

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-54**

B & B Boat & Rec., LLC,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

**Filed August 29, 2011
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

Department of Employment and Economic Development
File No. 25777794-3

Thomas C. Pearson, Gammello, Qualley, Pearson & Mallak, PLLC, Baxter, Minnesota
(for relator)

Lee B. Nelson, Amy R. Lawler, Minnesota Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Larkin, Presiding Judge; Stauber, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Relator challenges an unemployment-law judge's (ULJ) determination that the
statutory requirements for the transfer of the experience-rating history of a predecessor

employer to relator have been met. Because that determination is correct under Minn. Stat. § 268.051, subd. 4(b) (2010), we affirm in part. But because the ULJ erred in failing to apportion the experience-rating history as required under section 268.051, subdivision 4(b), we reverse in part and remand.

FACTS

James and Carol Halverson each previously owned a 50% interest in Brainerd Sports & Marine, LLC (BS&M). In November 2008, BS&M ceased operations, and surrendered its assets to secured creditors. In April 2009, James and Carol's son, Brian Halverson, formed relator B&B Boat & Rec., LLC. Brian Halverson is the president, and 98% owner, of B&B. B&B purchased BS&M's building and equipment from BS&M's secured creditors and hired seven of BS&M's twelve employees. B&B did not acquire BS&M's inventory or accounts receivable.

In April 2010, respondent Minnesota Department of Employment and Economic Development (DEED) sent B&B a letter, stating that B&B was reporting wages for employees previously reported by BS&M and that it appeared that B&B had acquired either all or part of BS&M's operations in Minnesota. The letter also stated, "The movement of employees from one related entity to another is considered acquisition for unemployment tax purposes." DEED asked B&B to provide notification if an acquisition had occurred or to provide a written explanation for the transfer of employees from BS&M to B&B if an acquisition had not occurred. B&B responded and denied that it had acquired operations from BS&M. In July 2010, DEED issued a "Determination of Succession," notifying B&B that it would receive a "full transfer of the experience rating

history” from BS&M. DEED acknowledges that, because BS&M had laid-off all of its employees when it ceased operations in November 2008, the experience rating was high: 5.33% in 2009 and 9.4% in 2010.

B&B appealed DEED’s determination that it is a successor to BS&M, and a ULJ initially determined that B&B is not BS&M’s successor. But the ULJ filed an amended decision that determined, implicitly, that B&B is a successor to BS&M and that the requirements for transfer of BS&M’s experience-rating history to B&B were satisfied. B&B filed a request for reconsideration, and the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

Our review of a ULJ’s decision is governed by Minn. Stat. § 268.105, subd. 7(d) (2010), which provides, in relevant part:

The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- ...
- (4) affected by [an] error of law; [or]
- (5) unsupported by substantial evidence in view of the entire record as submitted[.]

We apply a de novo standard of review to a ULJ’s interpretation of the unemployment insurance statutes. *Abdi v. Dep’t of Emp’t & Econ. Dev.*, 749 N.W.2d 812, 815 (Minn. App. 2008).

An employer's tax rate is computed "by adding the base tax rate to the employer's experience rating." Minn. Stat. § 268.051, subd. 2(a) (2010). Each year DEED must notify an employer of its tax rate and state the factors used in determining its experience rating. *Id.*, subd. 6(a) (2010). "Experience rating is a method whereby [an employer's unemployment] contributions are gauged to the employer's prior employment record. Generally then, if relatively few former employees have become eligible for benefits, the employer's rate of contribution is adjusted downward." *Easy Street West v. Commissioner of Econ. Sec.*, 345 N.W.2d 250, 253 (Minn. App. 1984). "[E]xperience rating is based on the theory that unemployment is to some extent within the control of management and that lower taxes will be an incentive to employment stabilization." *Id.*

Under Minn. Stat. § 268.051, subd. 4(a) (2010), when a taxpaying employer acquires all of the organization, trade, business, or workforce of another employer and there is 25% or more common ownership between the two, the experience-rating history of the predecessor employer is transferred to the successor employer. Minn. Stat. § 268.051, subd. 4(b), further explains that when

(1) a taxpaying employer acquires *a portion, but less than all*, of the organization, trade or business, or workforce of another taxpaying employer; and

(2) there is 25 percent or more common ownership or there is substantially common management or control between the predecessor and successor, the successor employer acquires, as of the date of acquisition, the experience rating history attributable to the portion it acquired, and the predecessor employer retains the experience rating history attributable to the portion that it has retained.

....

(c) The term "common ownership" for purposes of this subdivision includes ownership by a spouse,

parent, grandparent, child, grandchild, brother, sister, aunt, uncle, niece, nephew, or first cousin, by birth or by marriage.

(Emphasis added.)

Thus, under Minn. Stat. § 268.051, subd. 4, if an employer acquires all, or a portion, of a predecessor business, and there is 25% or more common ownership between the two, the acquiring employer is considered a successor employer, and the successor employer is assigned all, or a portion, of the experience-rating history of the predecessor employer.

In his amended decision, the ULJ cited section 268.051, subdivision 4, described the text of subparts (a) and (b), and concluded that “the requirements for the experience rating history of BS&M to be transferred to B&B have been met.” We agree with B&B that the ULJ could have explained the reasons for that conclusion with greater precision. For example, the amended decision twice references “the above-described provision of the law” without clarifying whether the reference is to subdivision 4(a) or (b), and further states that B&B acquired “substantially all” of the business of BS&M, which is a reference to a repealed statutory standard for determining successor liability. *See* 2005 Minn. Laws ch. 112, art 1, § 7, at 677. B&B nonetheless agrees that it is a successor employer under section 268.051, subdivision 4(b). We therefore affirm in part.

There remains one issue for our consideration: B&B maintains that the ULJ erred in failing to apportion the experience-rating history according to the process set forth under section 268.051, subdivision 4(b). DEED agrees with B&B on this point, as does this court. Section 268.051, subd. 4(b) provides that in the event of a partial acquisition,

“the successor employer acquires, as of the date of acquisition, the experience rating history attributable to the portion it acquired, and the predecessor employer retains the experience rating history attributable to the portion that it has retained.” The statute further provides that

[i]f the commissioner determines that sufficient information is not available to substantiate that a distinct severable portion was acquired and to assign the appropriate distinct severable portion of the experience rating history, the commissioner must assign the successor employer that percentage of the predecessor employer’s experience rating history equal to that percentage of the employment positions it has obtained, and the predecessor employer retains that percentage of the experience rating history equal to the percentage of the employment positions it has retained.

Minn. Stat. § 268.051, subd. 4(b).

Despite the clear statutory directive requiring apportionment of the experience rating in the event of a partial acquisition, the ULJ affirmed DEED’s full transfer of BS&M’s experience-rating history to B&B. The ULJ erred in this regard. We therefore reverse the ULJ’s decision to the extent that it affirms DEED’s full transfer of BS&M’s experience-rating history to B&B. Because the record supports only a partial transfer of BS&M’s experience-rating history to B&B, we remand for a determination of the “experience rating history attributable to the portion” of BS&M that B&B acquired, under the standards set forth in section 268.051, subdivision 4(b).

Affirmed in part, reversed in part, and remanded.

Dated:

Judge Michelle A. Larkin