STATE OF MICHIGAN

COURT OF APPEALS

TEAM MEMBER SUBSIDIARY, L.L.C., Petitioner-Appellant,	UNPUBLISHED September 6, 2011
v	No. 294169 Livingston Circuit Court
LABOR & ECONOMIC GROWTH UNEMPLOYMENT INSURANCE AGENCY, Respondent-Appellee.	LC No. 08-023981-AV

Before: METER, P.J., and SAAD and WILDER, JJ.

PER CURIAM.

Petitioner appeals by leave granted from a circuit court order upholding the decision of the Michigan Employment Security Board of Review (the Board) denying petitioner's request to be considered a liable employer for the purposes of unemployment tax under the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*. We affirm.

Petitioner was founded to serve as an employee leasing company to Kitchen Suppliers, Inc. (KSI). To begin the process, KSI transferred employee files and a file cabinet to petitioner for $100 in June 2005. Petitioner then began providing human-resources services and making payroll payments for KSI exclusively. Petitioner requested a determination from respondent that it was an employee-leasing company of KSI and thus a liable employer for purposes of state unemployment taxes.[1] See 2002 AC, R 421.190(2). Respondent held that petitioner was a

[1] Petitioner states: "The only reason [petitioner] sought to be identified as the employer was because the federal government regulations do not provide credit [for state unemployment-tax contributions] in a situation where 'Employer A' makes the contribution, but 'Employer B' seeks the credit; rather, everything in the federal system is dictated by employer tax identification numbers." Petitioner states that it and KSI have different tax-identification numbers. Evidently, petitioner is arguing that it will not be able to obtain federal credit because it (petitioner) made the unemployment-tax contributions while KSI will be forced to seek the credit. In response to petitioner's tax-credit concerns, respondent states:

> [Petitioner] incorrectly alleged that its Circuit Court appeal was the only means to get a certification of State unemployment tax necessary to receive

"captive provider" under 2002 AC, R 421.190(1)(a), which defines "captive provider" as "an employee leasing company which limits itself to providing services and employees to only 1 client entity and the entity's subsidiaries and affiliates and which does not hold itself out as available to provide leasing services to other client entities that do not share an ownership relationship with the employee leasing company." Respondent determined, in part, that because petitioner was a captive provider, it could not be the liable employer of KSI's employees for the purposes of unemployment tax. See 2002 AC, R 421.190(2)(f). Petitioner asked for a redetermination, arguing that it was a successor employer to KSI under MCL 421.22. Respondent declined the request for a redetermination.

Petitioner sought further review. Petitioner stipulated to being a captive provider under the definition of that phrase provided by Rule 190, but challenged the validity of the rule on the basis that it conflicted with the provisions of the MESA. Petitioner stated that under the MESA, it should be considered an employer for purposes of unemployment tax.[2] The administrative law

> federal FUTA [Federal Unemployment Tax Act] tax credits. Actually, [petitioner] never requested the Agency's certification for federal FUTA tax credits, which the Agency *did* provide once it learned of that request.
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> When it did so, the Agency explained that it provided the certification to protect/preserve KSI's credit during its pending appeal. As any ultimate appellate resolution would result in the issuance of a certification, the Agency issued certifications to [petitioner] *and* KSI. Both could then, in combination, apply for a FUTA tax credit. The Agency never conceded that [petitioner] was, itself, liable for federal FUTA taxes flowing from its incomplete federal forms and "voluntary" payments. As [petitioner] acts as the agent of KSI, the certification must inevitably inure to the benefit of its principal, KSI, whether submitted under the name of KSI or its payroll agent—petitioner.
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> [Petitioner] also alleged its FUTA tax rate was improperly high because it lacks FUTA credits that reduce FUTA taxes by a fraction of each dollar paid for State MESA taxes. But here, the Agency held [petitioner] lacked liability for any State MESA tax. That meant any [of petitioner's] fractionally higher FUTA tax was more than counterbalanced by [petitioner's] absence of any State . . . tax liability. [Emphases in original.]

[2] Petitioner emphasizes MCL 421.22 and MCL 421.41. At the relevant time, MCL 421.22(c) provided:

> Notwithstanding any other provisions of this section, if an employer subject to this act transfers subsequent to December 31, 1973, any of the assets of his business, by any means otherwise than in the ordinary course of trade, to any transferee or transferees substantially owned or controlled, in whole or major part, either directly or indirectly by legally enforceable means or otherwise, by the same interest or interests which owned or controlled the transferor at the time of such transfer, such transfer shall be deemed a "transfer of business" for the purposes of this section.

judge concluded that he did not have the authority to declare Rule 190 invalid as in conflict with the MESA. He found that petitioner could not be considered a liable employer. Petitioner subsequently appealed to the Board, which affirmed on the basis that petitioner failed to assert that Rule 190 was improperly promulgated. Petitioner appealed to the circuit court, which upheld the Board's determination that petitioner was not a liable employer for purposes of unemployment tax. The circuit court found that petitioner was an employer under the MESA but that it was nevertheless not the liable employer for unemployment-tax purposes because it fit into the "sub-class" of being a captive provider. It stated that the MESA was intended, in part, to prevent the creation of "paper reorganizations" that, in effect, change nothing of substance.

Petitioner first argues that the trial court erred by not addressing its claim that MCL 421.41(7) supports its position that it should be considered the liable employer of KSI employees for unemployment-tax purposes. "A final agency decision is subject to court review but it must generally be upheld if it is not contrary to law, is not arbitrary, capricious, or a clear abuse of discretion, and is supported by competent, material and substantial evidence on the whole record." *Vanzandt v State Employees' Retirement Sys*, 266 Mich App 579, 583; 701 NW2d 214 (2005). "This Court reviews a lower court's review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clearly erroneous standard of review." *Id*. at 585.

The circuit court was not required to voice its conclusion concerning every argument presented. See, generally, *LaFleche v Ybarra*, 242 Mich App 692, 700; 619 NW2d 738 (2000). The circuit court dismissed by implication petitioner's argument that the plain language of MCL 421.41(7) made it an "employer" under the MESA and therefore liable for unemployment taxes for KSI's employees. It instead found that petitioner was an "employer" by virtue of MCL 421.22(c) and MCL 421.41(2)(b). Therefore, the circuit court did not have to address petitioner's argument based on MCL 421.41(7), which provided, at the pertinent time, that "[e]mployer" included:

MCL 421.41(2)(b) provided that "[e]mployer" included "[a]ny individual, legal entity, or employing unit described as a transferee in section 22(c)." MCL 421.41(7) provided that "[e]mployer" included:

> Any employing unit not an employer by reason of any other paragraph of this section for which services in employment are performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund; but services performed for such employing unit shall constitute employment for the purposes of this act only to the extent that such services constitute employment with respect to which such federal tax is payable.

The statutes were subsequently reworded somewhat through amendment.

> Any employing unit *not an employer by reason of any other paragraph of this section* for which services in employment are performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund; but services performed for such employing unit shall constitute employment for the purposes of this act only to the extent that such services constitute employment with respect to which such federal tax is payable. [Emphasis added.]

Under the plain language of MCL 421.41(7), that section applied only when the entity satisfied none of the previous definitions for "employer." Because it considered petitioner an "employer" under a previous paragraph, the circuit court dismissed by implication petitioner's argument that the language of MCL 421.41(7) should control.

Petitioner next argues that the circuit court erred by not applying judicial estoppel in this case. Petitioner cites *Paschke v Retool Industries*, 445 Mich 502; 519 NW2d 441 (1994), in support of its argument. In *Paschke, id*. at 509, the Michigan Supreme Court adopted the "prior success" model of judicial estoppel. "Under this doctrine, a party who has *successfully* and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding." *Id*. (internal citations and quotation marks omitted; emphasis added by *Paschke*). "Prior success" requires that the court in the previous proceeding accepted the prior argument as true; moreover, the claims in question must be "wholly inconsistent." *Id*. at 510.

Petitioner argues that respondent should be estopped from claiming that because petitioner is a captive provider under Rule 190, it cannot be a successor employer of KSI and liable for unemployment-tax purposes. Petitioner bases this argument on respondent's position in a case involving three doctors with separate medical practices who created a fourth entity in order to combine the ministerial aspects of their practices. Some employees were transferred to the new entity, while others remained with their previous employers. Originally, respondent assigned the new entity the normal 2.7 percent experience rating given to new employers for the purposes of unemployment tax. Later, respondent assigned the rating previously given to the practice of one of the individual doctors. The administrative law judge determined that "the Agency would appropriately consider the new entity a successor to each of the prior sole-practitioner businesses." However, because respondent had not timely moved for reconsideration of the 2.7 percent experience rating, he set aside the new rating despite the "successor" status. The Board later remanded for a recalculation of the experience rating.

Petitioner argues that respondent successfully argued in the prior proceedings involving the doctors that a captive provider is a successor employer for unemployment-tax purposes. However, in the prior case, Rule 190 was not at issue, nor was any captive-provider analysis part of the decision. In fact, it appears that the fourth entity was not a captive provider under Rule 190. Again, Rule 190 defines "captive provider" as "an employee leasing company which limits itself to providing services and employees *to only 1 client entity and the entity's subsidiaries and affiliates* and which does not hold itself out as available to provide leasing services to other client entities that do not share an ownership relationship with the employee leasing company." 2002 AC, R 421.190(1)(a) (emphasis added). The fourth entity provided employees for all three

doctors' practices. We find that petitioner has not demonstrated wholly inconsistent claims and has not established the elements of judicial estoppel as set forth in *Paschke*, 445 Mich at 510.

Next, petitioner argues that the circuit court erred when it held that statements made by respondent to petitioner's CPA, in unrelated cases, were "interpretive statements" under MCL 24.207(h)[3] and therefore not binding on respondent. In these statements, respondent gave advice concerning its position relative to employee leasing companies and captive providers. The advice pertained to entities other than petitioner. Petitioner relied on these statements to support its request to be considered a liable employer for unemployment-tax purposes. Petitioner argues that the trial court should have concluded that respondent was bound by these statements in its dealings with petitioner.

The circuit court concluded that the statements at issue were interpretive statements, and we agree. Interpretive statements explain a statute or rules from which an agency derives its authority. *Faircloth v Family Independent Agency*, 232 Mich App 391, 404; 591 NW2d 214 (1998). An interpretive statement does not have the force or effect of law. See, generally, *id*. at 403-404; see also MCL 24.207(h). Communication of an interpretive statement does not convert the statement "into an independently enforceable rule." *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 243-244; 501 NW2d 88 (1993). Moreover, petitioner's attempt to construe the statements in question as improperly promulgated rules fails to acknowledge that an improperly promulgated rule is not enforceable. "[A]n administrative agency cannot rely upon a guideline or unpromulgated policies in lieu of rules promulgated under the APA." *Dept of Natural Resources v Bayshore Assoc, Inc*, 210 Mich App 71, 85-86; 533 NW2d 593 (1995).

The statements could conceivably be considered declaratory rulings under MCL 24.263. That statute specifically sets forth that a declaratory ruling is binding on the agency *and* the person requesting the ruling. *Id*. However, as the circuit court concluded, because petitioner was not the party that requested the statements in question, they were not binding in this case. Additionally, the statute authorizes prospective changes to declaratory rulings. *Id*.

Next, petitioner claims that the circuit court improperly considered an alternative basis for affirmance not raised during the administrative proceedings—namely, that Rule 190 was not contrary to the MESA because it was consistent with MCL 421.40. However, an appellee may assert alternative grounds for affirmance without filing a cross-appeal, as long as the appellee does not seek a more favorable decision. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). It is true that, in general, alternative grounds are not properly preserved for appeal unless the pertinent argument was presented below. *City of Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (2006). Nevertheless, a reviewing court (as the circuit court was here) may consider an issue not raised below if it involves a question of law and all of the facts necessary for its resolution have been presented. *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998). The issue in question is one of statutory interpretation, which is a question of law. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32;

[3] MCL 24.207(h) provides that "[r]ule" does not include, among other things, an "interpretive statement."

658 NW2d 139 (2003). The necessary facts are available, and therefore the circuit court did not clearly err by permitting respondent to raise this argument.

Petitioner argues that Rule 190 is invalid because it is contrary to the plain language of the MESA, i.e., it improperly contradicts a finding under the MESA that petitioner is an "employer." See MCL 421.22 and MCL 421.41. However, petitioner attempts to read MCL 421.22 and MCL 421.41 in isolation in order to establish that Rule 190 is invalid. Provisions must be read in the context of an entire statute in order to "achieve a harmonious and consistent result." *Ferguson v Pioneer State Mutual Ins Co*, 273 Mich App 47, 52; 731 NW2d 94 (2006). Statutes within an act must be read in the context of the entire act. *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003). While petitioner is correct that an entity may become an "employer" under MCL 421.41 and MCL 421.22, petitioner fails to take into account MCL 421.40, which provides:

> "Employing unit" means any individual or type of organization, including, but not limited to, a governmental entity as defined in section 50a, a partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to this amendatory act, had in its employ 1 or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains 2 or more separate establishments within this state shall be considered to be employed by a single employing unit for all the purposes of this act. *Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be considered to be employed by that employing unit for all the purposes of this act, whether the individual was hired or paid directly by that employing unit or by the agent or employee*, provided the employing unit had actual or constructive knowledge of the work. [Emphasis added.]

MCL 421.40 makes clear that an individual may only be employed by one employing unit and that an agent of an employing unit cannot be the liable employer. Petitioner could be considered an "agent" of KSI within the meaning of this statute, and this interpretation is consistent with Rule 190's captive-provider restriction. Given the standard of review we must employ, see *Vanzandt,* 266 Mich App at 583, we find no basis to reverse the trial court's decision.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Kurtis T. Wilder