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Jobe, Mark

CIRCUIT COURT ORDER/OPINION
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Appeal Docket No: 2890

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Date: 11/20, 2008

R. Douglas Daligga, Director
MES - Board of Review

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

CTC ACQUISITION CO, LLC,

Appellant-Employer,

v

STATE OF MICHIGAN,
MICHIGAN UNEMPLOYMENT
INSURANCE AGENCY,
DEPARTMENT OF LABOR AND
ECONOMIC GROWTH

Appellee-Agency.

No. 08-06293-AE

HONORABLE
JAMES ROBERT REDFORD

OPINION AND ORDER

**At this session of court held in the
17th Circuit Court,
County of Kent, State of Michigan,
On this 10th day of November 2008.**

This is an appeal from the decision of the Michigan Employment Security Board of Review (the Board). The Board affirmed the decision of the administrative law judge, affirming the decision of the agency to recalculate Appellant-Employer's contribution rate and increase the rate from 2.7% to 10.3%. For the reasons set forth below, the order of the Board is REVERSED.

I. CASE HISTORY

This case stems from CTC Acquisition Co, LLC's (CTC or the Employer) purchase of much, but not all, of Grand Rapids Controls, Inc's (GRC, Inc) assets. GRC, Inc was a spring and cable manufacturer solely owned by Linda Southwick. The sale occurred in April 2004. CTC ceased the spring manufacturing line, but continued the cable production line. CTC retained GRC, Inc's production staff, but not it's management staff. CTC renamed GRC, Inc to GRC, LLC.

CTC reported the acquisition to the Michigan Unemployment Insurance Agency (UIA) for a determination of the appropriate contribution rate. According to the Michigan Employment Security Act, MCL 421.1, *et seq*, a "new employer" is assigned a 2.7% contribution rate. This means that the new employer must pay 2.7% of the amount of its payroll to the UIA. When a business acquires more than 75% of another business, however, it is considered to be a "transfer of business," and the former employer's contribution rate is transferred to the acquiring company. MCL 421.19; MCL 421.22; *Ha-Marque Fabricators, Inc v MESC*, 178 Mich App 470, 474; 444 NW2d 190 (1989).

In August 2004, the UIA assessed CTC a contribution rate of 2.7%, finding that it was a "new employer" because it acquired less than 75% of GRC, Inc's assets. However, in June 2005, the UIA reconsidered CTC's contribution rate, determined that it had acquired more than 75% of GRC, Inc's assets, and assigned CTC GRC, Inc's contribution rate of 10.3%. When it reconsidered the rate, the UIA determined that leasehold improvements, valued at $1.3 million, were not GRC, Inc's asset. As such, they could not be considered in determining the percentage of GRC, Inc's assets that were acquired by CTC.

The UIA is permitted to reconsider and redetermine an employer's contribution rate. MCL 421.32a(2). However, unless the reconsideration occurs within 30 days of the original determination, the rate may only be reconsidered for good cause.

CTC timely initiated appellate review proceedings. The ALJ affirmed the UIA, and the Board affirmed the ALJ. Consequently, CTC filed the instant appeal.

There are two determinative issues presented in this appeal. First, is remand required for a determination of whether the agency had good cause to reconsider CTC's contribution rate because the rate was not reconsidered within 30 days of the original determination? Second, did the Board err in not considering GRC, Inc's leasehold improvements in the asset calculation? It is the opinion of this Court that, as a matter of law, the leasehold improvements were GRC, Inc's assets and should have been included in the calculation. Because of our decision on this issue, the matter need not be remanded for a determination of good cause.

II. Standard of Review

The standard of review for appeals from administrative agencies in contested cases was well stated in *Trumbles Rent-L-Center, Inc v Employment Security Commission*, 197 Mich App 229, 233; 495 NW2d 180 (1992):

> [A] [c]ourt's review of a decision by the MESC Board of Review is limited. *Becotte v. Gwinn Schools*, 192 Mich.App. 682, 685, 481 N.W.2d 728 (1991). Such a decision may be reversed only where the Court finds that it is contrary to law or not supported by competent, material, and substantial evidence. *Id.*, citing M.C.L. § 421.38(1); M.S.A. § 17.540(1). Substantial evidence is that which a reasonable mind would accept as adequate to support a decision. *Id.* Substantial evidence is more than a mere scintilla but less than a preponderance of the evidence. *Id.* See also, e.g., *Tomei v. General Motors Corp.*, 194 Mich.App. 180, 183-184, 486 N.W.2d 100 (1992).

See also MCL 421.38(1).

III. Analysis

First, this Court must determine if the leasehold improvements were GRC, Inc's asset. Clearly, the leasehold improvements, such as factory manufacturing equipment and an air conditioning system, had value. GRC, Inc included them on its balance sheet.[1] That GRC, Inc, wrote the improvements off of its books does not suggest a contrary result. When the lease terminated, GRC's interest in the improvements terminated per case law and the express terms of the lease. GRC, Inc received no compensation for the improvements when the lease terminated. Therefore, the improvements were properly written off.

GRC, Inc could have received payment from CTC for the leasehold improvements by bargaining for them when negotiating the price of the lease assignment. The parties, apparently, did not take that route. Nonetheless, the leasehold improvements were assets, and simply because the highest value was not clearly realized does not deprive the improvements of their status as assets.

Next, this Court must determine whether the leasehold improvements were transferred to CTC as contemplated by the statute. Leasehold improvements generally belong to the lessee. See *Wycoff v Gavriloff Motors, Inc*, 362 Mich 582; 107 NW2d 180 (1992). Additionally, in the instant case, GRC, Inc's lease expressly provided that the leasehold improvements belonged to the lessee, but if they were not removed prior to the termination of the lease, ownership passed to the lessor.

At oral argument, the parties agreed that the lease between GRC, Inc and the entity from which GRC, Inc leased its land and buildings terminated when CTC acquired GRC's assets.[2] The agency argued that the intervening ownership interest of the lessor

[1] The parties agreed that the Board did not look at the appropriate balance sheet when it reasoned that if the leasehold improvements were an asset they would be listed on the balance sheet. The Board was referring to GRC, LLC's balance sheet (the assumed name given by CTC) rather than GRC, Inc's balance sheet.
[2] But for this agreement and Appellee's argument that the lease terminated, this Court's opinion may have been different. The parties stated that, as part of the acquisition, GRC, Inc "assigned" its lease to CTC. It is unclear if the parties used this word for its legal meaning. However, this Court is of the opinion that if the lease were truly "assigned," then the value of the lease would need to include the value of the leasehold

was irrelevant because GRC, Inc was still divested of an asset. The agency argued that the focus must be on what the seller lost and not what the acquirer gained.

This Court disagrees. The focus, pursuant to Michigan statute, must be on what the seller's total assets were and what percentage of those assets was transferred to a particular acquiring business. If GRC, Inc had divided all of its assets equally among 10 purchasers, one could not argue that the business was transferred merely because more than 75% of GRC, Inc was sold all together. Moreover, MCL 421.22(b) specifically states that "a transfer of assets to *a* transferee which involves less than 75% of the transferor's assets shall not be deemed a transfer of business…." The purpose of the statutory threshold is to distinguish acquiring companies that purchase parts of a business and companies that take over a business. As such, the proper focus is on what percentage of assets a transferor transferred to a single transferee.

The parties agreed that the lessor, as opposed to GRC, Inc, transferred any interest in the leasehold improvements to CTC. The statute clearly states that we look to the selling business and the acquiring business. There is no provision requiring third party transfers to be considered. It is not for this Court to question the wisdom of what the legislature has written, merely to apply that written word, especially in cases such as this where there are no allegations of fraudulent transferring. CTC merely made a wise business decision.

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improvements because CTC would merely step into the shoes of GRC, Inc, and own the leasehold improvements until the lease terminated. If the lease was "assigned," then the lease did not "terminate," and the leasehold improvement interest did not revert to the lessor. Consequently, the leasehold improvements would be calculated as an asset that was acquired, and CTC would not be a new employer. However, both in it's brief and in oral argument, the Agency represented, agreed, and argued that the lease terminated and that the leasehold improvement interest reverted to the lessor.

Because the leasehold improvements were GRC, Inc's asset, and because GRC, Inc did not transfer the improvements to CTC, CTC acquired less than 75% of GRC, Inc. Therefore, CTC is a new employer and must be assessed the 2.7% rate. Based on this opinion, it is not necessary to remand for a determination of whether the agency has good cause to reconsider the rate determination more than 30 days after the original determination.

IV. CONCLUSION AND ORDER

IT IS ORDERED that the decision of the Board is REVERSED.

IT IS FURTHER ORDERED that the UIA will reinstate the original 2.7% contribution rate determination.

IT IS SO ORDERED.

JAMES ROBERT REDFORD

James Robert Redford
Circuit Court Judge

This is a final order and closes the case.