF MICHIGAN, DEPARTMENT OF LABOR & ECONOMIC GROWTH, and UNEMPLOYMENT INSURANCE AGENCY,

Appellants.

UNPUBLISHED
December 18, 2008

No. 278223
Sanilac Circuit Court
LC No. 07-031516-AE

Before: Borrello, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Appellants appeal the order of the circuit court reversing the decision of the Michigan Employment Security Commission Board of Review ("the Board"). The court found that the Board's determination that appellee was a successor employer under the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*., was based on a mistake in the form filed by the appellee rather than on the relevant facts and applicable law, and therefore improper. For the reasons set forth in this opinion we affirm the circuit court's order.

In 1991, Newcor was a publicly-held corporation that owned approximately nine different divisions, including one in Deckerville, Michigan, that produced rubber and plastic components for the automotive, trucking, and agricultural industries. In December 2001, Newcor filed for bankruptcy, and under the terms of its bankruptcy restructuring plan, it was required to spin off and sell some of its divisions. The Deckerville division of Newcor was incorporated as Michigan Rubber and Plastic, Inc. (MRPI) on January 13, 2003.

In April 2003, Ken Jehle, the general manager of the Deckerville division and later, MRPI, presented a formal offer to purchase to Newcor, and signed an asset purchase agreement with the company for its Deckerville division on September 19, 2003. Jehle, along with a group of investors, formed appellee in July 2003 to purchase the division, and the money for the sale was transferred from his bank to an account for Newcor at its financial institution. Newcor publicized the sale of the Deckerville division in a press release, stating that it had sold one of its entities, representing less than ten percent of its total sales, to a group of investors for "four or five million dollars."

Following the close of the sale of the Deckerville division from Newcor to appellee, Jehle completed appellant Unemployment Insurance Agency's (UIA or "the Agency") UC Schedule B Successorship Questionnaire ("Schedule B") at the Agency's request. According to appellee, Jehle contacted the UIA because he did not understand the form, and told them that he could not complete it because the form did not provide him with an opportunity to explain "the substance of the asset purchase." In particular, Jehle complained that the form did not permit appellee to explain that MRPI was a transitional corporation that was created as part of Newcor's bankruptcy restructuring plan and that Midwest actually purchased the Deckerville Plant from Newcor, which represented only nine percent of Newcor's assets. Jehle testified that he decided to list both MRPI and Newcor as the former owners of the business. However, apparently in reliance on Schedule B, the UIA found that appellee was a successor to MRPI, and assigned it the same tax rate as had been assigned to MRPI, which in turn was the same tax rate that had been assigned to Newcor.

Appellee appealed the Agency's decision before an administrative law judge (ALJ), who stated that the issue was whether appellee was a successor employer as defined under section 41 of MESA, MCL 421.41(2)(a). The ALJ affirmed the Agency's redetermination, finding that appellee's completed Schedule B form "made clear that [appellee] . . . was acquiring all of the assets, trade, and organization of [MRPI], a wholly owned subsidiary of Newcor, Inc., not a portion of Newcor, Inc." (Emphasis in original). Appellee appealed the ALJ's decision to the Board, which affirmed, finding that appellee bought its business from MRPI, not Newcor, and that it had purchased more than 75 percent of MRPI's assets, trade, and organization and was thus a successor employer under § 41 of MESA.

Appellee appealed the decision of the Board to the circuit court, which found in appellee's favor, citing precedent that requires the administrative body to "look at substance over form." The court stated it was "clear that the seller was Newcor, they got the money for it. . . . Newcor was the true predecessor in interest and since Midwest did not purchase seventy-five percent . . . of [its] business or assets they are not a successor employer under the act." The court further found that the ALJ and the Board's reliance on the mistake in Schedule B was contrary to law, as "something this important should [not] be decided by a mistake in form."

The circuit court found that the decisions of both the ALJ and the Board were contrary to this Court's finding in *K & K Woodworking v MESC*, 206 Mich App 515; 522 NW2d 694 (1994), because the decisions failed to consider the substance of the transaction. The court noted that during Newcor's bankruptcy proceedings

> a relatively small portion of Newcor was spun off into MRPI and subsequently . . . sold to Midwest. Midwest paid the money to Newcor. So I think it's clear that the seller was Newcor, [and] . . . . Midwest was the purchaser . . . and since Midwest did not purchase seventy-five percent . . . of [Newcor's] business or assets they are not a successor employer under the act.

On appeal, appellants claim first that the tax rating assigned to MRPI is binding and was not appealed by Jehle, who was the general manager of that company as well as appellee. Because Jehle "failed to appeal [the Agency's decisions] or cause them to be appealed," appellee cannot now "seek to step into the shoes of MRP[I] and collaterally attack a final decision." Further, appellants argue that appellee is a successor employer under section 41 of MESA, and that the

Agency's decision was therefore justified.

MCL 421.41(2)(a) states that "employer" refers to "[a]ny individual, legal entity, or employing unit that acquires the organization, trade, or business, or 75% or more of the assets of another organization, trade, or business, which at the time of the acquisition was an employer subject to this act." MCL 421.22 governs transfer of business, and states, in relevant part, as follows:

> (a) If an employer subject to this act transfers any of the assets of the business by any means otherwise than in the ordinary course of trade and there is not substantially common ownership, management, or control of the transferor and the transferee, the transfer shall be deemed a "transfer of business" for the purposes of this section if the commission determines both of the following:
>
> (1) That the transferee is an employer subject to this act on the transfer date, has become subject to this act as of the transfer date under section 41(2)(a) or elects to become subject to this act as of the transfer date under section 25.
>
> (2) That the transferee has acquired and used the transferor's trade name or good will, or that the transferee has continued or within 12 months after the transfer resumed all or part of the business of the transferor either in the same establishment or elsewhere.
>
> (b) Notwithstanding subsection (a), a transfer of assets to a transferee that involves less than 75% of the transferor's assets shall not be deemed a transfer of business unless all of the following occur:
>
> (1) The commission is notified of the transfer of assets by the transferor or transferee within 30 days after the end of the quarter in which the transfer occurred.
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> * * *
>
> (c) (1) In the case of a transfer of business as defined in subsection (a) or (b), the commission shall assign the transferor's experience account, or a pro rata part of the account, to the transferee.
>
> (2) When the commission transfers an employer's experience account in whole or in part under this section, it shall also transfer a proportionate share of the amount of the total wages and wages subject to contributions under this act paid by the transferor and properly allocable to the transfer of business; and the transferred account shall be chargeable for all benefit payments based on employment in the business or portion of the business transferred. [MCL 421.22(a), (b)(1), (c)(1).]

"Experience account" as used in the statute

> means an account in the unemployment compensation fund showing an employer's experience with respect to contribution payments and benefit charges under this act, determined and recorded in the manner provided in this act. A reference in this act to an employer's "experience record" or "rating account" shall be construed to include reference to the employer's experience account. [MCL 421.3(2)(c).]

In *K & K Woodworking*, Timmer & Brummel, Inc. executed an agreement with NBD Bank to surrender ownership of its corporate assets and cash to the bank in order to pay a business loan. *K & K Woodworking*, *supra* at 516-517. The plaintiff later purchased the assets of Timmer from the bank, and was found by the MESC to be the successor employer to Timmer and as such, liable for Timmer's unpaid contributions to the unemployment fund. *Id.* at 517. After an MESC referee affirmed the Commission's decision, the circuit court reversed on appeal, concluding that the plaintiff "was not a successor employer because it had acquired Timmer's assets from NBD [Bank]." *Id.* This Court reversed the circuit court, holding that under § 41 of the MESA, "the Legislature intended to permit a factual inquiry into the substance of the transaction rather than require any technical form of acquisition." *Id.* at 518. The Court further held that "the lack of direct privity" between the plaintiff and Timmer did not preclude the Commission's finding, and that "[b]ecause it could reasonably be found that the bank acted as a conduit to facilitate the transfer of assets between K & K and Timmer in order to safeguard its own secured interest, we affirm the referee's finding that K & K was the successor employer to Timmer." *K & K Woodworking*, *supra* at 519.

Similarly, in the instant case, appellee claims that MRPI was created simply to facilitate the transfer of business from Newcor to a seller, and that MRPI never conducted any business on its own or employed a single worker. Significantly, appellants do not dispute the fact that MRPI was created as a result of Newcor's bankruptcy restructuring plan and as an incorporation of Newcor's Deckerville division, a division that comprised only nine percent of Newcor. However, according to the agency's analysis, MRPI was the same entity as Newcor, thus justifying the transfer of Newcor's experience rating to MRPI and by extension, to appellee.

MCL 421.22(a) states that where the transferor and transferee share "substantially common ownership, management, or control," there is no transfer of business. Thus, under this portion of the statute, MRPI should not have been treated as a new business with its own tax rating because it shared ownership, management[1], and control with Newcor. Thus, insofar as the Agency's argument is that it assigned Newcor's experience rating to appellee because it purchased all of the assets of MRPI and MRPI was the successor to Newcor, it lacks merit because neither appellee nor MRPI were successor employers to Newcor under § 22(a) of the statute. The Agency should not be permitted to assert that because Jehle was general manager of both companies and failed to appeal its incorrect decision with respect to MRPI, appellee must

[1] Jehle was hired by Newcor and served as general manager of its Deckerville division and later MRPI before purchasing the latter's assets with a group of investors to form appellee.

accept the Agency's improper decision despite its status as a distinct organization that purchased MRPI's assets from Newcor.

Based on § 22, the circuit court did not err by reversing the Board's decision and concluding that appellee was not a successor employer under the MESA. The circuit court, apparently based its decision on § 41 of the statute, stating that "Newcor was the true predecessor in interest" to appellee, and appellee did not purchase 75 percent of that company's business or assets. While we reach our conclusion on different grounds, it is clear from the record that MRPI did not operate as an entity that was separate and distinct from Newcor. As previously discussed, when appellee purchased MRPI's assets, it paid Newcor. Thus, it was reasonable for the court to assume that for all practical purposes, Newcor, not MRPI, preceded appellee as the owner of the Deckerville division. Because § 41(2)(a) defines a successor employer as one that has purchased "75% or more of the assets of another organization, trade, or business," and the court found that appellee did not purchase 75 percent of any of the statutory items, appellee is not a successor employer to Newcor under the statute. Therefore, the court did not err in finding that appellee was not a successor to MRPI.

Affirmed.

/s/ Stephen L. Borrello
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher