COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

U.S. NATURAL RESOURCES, INC.,	:	
Appellant,	:	**CASE NO. 12CVF-01-48**
-vs-	:	**JUDGE COCROFT**
OHIO UNEMPLOYMENT COMPENSATION REVIEW COMMISSION, et al.,	:	
Appellees.		

DECISION AND ENTRY

COCROFT, JUDGE

This case is before this Court on an appeal of the December 1, 2011 Decision issued by the Unemployment Compensation Review Commission (Commission). On October 28, 2011, the Commission conducted a hearing on the successor in interest issues in dispute. On December 1, 2011, the Commission issued its decision, concluding that the appellant, U.S. Natural Resources, Inc., (USNR) was a successor in interest to Coe Manufacturing Co., Inc. (Coe) pursuant to R.C. 4141.24.

This Court must determine whether the events that transpired in 2009 constituted a foreclosure, or a transfer of a predecessor's unemployment compensation rating experience to a successor employer pursuant to R.C. §4141.24(F). After a review of the pleadings, briefings, and certified record, this Court **AFFIRMS** the Commission's December 1, 2011 Decision, concluding that the appellant acquired the assets of Coe, thus, constituting a transfer, which made the appellant a successor in interest pursuant to R.C. 4141.24.

I. ASSIGNMENTS OF ERROR

The appellant has asserted the following assignment of error and issues for review:

THE COMMISSION ERRED IN FINDING USNR QUALIFIED AS A SUCCESSOR IN INTEREST UNDER R.C. 4141.24.

Can a foreclosure upon a debt of another company qualify the foreclosing company as a successor in interest so as to subject them to liability?

Can the Commission maintain its finding of successor in interest liability when USNR has already been determined not to qualify for such liability in another matter?

II. STATEMENT OF THE FACTS

The appellant was selected for a review by the Ohio Department of Job and Family Services (ODJFS) when a workforce transfer was detected from Coe to USNR during the first quarter of 2009. The review was performed as part of the Office of Employment Compensation's compliance monitoring efforts. On October 29, 2009, ODJFS mailed a letter to appellant requesting additional information. The appellant did not respond to the request within the specified time period. A Preliminary Report outlining the issue was mailed to the appellant on December1, 2009. Again, the appellant did not respond or dispute the conclusion stated in the report. The report was completed by Amy Bomman-Webber, ODJFS Unemployment Contribution Examiner, and details the issues which were identified during her examination of available records.

The primary purpose and scope of review was to evaluate the transfer of employees from Coe to USNR, and to determine whether appellant complied with R.C. Chapter 4141. The examiner concluded that, effective as of July 1, 2008, the liability status of USNR should be amended to reflect a mandatory transfer of unemployment experience from Coe to USNR, and that the unemployment contribution rate should be recalculated for 2009 and 2010.

The Director affirmed the Determination of Employer's Liability and Contribution Rate Determination. Specifically, the Director's reconsidered decision found that USNR was a successor

in interest to Coe and was properly assigned a contribution rate of 8.8% for 2009, and 9.4% for 2010. On August 3, 2010, USNR filed a timely appeal. Hearing Officer Blaine Brown conducted a telephone hearing on October 28, 2011. ODJFS was represented by Attorney Bob Kennedy and presented Amy Bornman-Weber as its witness. USNR was represented by Attorney Audrey Bentz and presented no witnesses.

As background, Coe and the USNR were competitors in the same manufacturing business. When Coe began experiencing financial problems, the appellant became a holder of a number of Coe's notes/obligations. On June 4, 2008, the lenders entered into an agreement with CNM Acquisition, LLC, a subsidiary of USNR. In essence, the assets of Coe were part of the security for the loans, making the appellant a secured creditor. When Coe failed to meet its financial obligations, CNM Acquisition, LLC filed lawsuits in Lake County, Ohio Common Pleas Court. See Exhibits A and B.

Relevant to this lawsuit, two cases that were filed in Lake County, Ohio, and assigned to Judge Richard L. Collins, Jr. The disposition of the two cases are as follows: In *CNM Acquisition LLC v. The Coe Manufacturing Company,* Case No. 08-3942, the record demonstrates the case was dismissed by a December 16, 2008 Agreed Judgment Entry. The record shows that a money judgment was entered in favor of the plaintiff and against the defendant on all seven counts (notes). In *CNM Acquisition, LLC v. The Coe Manufacturing Company et al.,* Case No. 08-3941, the Agreed Judgment Entry reflects a money judgment " in favor of plaintiff and against defendants Doe Manufacturing Company, Coe Newnes/McGehee (2006) LLC and Coe Newnes/McGehee (USA) LLC, jointly and severally, in the amount of $17,061,402.14 plus interest at the default rate of 17.50% per annum, on the principal balance of $16,953,368.29 from November 1, 2008, which default interest rate is subject to change pursuant to the terms of the Loan Documents, as amended

or modified, plus attorney fees, costs including costs of this motion, and other amounts allowable pursuant to the terms of the Loan Documents."

As previously stated, the appellee became aware that Coe's employees were working for the appellant. Tr. at 9. When the appellant did not respond to ODJFS inquiries, the appellee began an investigation and discovered USNR press releases that identified the events of 2009, showing that the appellant acquired Coe. See Exhibits 9 and 10. The following is an excerpt from a June 30, 2008 USNR press release:

> USNR Acquires Coe Newnes/McGehee.
>
> Woodland, Washington- USNR is pleased to announce its acquisition of Coe Newnes/McGehee. The solid wood business unit will continue to operate out of Salmon Arm, British Columbia, as Newnes-McGehee, a division of USNR. The engineered wood products business units will continue to operate independantly out of Painesville, Ohio, as Coe Manufacturing Company.
>
> George Van Hoomissen, USNR's President and CEO, commented, "We see tremendous potential in both the Newnes-McGehee and Coe Manufacturing businesses. For many years, both companies have employed some of the industry's most qualified personnel and offered some of the best products on the market. Now those people and products will be backed by the financial stability of USNR...
>
> ***
>
> Mike Parkes, former Coe Newnes/McGehee Sales Manager for solid wood products and not part of the newly combined USNR and Newnes-McGehee sales team, remarked, "It is great to see these organizations that were so recently competitors, pull together so quickly. This is a very positive outcome.
>
> ***
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> These acquisitions firmly establish USNR as one of the largest suppliers of wood processing equipment in the world, offering state-of-the-art machinery, controls and optimization to both solid wood and engineered wood products sectors...
>
> See Exhibit 9.

The following is an excerpt from Exhibit 10:

> USNR Aquires Coe Newnes/McGehee
>
> Woodland, Washington, June 30, 2008- USNR is pleased to announce its recent acquisition of Coe Newnes/McGehee, including both its solid wood business unit (Newnes-McGehee) and its dry kiln and engineered wood product business unit (Coe Manufacturing).
>
> See Exhibit 10.

At the hearing on October 28, 2011, the appellant did not object to any of the exhibits offered. Instead, the appellant simply argued that the Lake County cases were "foreclosure" cases and that there had been no "voluntary" acquisition. However, no such statutory language requiring "voluntariness" is contained in R.C. 4141.24.

Following the October 28, 2011 hearing, the hearing officer rendered a decision that sets forth the following FINDINGS OF FACTS:

> Coe became insolvent around March of 2009 and its largest secured creditor, US Natural Resources, Inc. foreclosed on Coe's debt. Coe's debt was collateralized by its assets and this transaction resulted in Coe transferring all of its assets to US Natural Resources, Inc.
>
> The contribution rates of 8.8% for 2009 and 9.4% for 2010 are based upon the combined experience of the successor and predecessor employers.

The hearing officer relied on R.C. §4141.24(F) and O.A.C. §4141-17-04 in determining that Coe had transferred all of its trade and/or business to the appellant, making the appellant the successor of Coe. Key to the hearing officer's determination was an admission by Matthew Whipple, USNR's Corporate Controller, stating in the employer's initial appeal to the Determination of Employer's Liablility and Contribution Rate Determination, that "Coe's debt was collateralized by its assets and this transaction resulted in Coe transferring all of its assets to US Natural Resources, Inc." See Exhibit 3. Thereafter, the appellant filed a timely appeal.

III. STANDARD OF REVIEW

R.C. 4141.26(D) sets forth the standard of review that this Court must apply when considering appeals of decisions rendered by the Commission relevant to the issues now before this Court. R.C. 4141.26(D) provides, in relevant part:

> After an appeal has been filed in the court, the commission, by petition, may be made a party to such appeal. Such appeal shall be given precedence over other civil cases. The court may affirm the determination or order complained of in the appeal if it finds, **upon consideration of the entire record, that the determination or order is supported by reliable, probative, and substantial evidence and is in accordance with law**. In the absence of such a finding, it may reverse, vacate, or modify the determination or order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. An appeal may be taken from the decision of the court of common pleas of Franklin county. (Emphasis added)

IV. ANALYSIS:

The appellant argues that R.C. §4141.24(F) sets forth that a transfer must be a completely voluntary process and that the asset transfer in this case was as a result of a court ordered "foreclosure." The appellant asserted that the Lake County cases resulted in a foreclosure, and any transfer by Coe under those circumstances cannot be viewed as voluntary. The appellee submits that there is no language supporting the notion of "voluntariness," and that no such language or prerequisite appears in the statute.

Appellant also claims that the same transfer issue was litigated during a Bureau of Worker's Compensation (BWC) hearing. Presumably, in the BWC case, there was a determination that the appellant was not a successor. The appellant claims that this decision was authoritative and should have been followed by the appellee. The appellee asserts, and this Court agrees, that the BWC was applying different statutes and codes, and therefore, the BWC finding has no precedential value in this case.

There are three methods for becoming a successor in interest. Since two of the methods require both the predecessor employer and the acquiring employer to submit an application to the director, these methods do not apply in this case. Thus, USNR became a successor in interest by operation of law when it acquired the assets of Coe. See R.C. 4141.24(F). All of the parties agree that the first factor in R.C. §4141.24(F) applies to this case. R.C. 4141.24(F) provides as follows:

> (F) If an employer transfers all of its trade or business to another employer or person, the acquiring employer or person shall be the successor in interest to the transferring employer and shall assume the resources and liabilities of such transferring employer's account, and continue the payment of all contributions, or payments in lieu of contributions, due under this chapter.
>
> If an employer or person acquires substantially all, or a clearly segregable and identifiable portion of an employer's trade or business, then upon the director's approval of a properly completed application for successorship, the employer or person acquiring the trade or business, or portion thereof, shall be the successor in interest. The director by rule may prescribe for effecting transfers of experience as provided for in this section.

Additionally, O.A.C. 4141-17-04 sets forth the circumstances by which one employer automatically becomes a successor in interest by operation of law. O.A.C. 4141-17-04 states:

> (A) The transferee shall become a successor in interest by operation of law where:
>
> (1) There is a transfer of all the transferor's trade or business located in the state of Ohio; and
> (2) At the time of the transfer the transferor is liable under Chapter 4141 of the Revised Code.
>
> (B) The transferee, as successor in interest, shall assume all of the resources and liabilities of the transferor's account. The director shall revise the contribution rates of the transferee to reflect the result of the successorship.
>
> (C) The director shall not approve a transfer of experience or contribution rates of the transferee or transferor for any contribution period with respect to which the director has determined contribution rates for the transferee or transferor pursuant to division (G) of section 4141.24 or section 4141.48 of the Revised Code.

The law clearly states that if an employer transfers all of its trade or business to

another employer or person, the acquiring employer or person shall be the successor in interest to the transferring employer. The total transfer of assets is the only requirement for the transfer. There is no statutory language which makes a distinction between "voluntaty" and "involuntary transfer." See *Kate Corp. v. Ohio State Unemployment Comp. Review Comm'n*, 2003 Ohio 5668.

All of the assets of Coe, which were acquired by the appellant, are located within the state in Painesville, Ohio. The appellant acquired not only the former employer's assets and ongoing business, but also employed most of Coe's employees. The "Coe" employees were reported to ODJFS on both accounts, Coe's and USNR's, in the first quarter of 2009. See Exhibits 6 and 7. After the first quarter of 2009, Coe stopped reporting employees. Thus, the evidence is clear that the appellant is, and has been, the employer of the former Coe employees since 2009.

In determining whether the events in 2009 established a foreclosure, as asserted by the appellant, or a transfer, as argued by the appellee, neither the appellant, nor the appellee, has cited any case law on point. See R.C. §4141.24(F). The appellant claims that this Court should follow the holding in *Jacobs v. Cornell*, 1956 Ohio App. LEXIS 918. However, *Jacobs* is not applicable to the facts herein. In *Jacobs*, Wells borrowed money from Jacobs and thereafter, purchased the assets of a gasoline station. He obtained a lease from the Standard Oil Company. Jacobs signed the lease to protect his loan but did not form a partnership with Wells. Eventually, Standard Oil cancelled Wells' lease and Jacobs obtained a separate, new lease from Standard Oil Company, taking over the business. Jacobs, under those facts, was not the successor in interest to the original lessee, Wells, and thus, did not assume the resources and liabilities of Wells.

In the case *sub judice*, Coe had pledged its assets to its creditors as collateral for several

notes prior to any lawsuits being filed. Thus, the facts are distinguishable. In *Jacobs,* the court concluded that there was no evidence that Jacobs was a direct successor to Wells since their relationship was that of debtor and creditor. In the facts before this court, Coe voluntarily agreed to allow its secured creditor, USNR, to acquire its assets and trade/business, and apply that acquisition to the debt that it owed.

In the current case there is no evidence of a court ordered foreclosure. The record demonstrates that a subsidiary of USNR, and not USNR, reached an agreement, wherein the Lake County litigation was terminated by an Agreed Judgment between the parties in that case, which the Lake County judge approved. Clearly, the Lake County judge did not review the issues or make any determination in that case, but merely approved the agreement reached by the parties. Pursuant to those court approved agreements of the parties in that case, subsequently, the appellant credited the value of Coe's assets, pledged by Coe to secure payment of the loans made to it by the appellant, against what Coe owed to USNR. Thus, the ownership of Coe's assets were transferred from Coe to the appellant.

The USNR press release exhibits produced by the appellee corroborate the appellee's position that USNR acquired the assets of Coe. Likewise, the statement of Matthew Whipple, the appellant's Corporate Controller, is evidence supporting an acquisition of Coe by USNR, and not a court ordered "foreclosure." Thus, the appellant is now denying it is a successor to Coe when at one point in time it trumpeted the acquisition of Coe through its press releases. Clearly, the *Jacobs* case can be distinguished and does not apply to the facts herein.

In its reply brief, the appellant attempted to distance itself from its own press release statements. The appellant relied upon the holding in *In re Nice Systems, Ltd. Securities Litigation,* 135 F.Supp. 552 (D.N.J. 2001). The appellant cited language from the *Nice* case, which stated that

a press release was insufficient to support a claim for investor fraud. The *Nice* case is a federal securities fraud case and thus, is not applicable to the facts before this Court. The appellant also relies on the holding in *All Star v. Personnel, Inc., v. Ohio Unemployment Rev. Comm'n*, 2006-Ohio-1302. A review of that case supports the appellee's position, since the *All Star* holding stands for the proposition that a transfer made during a time of financial distress is still a transfer under the statute. The Tenth District Court of Appeals in the *All Star* case concluded that "the commission's decision was supported by reliable, probative and substantial evidence demonstrating that the Sustar Agency transferred its entire business to All Star, thereby rendering All Star the successor-in-interest to the Sustar Agency, pursuant to R.C. 4141.24(F)."

The appellant's argument that the statutory language requires proof of "voluntariness" is not well-taken. Even if the interpretation of the statute required an element of voluntariness, the evidence overwhelmingly supports that appellant and Coe *voluntarily* entered into an agreement resulting in the appellant's acquisition of Coe's assets. Accordingly, since the acquisition of Coe's assets and trade/business by USNR was by agreement of the parties, the acquisition was voluntary.

Appellant argues in its reply brief that, as a creditor of Coe, it could not meet the definition of employer as found within R.C. §4141.01. The appellant further claims that the Lake County cases resulted in a "court ordered foreclosure." However, the record is clear that the document ending the litigation between CNM Acquisition LLC and Coe was an Agreed Judgment Entry which was merely approved by that court. It was not an independent review, determination and judgment entry of the Lake County Court that ended that litigation. The parties in that lawsuit agreed to resolve their differences on their own, and subsequently memorialized that agreement by submitting an Agreed Judgment Entry to that court. The Lake County cases are silent as to the issue of a transfer since the judgment entries only address an agreed amount for monetary damages.

The appellant claims that its position is correct because when a bank forecloses, the Commission does not claim that the bank is a successor. However, when a bank forecloses, the employees of the debtor do not become employees of the bank, which is what occurred in this case. Many of the employees of Coe became employees of USNR with little interruption in their employment. Accordingly, the appellant's argument that a "foreclosure" occurred is not well-taken.

This Court concludes that there is no statutory language in R.C. 4141.24(F) requiring a transfer to be "voluntary," and even if there were, there is reliable, probative and substantial evidence which supports that the acquisition of Coe by USNR was voluntary. The certified record established that Coe was acquired by the appellant by operation of law. See R.C. 4141.24. There is reliable, probative and substantial evidence that demonstrates that Coe was acquired by the appellant, and that the appellant is the successor to Coe. Upon review, the Commission's December 1, 2011 Decision is in accordance with the law.

V. DECISION:

The Commission's Decision of December 1, 2011 is hereby **AFFIRMED**.

THE COURT FINDS THAT THERE IS NO JUST REASON FOR DELAY. THIS IS A FINAL APPEALABLE ORDER. Pursuant to Civil Rule 58, the Clerk of Court shall serve notice of this judgment and its date of entry upon all parties.

It is so ordered.

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Franklin County Court of Common Pleas

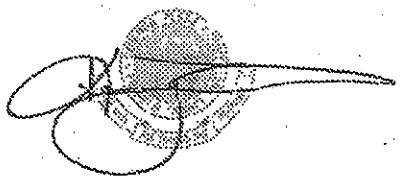
Date: 06-28-2012

Case Title: US NATURAL RESOURCES INC -VS- OHIO STATE UNEMPLOYMENT COMPENSATION REV ET AL

Case Number: 12CV000048

Type: DECISION/ENTRY

It Is So Ordered.



/s/ Judge Kimberly Cocroft