MES 9009
(Rev. 04/11)

AUTHORITY: M.E.S. ACT, SECTIONS 34,38

1-248-569-9980

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
EMPLOYMENT SECURITY BOARD OF REVIEW
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IMPORTANT NOTICE TO PARTIES

Attached is a decision of the Employment Security Board of Review which **WILL BECOME FINAL unless further action is taken by you.**

The Michigan Employment Security Act provides the following **ALTERNATIVE METHODS** of recourse from decisions or final orders of the Board of Review.

A. REHEARING AND/OR REOPENING

Sec. 34 .....The Board of Review **may, either upon application by an interested party for rehearing** or on its own motion, proceed to **REHEAR**, affirm, modify, set aside, or reverse a prior decision on the basis of the evidence previously submitted in that case, or on the basis of additional evidence **if the application or motion is made within 30 days after the date of mailing of the prior decision.** The Board of Review **may, for GOOD CAUSE, REOPEN AND REVIEW** a prior decision of the Board of Review and issue a new decision **AFTER the 30-day appeal period has expired, but a review shall not be made unless the request is filed with the Board,** or review is initiated by the Board with notice to the interested parties, **within 1 year after the date of mailing of the prior decision.** Unless an interested party, within 30 days after mailing a copy of a decision of the Board of Review or of a denial of a motion for a rehearing, files an appeal from the decision or denial, or seeks judicial review as provided in section 38, the decision shall be final.

B. APPEALS TO CIRCUIT COURT

Sec. 38. **The circuit court of the county in which the claimant resides OR the circuit court of the county in which the claimant's place of employment is or was located,** or, if a claimant is not a party to the case, the circuit court of the county in which the employer's principal place of business in this state is located, may review questions of fact and law on the record made before the Referee and the Board of Review involved in a final order or decision of the Board, and may make further orders in respect thereto as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. **Application for review shall be made within 30 days after mailing a copy of the order or decision** by any method permissible under the rules and practices of the circuit courts of this state.

TIME FOR FILING REQUESTS FOR REHEARING OR APPEALING TO COURT

Your attention is directed to the time for filing either an appeal to circuit court, or a petition for rehearing before the Board of Review. **Filing means the date** on which either the circuit court claim of appeal or the Board of Review petition is **RECEIVED. Circuit court claims of appeal are to be filed WITH THE CLERK OF THE APPROPRIATE COURT** as set forth in Section 38 above. **Filing of petitions for rehearing or reopening before the Board of Review should be filed WITH THE BOARD, OR** in any branch office of the Michigan Unemployment Agency or reciprocating employment security office of other states. Such claims of appeal or petitions for rehearing **must be filed within thirty (30) days** with the following exception, as provided in:

Sec. 49 Whenever the last day of the 30-day period, provided for in sections 14, 32a, 33, 34 and 38, falls on a Saturday, Sunday or legal holiday, such 30-day period shall run until the end of the next day which is neither a Saturday, Sunday nor legal holiday.

MES-1852 (REV11)

STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

JOHN V. ALLEN,

Claimant

Appeal Docket No.: B 2009-00698-RO1-203891W

Social Security No.: 330-52-3908

AGRA INDUSTRIES INS.,

Employer

DECISION OF BOARD OF REVIEW

This case is before the Board of Review as a result of the claimant's April 2, 2009 appeal from a March 4, 2009 Administrative Law Judge (Referee) order denying application for rehearing. The Referee's underlying February 12, 2009 decision affirmed a January 12, 2009 Unemployment Insurance Agency (Agency) redetermination, which found the claimant disqualified for benefits under the voluntary leaving provision of the Michigan Employment Security Act (MES Act), Section 29(1)(a).

After reviewing the record, we find the Referee's March 4, 2009 order denying application for rehearing must be affirmed and the underlying February 12, 2009 decision must be reversed. The claimant is not disqualified under the voluntary leaving provision, Section 29(1)(a) of the MES Act. Our reasons are as follows.

In *Merren v Michigan Employment Security Commission*, 380 Mich. 240 (1968), the claimant quit a job with a Michigan employer to take a job with a Florida employer and was laid off from the latter job after working about ten weeks. The issue was whether the claimant was properly "disqualified for unemployment benefits under the Michigan Employment Security Act [Section 29(1)(a)] which provides that a claimant is disqualified from unemployment benefits if he voluntarily leaves employment without good cause attributable to the employer, but provided an exception if the claimant left to accept permanent full-time work with another employer and is laid off within 39 weeks, the disqualification being based on the theory that the exception applies only if the second employer is also a Michigan employer." *Merren, supra* at 245. The equally divided court affirmed the appeal board's decision to deny the claimant's benefits based on the theory that "the legislature intended to protect not only the claimant in his efforts at other employment but at the same time give some protection to the separating employer from whom the claimant left his work voluntarily so that the separating employer would not have to assume the entire burden of having charged to its rating account the entire amount of benefits so paid to the individual. ...[T]he new employer must be a subject employer under the act; otherwise it would be impossible for the claimant to earn credit weeks in the course of employment with the new employer. To hold that the new employer need not be a subject liable employer under the act would create an anomaly and it would be impossible to fulfill the intent of the legislature." *Merren, supra* at 246 quoting the appeal board.

The proviso clause in 29(5) of the MES Act now reads:

> If an individual leaves work to accept permanent full-time work with another employer and performs services for that employer, or if an individual leaves work to accept a recall from a former employer:
> (a) Subsection (1) does not apply.
> (b) Wages earned with the employer whom the individual last left, including wages previously transferred under this subsection to the last employer, for the purpose of computing and charging benefits, are wages earned from the employer with whom the individual accepted work or recall, and benefits paid based upon those wages shall be charged to that employer.

In *Roman Cleanser Company v Murphy*, 29 Mich App 155 (1970), the Michigan Court of Appeals held:

> In *Merren v. Employment Security Commission* (1963), 3 Mich.App. 383, 142 N.W.2d 493, affirmed by an equally divided court, 380 Mich. 240, 156 N.W.2d 524, this Court held that an employee who voluntarily left his employment with a Michigan employer and took work with an out-of-state employer, and who was then laid off by the out-of-state employer, was not entitled to reinstatement or use of any part of the credit weeks he had acquired while working for the Michigan employer. Those credit weeks were cancelled by virtue of the employee's voluntary quitting. Our rationale in *Merren* was that:
>
> "To grant Merren's claim (would be) to penalize Lear Siegler (the Michigan employer), who would then pay Merren from its account without any contribution from another 'employer'."
>
> Likewise, were we to hold in the present case that Murphy's work in Kentucky requalified him for benefits under the act we would penalize Roman by requiring it to pay Murphy from its own account without any contribution from another employer. This we refuse to do.
>
> We adhere to our decision in *Merren*. It controls this case. The commission erred as a matter of law in determining that Murphy's work with an out-of-state employer requalified him for benefits chargeable to the account of his former Michigan employer. We conclude that Murphy stands disqualified under the act.

Roman Cleanser Company v Murphy, 29 Mich App 155,165-166 (1970).

The Interstate Benefit Payment Plan has been in effect since 1938, but it applies only to those administrative State agencies adopting the Plan. Currently, all States are signatories to the Plan.

> This Plan shall operate as to those administrative State agencies adopting the Plan. The purpose of this Plan shall be to initiate and further a method for the payment of unemployment compensation benefits to those unemployed individuals who have

> earned uncharged wage credits or who have accumulated uncharged credit weeks under the unemployment compensation laws of one or more States (the administrative agencies of which have subscribed to the Plan), and who otherwise might be deprived of benefits because of their absence from a State in which such credits were accumulated.
>
> To effectuate this purpose, the unemployment compensation administrative agencies (hereinafter referred to as State agencies) subscribing hereto shall act as agents for each other in a procedure contemplated by this Plan, to the end that no such individual shall be deprived of said benefit credits by reason of his absence from that State in which such credits were accumulated.

ET Handbook No. 392, Appendix B, Interstate Agreements, Article I.

Each participating state must cooperate with the other participating states and must promulgate regulations for the payment of benefits to interstate claimants. Michigan has done so. See Section 11 of the MES Act (below).

The Federal-State Extended Unemployment Compensation Act of 1970, title II, Public Law 91-373, section 202, changed the federal provision to require that all states cooperate to provide Combined-Wage Claims. It provides, in pertinent part:

> (c) If an individual elects to file a Combined-Wage Claim, all employment and wages in all States in which the individual worked during the base period of the paying State must be included in such combining, except employment and wages which are not transferrable under the provisions of § 616.9(b).
>
> * * *
>
> (e) If the Combined-Wage Claimant files his/her claim in a State other than the paying State, the claimant shall do so pursuant to the Interstate Benefit Payment Plan.

PL 91-373, § 202(c) & (e) (emphasis added).

The Employment Security Amendments of 1970 under PL 91-373 became effective January 1, 1972, and provide, in pertinent part, that State laws must include the following provisions, now specified in The Federal Unemployment Tax Act (FUTA), 26 USC §3301 *et seq.*:

> 26 USC § 3304 (9)(A) compensation shall not be denied or reduced to an individual solely because he files a claim in another State (or a contiguous country with which the United States has an agreement with respect to unemployment compensation) or because he resides in another State (or such a contiguous country) at the time he files a claim for unemployment compensation;
>
> (B) the State shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment covered under the State law with his wages and employment covered under the unemployment

> compensation law of other States which are approved by the Secretary of Labor in consultation with the State unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations. Any such arrangement shall include provisions for (i) applying the base period of a single State law to a claim involving the combining of an individual's wages and employment covered under two or more State laws, and (ii) avoiding duplicate use of wages and employment by reason of such combining;

The following provisions are also pertinent:

26 USC § 3304(a)(9)(B) provides,

> [T]he State shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment covered under the State law with his wages and employment covered under the unemployment compensation law of other States which are approved by the Secretary of Labor in consultation with the State unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations. Any such arrangement shall include provisions for (i) applying the base period of a single State law to a claim involving the combining of an individual's wages and employment covered under two or more State laws, and (ii) avoiding duplicate use of wages and employment by reason of such combining;

26 USC § 3306

> (a)(1) In general.--The term "employer" means, with respect to any calendar year, any person who—
>
> (A) during any calendar quarter in the calendar year or the preceding calendar year paid wages of $1,500 or more, or
> (B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least one individual in employment for some portion of the day.
>
> * * *
>
> (c) Employment.--For purposes of this chapter, the term "employment" means any service performed ... after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States.... [Subject to exceptions].

Under the provisions of §3304(a)(9)(B) of the Federal Unemployment Tax Act, the Secretary of Labor established a system whereby an unemployed worker with covered employment or wages in more than one State may combine all such employment and wages in one State, in order to qualify for benefits or to receive more benefits. The Federal Regulations governing the Interstate Arrangement for Combining Employment and Wages, 20 CFR 616.1 *et seq.*, were promulgated.

The regulations are mandatory for all states: "Each State agency will cooperate with every other State agency by implementing such rules, regulations, and procedures as may be prescribed for the operation of this arrangement. Each State agency shall identify the paying and the transferring State with respect to Combined-Wage Claims filed in its State." 20 CFR 616.3 (emphasis added).

The regulations provide in pertinent part:

20 CFR § 616.6 Definitions

(d) Combined-Wage Claimant. A claimant who has covered wages under the unemployment compensation law of more than one State and who has filed a claim under this arrangement.

(e) Paying State.

(1) The State in which a Combined-Wage Claimant files a Combined-Wage Claim, if the claimant qualifies for unemployment benefits in that State on the basis of combined employment and wages.

(2) If the State in which a Combined-Wage Claimant files a Combined-Wage Claim is not the Paying State under the criterion set forth in paragraph (e)(1) of this section, or if the Combined-Wage Claim is filed in Canada then the Paying State shall be that State where the Combined-Wage Claimant was last employed in covered employment among the States in which the claimant qualifies for unemployment benefits on the basis of combined employment and wages.

(f) Transferring State. A State in which a Combined-Wage Claimant had covered employment and wages in the base period of a paying State, and which transfers such employment and wages to the paying State for its use in determining the benefit rights of such claimant under its law.

(g) Employment and wages. "Employment" refers to all services which are covered under the unemployment compensation law of a State, whether expressed in terms of weeks of work or otherwise. "Wages" refers to all remuneration for such employment (emphasis added).

20 CFR § 616.7 Election to file a Combined-Wage Claim

(a) Any unemployed individual who has had employment covered under the unemployment compensation law of two or more States, whether or not the individual is monetarily qualified under one or more of them, may elect to file a Combined-Wage Claim....

20 CFR § 616.8(a) provides,

> Transfer of employment and wages--payment of benefits. The paying State shall request the transfer of a Combined-Wage Claimant's employment and wages in all States during its base period, and shall determine the claimant's entitlement to benefits (including additional benefits, extended benefits and dependents' allowances when applicable) under the provisions of its law based on employment and wages in the paying State and all such employment and wages transferred to it hereunder. **The paying State shall apply all the provisions of its law to each determination made hereunder**, except that the paying State may not determine an issue which has previously been adjudicated by a transferring State. Such exception shall not apply, however, if the transferring State's determination of the issue resulted in making the Combined-Wage Claim possible under § 616.7(b)(2). If the paying State fails to establish a benefit year for the Combined-Wage Claimant, or if the Claimant withdraws his/her claim as provided herein, it shall return to each transferring State all employment and wages thus unused. (Emphasis added.)

An employee within the meaning of the Social Security Act is one who meets the tests of the more or less established concept of legal relationship of employer and employee, and one who does not meet those tests is not an employee within meaning of the act even though he may bear the title of corporate officer. Social Security Act Sec. 1101(a)(6); 42 USC 1301(a)(6). *U.S. v Griswold*, 124 F 2d 599 (CCA 1st Cir. 1941); *Deecy Products Co v Welch*, 124 F 2d 592, (CCA 1st Cir. 1941). See 121 ALR 1002.

Section 11 of the MES Act is largely permissive, and authorizes the Agency to enter into agreements with the appropriate agencies of other states or the federal government.[1]

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[1] Section 11 of the Act provides, in pertinent part:

(c) The commission is **authorized** to enter into agreements with the appropriate agencies of other states or the federal government whereby potential rights to benefits accumulated under the unemployment compensation laws of other states or of the federal government, or both, may constitute the basis for the payment of benefits through a single appropriate agency under plans that the commission finds will be fair and reasonable to all affected interests and will not result in substantial loss to the unemployment compensation fund.

(d) (1) The commission is **authorized** to enter into reciprocal agreements with the appropriate agencies of other states or of the federal government adjusting the collection and payment of contributions by employers with respect to employment not localized within this state.

(2) The commission is **authorized** to enter into reciprocal agreements with agencies of other states administering unemployment compensation, whereby contributions paid by an employer to any other state may be received by the other state as an agent acting for and on behalf of this state to the same extent as if the contributions had been paid directly to this state if the payment is remitted to this state. Contributions so received by another state shall be deemed contributions required and paid under this act as of the date the contributions were received by

Michigan courts have clearly expressed the policy underlying the MES Act and the approach to be taken in interpreting the MES Act in light of that policy. "The purpose of the Unemployment Compensation Act is to relieve the distress of economic insecurity due to unemployment. It was

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the other state. The commission may collect contributions in a like manner for agencies of other states administering unemployment compensation and remit the contributions to the agencies under the terms of the reciprocal agreements.

* * *

(f) The commission may cooperate with or enter into agreements with any agency of another state or of the United States charged with the administration of any unemployment insurance or public employment service law.

* * *

The courts of this state shall recognize and enforce liabilities, as provided in this act, for unemployment compensation contributions, penalties, and interest imposed by other states which extend a like comity to this state. The attorney general may commence action in the appropriate court of any other state or any other jurisdiction of the United States by and in the name of the commission to collect unemployment compensation contributions, penalties, and interest finally determined, redetermined, or decided under this act to be legally due this state. The officials of other states which extend a like comity to this state may sue in the courts of this state for the collection of unemployment compensation contributions, penalties, and interest, the liability for which has been similarly established under the laws of the other state or jurisdiction. A certificate by the secretary of another state under the great seal of that state attesting the authority of the official or officials to collect unemployment compensation contributions, penalties, and interest is conclusive evidence of that authority.

The attorney general may commence action in this state as agent for or on behalf of any other state to enforce judgments and established liabilities for unemployment compensation taxes or contributions, penalties, and interest due the other state if the other state extends a like comity to this state.

(g) The commission may also enter into reciprocal agreements with the appropriate and authorized agencies of other states or of the federal government whereby remuneration and services, that determine entitlement to benefits under the unemployment compensation law of another state or of the federal government, are considered wages and employment for the purposes of sections 27 and 46, if the other state agency or agency of the federal government has agreed to reimburse the fund for that portion of benefits paid under this act upon the basis of the remuneration and services as the commission finds will be fair and reasonable as to all affected interests. A reciprocal agreement may provide that wages and employment, that determine entitlement to benefits under this act, are considered wages or services on the basis of which unemployment compensation under the law of another state or of the federal government is payable; may provide that services performed by an individual for a single employing unit for which services are customarily performed by the individual in more than 1 state are considered services performed entirely within any 1 of the states in which any part of the individual's service is performed, in which the individual has his or her residence, or in which the employing unit maintains a place of business, if there is in effect as to those services, an election approved by the agency charged with the administration of the state's unemployment compensation law, pursuant to which all the services performed by the individual for the employing unit are considered to be performed entirely within the state; and may provide that the commission will reimburse other state or federal agencies charged with the administration of unemployment compensation laws with such reasonable portion of benefits, paid under the law of any other state or of the federal government upon the basis of employment and wages, as the commission finds will be fair and reasonable as to all affected interests. Reimbursements payable under this subsection are considered benefits for the purpose of limiting duration of benefits and for the purposes of sections 20(a) and 26, and the payments shall be charged to the contributing employer's experience account for the purposes of sections 17, 18, 19, and 20, or the reimbursing employer's account under section 13c, 13g, 13i, or 13l, as applicable. Benefits paid under a combined wage plan shall be allocated and charged to each employer involved in the quarter in which the paying state requires reimbursement. Benefits charged to this state shall be allocated to each employer of this state who has employed the claimant during the base period of the paying state in the same ratio that the wages earned by the claimant during the base period of the paying state in the employ of the employer bears to the total amount of wages earned by the claimant in the base period of the paying state in the employ of all employers of the state. The commission is authorized to make to other state or federal agencies and receive from other state or federal agencies reimbursements from or to the fund, in accordance with arrangements made pursuant to this section

enacted in the interest of public welfare to provide for assistance to the unemployed and, such is entitled to a liberal interpretation." *Godsel v UCC*, 302 Mich 652 (1942). *See also, Copper Range Co v UCC*, 320 Mich 460 (1948).

"[I]n Michigan we follow the rule of statutory construction that requires a 'liberal' construction to afford coverage and a 'strict' construction to effect disqualification." *Great Lakes Steel Corporation v MESC*, 6 Mich Appeal 656 (1967), Affirmed, 381 Mich 249. *See also, Salentous v MESC*, 33 Mich App 228 (1971).

In *Fifth District Republican Committee v MESC*, 19 Mich App 449, 452 (1960) the Michigan Court of Appeals explained that a "liberal interpretation requires that we view with caution any construction of the Act which would narrow its coverage and deprive persons entitled thereto of the benefits of the Act." The Michigan Court of Appeals has stated that the "disqualification provisions [of the MES Act] should be narrowly construed. *Chrysler Corp v Devine*, 92 Mich App 555, 558 (1979).

On the other hand, State agencies are given deference in the interpretation of the statutes the agencies execute: "We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution." *U.S. v. Cerecedo Hermanos y Compania*, 209 U.S. 337, 339, 28 S.Ct. 532, 533(U.S.1908). The State's interpretation of a statute may be driven by public policy concerns.

In 1968, the concern expressed in *Merren*, was to "give some protection to the separating employer from whom the claimant left his work voluntarily so that the separating employer would not have to assume the entire burden of having charged to its rating account the entire amount of benefits so paid to the individual. . . .[T]he new employer must be a subject employer under the [MES] act; otherwise it would be impossible for the claimant to earn credit weeks in the course of employment with the new employer. To hold that the new employer need not be a subject liable employer under the [MES] act would create an anomaly and it would be impossible to fulfill the intent of the legislature." *Merren, supra.*

However, the concerns articulated in *Merren* have been mooted by the amendments to FUTA (26 U.S.C. §3301 *et seq.*) resulting from P.L. 91-373, which were effective January 1, 1972, and the resulting Federal Regulations governing Interstate Arrangements for Combining Employment and Wages (20 CFR 616.1 *et seq.*). Therefore, we find no public policy reasons remain for continuing to follow the holding in *Merren*. The State may now "collect" funds from out-of-state employers through the Interstate Arrangement for Combining Employment and Wages, and Michigan employers no longer assume the entire burden. Moreover, in a combined wage claim, the law of the paying state applies. 20 CFR § 616.8(a).

Considering the 1972 amendments to the FUTA (26 USC §3301 *et seq.*) and the resulting Federal regulations (20 CFR 616.1 *et seq.*), which occurred in 1971-1972, after the holding in *Merren*, we find the provisions of Section 29(5) of the Act should apply when a claimant voluntarily leaves a Michigan job to accept work in another state or when a claimant voluntarily leaves an out-of-state job to accept work in Michigan, because the State is bound by FUTA "to assure the prompt and full payment of compensation in such situations." 26 USC §3304(9)(B).

The provisions of the Interstate Agreement from 1938 and Section 11 of the MES Act governed payment of benefits in these circumstances, even at the time of the holding in *Merren*. However, the statutory language at that time was permissive. The Federal statutes and regulations were amended under PL 91-373 and the provisions of the FUTA (26 USC §3301 *et seq.*) and the resulting Federal regulations (20 CFR 616.1 *et seq.*) now require all states to utilize the Interstate Arrangement for Combining Employment and Wages.

Further support that *Merren* has been mooted by the Legislature lies in Section 20 of the MES Act, which was amended effective October 1, 2000, and changed how Michigan charges an employer's account and experience account:

> **For benefit years established before October 1, 2000**...[i]f the individual earned credit weeks from more than 1 employer, a separate determination shall be made of the amount and duration of benefits based upon the total credit weeks and wages earned with each employer. Benefits paid in accordance with the determinations shall be charged against the experience account of a contributing employer or charged to the account of a reimbursing employer **beginning with the most recent employer first and thereafter as necessary against other base period employers in inverse order to that in which the claimant earned his or her last credit week with those employers.** If there is any disqualifying act or discharge under section 29(1) with an employer, benefits based upon credit weeks earned from that employer before the disqualifying act or discharge shall be charged only after the exhaustion of charges as provided above. Benefits based upon those credit weeks shall be charged first against the experience account of the contributing employer involved or to the account of the reimbursing employer involved in the most recent disqualifying act or discharge and thereafter as necessary in similar inverse order against other base period employers involved in disqualifying acts or discharges. The order of charges determined as of the beginning date of a benefit year shall remain fixed during the benefit year. (Emphasis added.)

The amendment changed the way such charges are calculated:

> **For benefit years established on or after October 1, 2000**, the claimant's full weekly benefit rate shall be charged to the account or experience account of the claimant's most recent separating employer for each of the first 2 weeks of benefits payable to the claimant in the benefit year in accordance with the monetary determination issued pursuant to section 32. However, if the total sum of wages paid by an employer totals $200.00 or less, those wages shall be used for purposes of benefit payment, but any benefit charges attributable to those wages shall be charged to the nonchargeable benefits account. **Thereafter, remaining weeks of benefits payable in the benefit year shall be paid in accordance with the monetary determination and shall be charged proportionally to all base period employers, with the charge to each base period employer being made on the basis of the ratio that total wages paid by the employer in the base period bears to total wages paid by all employers in the base period.** However, if the claimant did not perform services for the most recent separating employer or employing entity and

> receive earnings for performing the services of at least the amount a claimant must earn, in the manner prescribed in section 29(3), to requalify for benefits following a disqualification under section 29(1)(a), (b), (i), or (k) during the claimant's most recent period of employment with the employer or employing entity, then all weeks of benefits payable in the benefit year shall be charged **proportionally** to all base period employers, with the charge to each base period employer being made on the basis of the ratio that total wages paid by the employer in the base period bears to total wages paid by all employers in the base period. If the claimant performed services for the most recent separating employing entity and received earnings for performing the services of at least the amount a claimant must earn, in the manner prescribed in section 29(3), to requalify for benefits following a disqualification under section 29(1)(a), (b), (i), or (k) during the claimant's most recent period of employment for the employing entity but the separating employing entity was not a liable employer, the first 2 weeks of benefits payable to the claimant shall be charged **proportionally** to all base period employers, with the charge to each base period employer made on the basis of the ratio that total wages paid by the employer in the base period bears to total wages paid by all employers in the base period. The "separating employer" is the employer that caused the individual to be unemployed as defined in section 48. (Emphasis added.)

Prior to the amendment, the most recent employer paid 100 percent of the claimant's benefits attributable to the credit weeks associated with that employer; once that employer paid its share, the next most recent employer paid 100 percent of the claimant's benefits for its attributable credit weeks. After the amendment, each employer pays a prorated amount for each week of the claimant's benefits; therefore the separating employer does not assume the entire burden, as it did when the *Merren* decision was made. We find the statutory change to Section 20 of the MES Act further moots the concerns articulated in *Merren*.

Finally, we note that Section 43 of the MES Act, which provides for the types of services that are excluded from the term "employment," begins, "**[e]xcept as otherwise provided in section 42(6)**, the term "employment" does not include any of the following…." (Emphasis added.)

Section 42(6) provides, in relevant part:

> Notwithstanding section 43, **services performed for an employing unit, for which the employing unit is liable for federal tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund, shall be deemed to constitute employment for the purposes of this act**, but only to the extent that the services constitute employment with respect to which federal tax is payable. Notwithstanding any other provision of this act or any amendatory act, **services performed for an employing unit which are required to be covered under this act, as a condition for its certification by the United States secretary of labor, shall constitute employment for the purposes of this act**…. (Emphasis added.)

We interpret Sections 42(6) and 43 of the MES Act to mean that services performed for any

employing unit, which pays federal unemployment tax to any state, is considered employment within the MES Act.

In the instant matter, the claimant worked for Agra Industries, of Merrill, Wisconsin from March 24, 2008 until September 22, 2008. The claimant's home was in Gaastra, Michigan, which is 100 miles from Merrill, Wisconsin; therefore, the claimant lived in an apartment while working at Agra Industries. Maintaining two households became a financial burden, and the claimant began seeking employment closer to his home. He resigned from his job at Agra Industries to accept a position with Northwoods Manufacturing, in Kingsford, Michigan. The record shows he accepted the position with Northwoods Manufacturing before he resigned from Agra Industries, although he resigned from Agra Industries on September 22, 2008, and did not begin working for Northwoods until September 29, 2008. He worked for Northwoods Manufacturing for 39 days, and then he was laid off. After reviewing the entire record, we find the claimant voluntarily left employment with Agra Industries to accept permanent, fulltime employment with Northwoods Manufacturing, and he performed services for Northwoods Manufacturing. Therefore, Section 29(5) of the MES Act applies.

For the reasons stated above, the Referee's March 4, 2009 order denying application for rehearing is affirmed and the Referee's underlying February 12, 2009 decision, finding the claimant disqualified for benefits under the voluntary leaving provision of Section 29(1)(a) of the MES Act, is reversed.

The claimant is not disqualified for benefits under the voluntary leaving provision of Section 29(1)(a) of the MES Act.

Section 29(5) of the MES Act applies. Wages earned with Agra Industries, including wages previously transferred under this subsection to the last employer, for the purpose of computing and charging benefits, are wages earned from Northwoods Manufacturing, and benefits paid based upon those wages shall be charged to Northwoods Manufacturing.

This matter is referred to the Agency for action consistent with this decision.

Mark E. Kaufmann, Member

7/20/11

Amy L. Rosenberg, Chairperson

NEAL A. YOUNG, MEMBER, DISSENTING:

I agree with the Board majority's decision to affirm the Referee's March 4, 2009 order denying application for rehearing. However, I respectfully disagree with the Board majority regarding the substantive issue. I would affirm the Referee's February 12, 2009 decision, and find the claimant disqualified under the voluntary leaving provision, Section 29(1)(a) of the MES Act. My reasons are as follows.

After reviewing the entire record in this matter, I find the Referee's decision is in conformity with the facts as developed at the Referee hearing. I also find the Referee properly applied the law to the facts.

For the above reasons, I would affirm the Referee's decision and find the claimant disqualified for benefits under the voluntary leaving provision of Section 29(1)(a) of the MES Act. As the Board majority has chosen to do otherwise, I must dissent.

Neal A. Young, Member

MAILED FROM LANSING, MICHIGAN JUL 29 2011

This decision shall be final unless EITHER (1) the Board of Review RECEIVES a written request for rehearing on or before the deadline, OR (2) the appropriate circuit court RECEIVES an appeal on or before the deadline. The deadline is: AUG 29 2011

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME.