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CIRCUIT COURT ORDER/OPINION
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Appeal Docket No: 3012

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Reversed

22 Section of the Act

Date: 9/1, 2010

R. Douglas Daligga, Director
MES - Board of Review

STATE OF MICHIGAN

IN THE OAKLAND COUNTY CIRCUIT COURT

GLRS Leasing Services, LLC,

Appellant,

v

Case No. 2008 095740 AE
Hon. Edward Sosnick

State of Michigan,

Appellee.

_____/

Opinion and Order

This matter is before the Court on an appeal from a determination by Board of Review that GLRS Leasing Services LLC received a transfer of business under MCL 421.22 from LRS LLC. The Court heard oral argument and took the matter under advisement.

Decisions of the Employment Security Board of Review are reviewed on the certified record. MCR 7.104(B)(4). This Court may reverse a decision of the Board of Review only if the decision is contrary to law or not supported by the evidence on the record. MCL 421.38(1).

The issue presented to the Board of Review was whether there was a transfer of business from LRS Services, LLC, to GLRS Leasing Services, LLC, pursuant to MCL 421.22. The statute provides that if an employer transfers any of its assets of its business other than in the ordinary course of trade, such transfer shall be

deemed a transfer of business if the commission also determines (1) that the transferee is an employer and (2) that the transferee has acquired and used the transferor's trade name or good will, or that the transferee has resumed all or part of the business of the transferee. Subsection (b) provides that a transfer of less than 75% of the assets of the transferee will not be deemed a transfer of business unless the transferee and the transferor take other steps with the commission to have the transfer recognized as a transfer of business. Subsection (c) provides that a transfer outside the ordinary course of business to a transferee controlled by the same interests as the transferee is a transfer of business. The statute provides further that in the case of a transfer of business, the commission shall assign the transferor's rating account to the transferee.

At the hearing, Jeffery Gields testified that he was an examiner for the Unemployment Insurance agency. He audited LRS, LLC, because there had been a migration of employees from LRS to GLRS. He testified that LRS was a staffing leasing company and GLRS was in the same business. People from LRS told him that the transfer of employees was so that LRS could offer health care insurance to those employees. In the third month of the fourth quarter of 2004, LRS had 191 employees. In the next month they had only 10 employees. 110 of the 191 employees went to GLRS. He also testified that LRS had four owners. GLRS initially had two owners but later it had only one. There was no common

ownership between the two companies. Gields testified further that the owner of GLRS, Mr. Hamel, was at one time an employee of LRS. Diana Hashen was the controller for both companies. In 2004 LRS had an unemployment insurance tax rate of 2.4%. In 2005 its tax rate went up to 6.7%. The tax rate increase coupled with the drop in employees is what triggered the audit. At the time that GLRS was formed, LRS was its only client.

Joseph Mulligan also worked for the Unemployment Insurance Agency. He also testified that LRS was in the business of providing staffing to other companies. He confirmed Gields' testimony as to the numbers of employees transferred from GLRS to LRS. He testified that GLRS received the new employer rate of 2.7%. He testified that large numbers of employees came and went from LRS, but the total number at any one time was fairly stable. He testified that he believed that there was commonality of control between the two entities because Hamel worked for LRS and owned GLRS, and Hashen worked for both as the controller.

Hamel testified that he was the owner of GLRS. He was never an owner nor in management at LRS. He was a commissioned salesperson for LRS. In the course of his work for LRS, he ran into a lot of potential customers who also needed PEO services. The owners of LRS did not want to meet that business need. A PEO is different from what LRS does because it provides human resources

services. After talking to the owners of LRS, Hamel and another employee of LRS, LeAnn Farhood, decided to form a PEO called GLRS to pursue the business LRS didn't want. GLRS's first client was LRS.

LRS required LeAnn to do all of the GLRS business out of her home. They did not want her double dipping. Hamel did the sales work for GLRS and LeAnn did the books and paperwork. Later, LeAnn got sick, so Hamel bought her interest and hired an LRS employee, Diane Hashen, to do the paperwork. Again, she did the GLRS work out of her home.

Hamel never had a desk, computer or office at LRS when he worked exclusively for LRS. He worked out of his car on a laptop. Hamel had his GLRS related mail sent to LRS's address. Since forming GLRS, Hamel has continued to work as a commissioned salesperson for LRS. At the hearing in March of 2008, Hamel was still working as a salesperson for LRS and as the owner of GLRS. At the time that GLRS was formed, Hamel was the highest paid salesperson for LRS. Once both entities were operating, they had different clients. LRS still had the staffing business and GLRS had the PEO business.

Mark Sprader was a CPA for both companies. The owners of LRS told him that they wanted to transfer most of their employees to a PEO to reduce their Workers Compensation costs and to be able to provide health insurance to those employees. In 2005, a total of 675 different employees worked for LRS at one

time or another. 135 of them ultimately wound up working for GLRS. LRS had four or five salespeople.

The evidence in the record shows that LRS was indeed GLRS's first client. However, there is evidence that in February of 2005 GLRS contracted with Nloro Finishing, and it continued to contract with other employers who needed PEO services. The contracts reflect that GLRS was responsible for payroll, business taxes, premiums for employee benefits, insurance premiums, unemployment compensation charges, and pension and retirement plans.

It is undisputed that this case is governed by the former MCL 421.22 that predated the 2005 legislative amendments. The former statute provided essentially four ways that a transfer of business assets will be deemed a "transfer of business" subject to an assignment of the transferor's rating account. First, under (a)(1) and (2), if there is a transfer of assets other than in the ordinary course of trade, and the transferee is an employer subject to the act, and the transferee has acquired and used the transferor's trade name or goodwill, then the transfer is a transfer of business. There was no evidence in this case that the transferee, GLRS, acquired the transferor's trade name or good will. GLRS merely used a similar name. LRS continued to operate under its own name.

Also, under (a)(1) and (2), if there is a transfer of assets other than in the ordinary course of trade, and the transferee is an employer subject to the act, and

the transferee continues in all or part of the transferor's business, there is a transfer of business for purposes of the act. The evidence showed that GLRS was formed to provide PEO services. The owners of LRS were not interested in providing these services. The transfer of LRS employees to GLRS involved employees who needed PEO services. Because GLRS was providing PEO services and LRS was not, GLRS cannot be found to have continued in the business of LRS.

Section (b) provides that a transfer of less than 75% of the transferor's assets will not be deemed a transfer of business unless both the transferee and the transferor make an application to have the transfer treated as such. The appellee seems to argue that this provision implies that a transfer of more than 75% of the transferor's assets is automatically a transfer of business. The Court need not reach that issue of statutory interpretation because there was no evidence that LRS transferred more than 75% of its assets to GLRS.

The appellee proceeded on the assumptions that LRS's only assets were its staffing contracts with other businesses, and that the value of those contracts could be measured by numbers of employees without regard to how much LRS made on each contract. There was no evidence to support these assumptions. The evidence suggested that LRS had other assets including goodwill, office equipment, a lease or ownership interest in business premises, and trained salespeople and clerical staff. Assuming that the appellee's assumptions as to LRS's assets were true,

nonetheless, the appellee's witnesses testified that LRS had 191 employees before the transfer and 110 were transferred to GLRS. This is only 57% of LRS's employees. The CPA for both companies did not dispute that LRS had 191 employees shortly before the transfers began. He thought there were three separate transfers of employees over two months. By his count, 135 were transferred to GLRS. This is only 70% of LRS's employees. Thus, the evidence shows that LRS transferred less than 75% of its assets to GLRS, and there is no evidence that the two companies applied to have the transaction treated as a transfer of business.

Finally, subsection (c) of the act provides that if there is a transfer of assets other than in the ordinary course of trade, and the transferor and transferee are substantially owned or controlled in whole or in part by the same interests, the transfer is a transfer of business subject to the act. In this regard, the evidence showed that Hamel was the driving force behind the founding of GLRS. He thought that LRS should offer PEO services but the owners of LRS were not interested. He recruited an employee of LRS to go into the business with him and do the books and paperwork. When she got sick he bought her interest in the business and hired another LRS employee to work for him part-time. There was no evidence that Hamel or GLRS had any control over LRS. He was the top salesperson for LRS, but never held a managerial position. There was no evidence that LRS or its four owners had any control over GLRS. They required that the

LRS employee who was working with Hamel on GLRS do that work from her home.

The evidence certainly showed that GLRS enjoyed a beneficial relationship with LRS. Some of the business leads that Hamel developed while working for LRS needed PEO services. LRS did not provide PEO services and its owners were not interested in expanding into that area. By forming GLRS, Hamel was able to retain that PEO business for himself. However, the evidence did not show that GLRS acquired LRS's tradename or good will, nor that GLRS continued in the business of LRS, nor that GLRS acquired more than 75% of the assets of LRS, nor that the two companies were controlled by the same entities. These are the four statutory means by which a transfer of assets is deemed a transfer of business for purposes of assigning to the transferee the transferor's rating account. Accordingly, this Court finds that the determination of the Board of Review is contrary to law and not supported by the evidence on the record. The decision of the Board of Review shall be reversed.

The appellant also raises an issue regarding the statute of limitations as it relates to proceedings under MCL 421.22. The appellant has not demonstrated that this issue was raised below. Accordingly, it will not be considered on appeal.

The appellant also challenges the negligence penalty that was imposed. MCL 421.15(h) provides that if a deficiency in payment of the employer's

contribution to the fund is due to negligence or intentional disregard of the rules, 5% is added to the deficiency. Because this Court is reversing the appellee as to its determination that there was a transfer of business, there is no basis for assessing a deficiency.

WHEREFORE, IT IS HEREBY ORDERED that the decision of the Board of Review is reversed.

Dated: April 27, 2009

Hon. Edward Sosnick
Circuit Court Judge