

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

CLEVELAND PLATING, LLC,	:	
	:	
Appellant,	:	CASE NO. 17 CV 91
	:	
vs.	:	JUDGE CAIN
	:	
OHIO DEPARTMENT OF JOB	:	
AND FAMILY SERVICES,	:	
	:	
Appellee.	:	

DECISION AND JUDGMENT ENTRY
REVERSING THE DECEMBER 7, 2016 DECISION OF THE OHIO
UNEMPLOYMENT COMPENSATION REVIEW COMMISSION

CAIN, JUDGE

This is an administrative appeal, pursuant to R.C. 4141.26(D)(2), of a December 7, 2016 decision of the Ohio Unemployment Compensation Review Commission (“Commission”). The December 7, 2016 decision found that Cleveland Plating, LLC (“Cleveland”) was a successor in interest to The Barker Products, Co., Inc. (“Barker”) under R.C. 4141.24(F). As a result, the decision found that ODJFS property assigned Fleet unemployment compensation contribution rates of 7.5% for 2015 and 8.7% for 2016.

For the reasons that follow, this Court **REVERSES** the December 7, 2016 decision of the Commission, and finds that the Decision is not supported by reliable, probative, and substantial evidence and is not in accordance with law.

I. PROCEDURAL BACKGROUND

On July 13, 2016, a Determination of Employer’s Liability and Contribution Rate was mailed by Appellee Ohio Department of Job & Family Services (“ODJFS”) to Appellant Cleveland. The Determination found Appellant to be a successor of interest

to Barker and assigned contribution rates based on the unemployment experience of Barker. Appellant filed a request for reconsideration of ODJFS' determination. On August 8, 2016, the Director of ODJFS affirmed the determination that Cleveland was a successor in interest to Barker pursuant to 4141.24(F). On September 3, 2016, Appellant appealed the Director's Reconsideration Decision to the Commission.

On December 1, 2016, the Commission held a hearing by telephone on Appellant's appeal. Counsel for both Appellant and Appellee appeared. Neither Cleveland nor ODJFS presented any witnesses and the parties stipulated to the relevant facts. Appellee presented ODJFS Exhibits A through J which were admitted without objection. Appellant presented Employer Exhibits A through B which were admitted without objection. Counsel for both made closing arguments based on the exhibits. Based on the stipulations and exhibits, the Commission's decision set forth the following stipulated findings of fact:

1. Barker operated an electroplating company on East 134 Street in Cleveland, Ohio.
2. JP Morgan Chase Bank, N.A. was the secured creditor of Barker. On February 26, 2015, JP Morgan Chase Bank, N.A. advised all interested parties that they would be selling by private sale on or about March 10, 2015, all of the inventory, equipment, general intangibles and certain accounts receivable of Barker.
3. Following negotiation, Cleveland, a new entity, purchased personal property of Barker including inventory, equipment and certain accounts receivable, from JP Morgan Chase Bank, N.A. for \$85,000 on March 13, 2015.
4. Cleveland hired 10 of the 12 employees who worker for Barker.
5. The plant was closed and not operating for 10 to 14 days after the purchase of the assets by Cleveland. The plant was then reopened and Cleveland resumed operations at the East 134 Street facility.

In affirming the Director's Reconsidered Decision, ODJFS stated the following reasoning:

1. There is no dispute as to the facts in this case. The issue is whether the purchase of assets from a secured creditor constitutes a transfer of business from the debtor company to the purchaser. The Review Commission views the transfer as being akin to a purchase from a trustee or receiver. In those cases the purchaser is found to be a successor in interest to the company in trusteeship or receivership.
2. Cleveland cites the Supreme Court of Ohio's decision in *The State ex rel Valley Roofing, LLC v. Ohio Bureau of Workers Compensation*, 122 Ohio St 3d 275, which held in regards to Workers Compensation that the definition of "successor in interest" as a "transferee of the business in whole or in part" does not apply "if the business assets of the predecessor entity have been purchased from a bank and not directly from the employer." The case is distinguishable from the present case, because it rules on issues involving Workers Compensation law and not the Unemployment statute.
3. As Cleveland purchased all of the assets that were central to the business of Barker and continued to operate at the site where Barker conducted its business operations, Cleveland shall be held to be a successor in interest to Barker.

II. STANDARD AND REVIEW

The standard of review for appeals from the Unemployment Compensation Review Commission is found in R.C. 4141.26(D)(2), which states that a common pleas court may affirm the Review Commission's decision where, upon consideration of the entire record, it is "supported by reliable, probative, and substantial evidence and is in accordance with law." *Resource Title Agency, Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 14AP-39, 2014-Ohio-3427, ¶8. That quality of proof was articulated by the Ohio Supreme Court in *Our Place v. Liquor Control Comm.* (1992), 63 Ohio St. 3d 570 as follows:

- (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the

evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value. *Id.* at 571.

This appeal also deals with the interpretation of a code and/or statute. Please note the following relevant case law:

Moreover, in *Lorain City Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 533 N.E.2d 264, we held that courts must accord due deference to the State Employment Relations Board's interpretation of R.C. Chapter 4117, since the General Assembly designated it to be the proper forum to resolve public employment labor disputes. Similarly, we hold in the cause sub judice that courts must accord due deference to the State Board of Psychology in its interpretation of R.C. Chapter 4732 and the relevant provisions of the Ohio Administrative Code, given that the General Assembly has deemed it to be the proper forum to determine licensure matters concerning psychologists. *Leon v. Ohio Bd. of Psychology*, 63 Ohio St.3d 683, 687, 590 N.E.2d 1223 (Ohio 1992)

Said line of authority was followed in *Salem v. Koncelik*, 2005-Ohio-5537, 164 Ohio App.3d 597, 843 N.E.2d 799 (Ohio App. 10 Dist. 2005). Please note the following language from *Salem*:

We are cognizant that courts must give due deference to an administrative agency's interpretation of its own administrative rules. See *Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St.3d 147, 545 N.E.2d 1260. The General Assembly created these administrative bodies to facilitate certain areas of the law by placing the administration of those areas before boards or commissions composed of individuals who possess special expertise. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 614 N.E.2d 748, paragraph one of the syllabus. Thus, the Ohio Supreme Court has held that unless the construction is **unreasonable or repugnant** to that statute or rule, this court should follow the construction given to it by the agency. *Leon v. Ohio Bd. of Psychology* (1992), 63 Ohio St.3d 683, 590 N.E.2d 1223. (emphasis added)

"Administrative agencies have discretion to promulgate and interpret their own rules, and a reviewing court should give due deference to statutory interpretations by an administrative agency that has substantial experience and been delegated enforcement

responsibility.” *Id.* See *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 17-18 (2000), citing *Collinsworth v. W. Elec. Co.*, 63 Ohio St.3d 268, 272 (1992).

III. FINDINGS AND CONCLUSIONS

The allocation of unemployment compensation tax liabilities to the purchaser of a business is governed by R.C. 4141.24. At issue in this case is R.C. 4141.24(F). Generally, R.C. 4141.24(F) provides two methods by which an employer may qualify as a successor in interest: (1) by operation of law or (2) through voluntary application. This appeal concerns whether Fleet acquired successor-in-interest status by operation of law. R.C. §4141.24(F) reads in part:

(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 procedures for effecting transfers of experience as provided for in this section.

This case does not involve a voluntary application, therefore only the first paragraph of R.C. 4141.24(F) applies. “Pursuant to [the] first method, successor-in-interest status arises automatically upon the transfer of the entire business of the predecessor.” *Resource Title*, 2014-Ohio-3427 at ¶10, quoting *All Star Personnel, Inc. v. Unemp. Comp. Rev. Comm.*, 10th Dist. No. 05AP-522, 2006-Ohio-1302, ¶ 16, (citing *Makkas v. Unemp. Comp. Bd. of Rev.*, 18 Ohio St.3d 349, 350 (1985)).

Under the Ohio Administrative Code, a transferee is a successor in interest by operation of law where: "(1) [t]here is a transfer of all of the transferor's trade or business located in the state of Ohio; and (2) [a]t the time of the transfer the transferor is liable under Chapter 4141 of the Revised Code." Ohio Adm.Code 4141-17-04(A)(1) and (2). The Ohio Administrative Code also states that for the purposes of R.C. 4141.24, an employer's "trade or business" includes all real, personal and intangible property *integral* to the operation of the trade or business, and may include the employer's workforce as applicable." (Emphasis added.) Ohio Adm.Code 4141-17-01(A). A case-by-case determination must be made as to whether an employer transferred to another employer or person "all the property integral to the business." *Resource Title* at ¶18. Transfer of assets, rather than transfer of liabilities, is relevant to this determination. *Id.* at ¶15-16.

The record demonstrates, and this Court finds, that Appellant received all of Barker's assets that were integral to the operation of Barker's trade or business. Appellant purchased Barker's inventory, equipment and certain accounts receivable of Barker. Appellant then operated the same business from the same location within 10 to 14 days after the purchase with 10 of the 12 Barker employees.

Nevertheless, Appellant argues that it is not a successor in interest to Barker under R.C. 4141.24(F) and OAC 4141-17-04 because Appellant purchased Barker's assets from a bank via a creditor sale and not voluntarily from Barker. Appellant further argues that since the purchase was from a secured creditor bank, the provisions of OAC 4141-07-04(A) do not apply because at the time of the transfer, the bank, as the transferor, was not liable under Chapter 4141 of the Ohio Revised Code.

Specifically, Appellant argues that it should not be found to be a successor in interest pursuant to *State of Ohio, ex rel. Valley Roofing, LLC v. Ohio Bureau of Workers' Compensation*, 122 Ohio St.3d 275 (2009). In *Valley Roofing*, PNC Bank foreclosed on the assets of Tech Valley Contracting, Inc. ("Tech"). Valley Roofing Company, L.L.C. ("Valley") had purchased those assets from PNC and continued the business operation. When Valley applied for workers' compensation coverage, the Ohio Bureau of Workers' Compensation transferred Tech's experience rating to Valley finding that Valley was Tech's successor in interest. *State of Ohio, ex rel. Valley Roofing, LLC v. Ohio Bureau of Workers' Compensation*, 122 Ohio St.3d 275 (2009).

In holding that Valley was not a successor in interest, the Ohio Supreme Court stated:

We have defined "successor in interest," for workers' compensation purposes, as a "transferee of a business in whole or in part." *State ex rel. Lake Erie Constr. Co. v. Indus. Comm.* (1991), 62 Ohio St.3d 81, 83-84. This definition, however, does not apply if the business assets of the predecessor entity have been purchased from a bank and not directly from that employer. As we state in *Crosset*, "the specific language of *R.C. 4123.32(D)* [now *R.C. 4123.32(C)*] * * *, i.e., 'employer transfers his business in whole or in part or otherwise reorganizes the business,' is plain and unambiguous. The language of the statute clearly refers to a voluntary act of the employer and not the involuntary transfer of the employer's business through an intermediary bank." *Id.* at ¶15, citing *State ex rel. Crosset Co., Inc. v. Conrad*, 87 Ohio St.3d 467 (2000).

Appellee argues that the Tenth District Court of Appeals has specifically found that *Valley Roofing* is a worker's compensation case and does not control for purposes of determining whether a business is a successor in interest with regards to the unemployment compensation statutes. *AWL Transp., Inc. v. Ohio Dep't of Job & Family Servs.*, 10th Dist. No. 15AP-674, 2016-Ohio-2954. In *AWL Transp.*, the Commission found AWL Transport, Inc. ("AWL"), to be a successor in interest of Triple Lady's

Agency, Inc. ("Triple Lady") for purposes of determining liability and unemployment compensation rate under R.C. 4141. *Id.* In *AWL Transp.*, Triple Lady was operating at a loss and dissolved. AWL subsequently purchased assets from Triple Lady and a portion of Triple Lady's employees transferred to AWL.

AWL argued that R.C. 4141.24(F) required that the transfer of assets to be voluntary, and that the transfer in that case was "mandatory" because the USDA forced Triple Lady to sell its assets. *Id.* at ¶25. In support of this argument, AWL cited *Valley Roofing* and *State ex rel. K&D Group, Inc. v. Buehrer*, 135 Ohio St.3d (2013). In overruling AWL's assignment of error, the Court noted that "(a)s workers' compensation cases * * *, *K&D Group* and *Valley Roofing* are not controlling on our issue here." *Id.* at ¶27. However, the Court also stated that the extension of the rationale of *Valley Roofing* to AWL was not supported by the record because, "the transfer of assets appears to have been a voluntary approach to avoiding bankruptcy and layoffs and dissolving a business in financial hardship. Therefore we disagree that appellant 'effectively * * * purchased the assets through an intermediary bank,' as occurred in *K&D Group*, and do not find further support that there was no 'transfer of business or trade,' as contemplated by R.C. 4141.24(F)." *Id.*

Although *Valley Roofing* is not controlling, the statutory language in the Workers' Compensation Statute, R.C. 4123.32, and R.C. 4141.24(F) are practically identical. R.C. 4141.24(F) states that "(i)f an employer transfers all of its trade or business to another employer or person . . ." Correspondingly, the Workers' Compensation Statute provides that "if any employer transfers a business in whole or in part . . ." This Court finds that, like the Court in *Valley Roofing*, the specific language in R.C. 4141.24(F) is

plain and ambiguous and, therefore, refers to a voluntary act of the employer and not the involuntary transfer of the employer's business through an intermediary bank. Furthermore, unlike *AWL Transp.*, nothing in the record in this case demonstrates any voluntary action or approach by Barker in the transfer of its assets. This Court finds that the extension of the rationale of *Valley Roofing* to Cleveland is supported by the record in the present case.

DECISION

After a review of the entire record and based on the above evidence, the Court finds that the December 7, 2016 Decision by the State of Ohio Unemployment Compensation Review Commission was not supported by reliable, probative and substantial evidence and is not in accordance with law. The evidence does not support the finding of the State of Ohio Unemployment Compensation Review Commission that Appellant Cleveland Plating, LLC is a successor in interest to The Barker Products, Co., Inc. pursuant to R.C. 4141.24(F). Appellant Cleveland Plating, LLC's assignments of error are **AFFIRMED**.

For the reasons set forth above, the Court renders judgment in favor of Appellant, and the December 7, 2016 Decision of the State of Ohio Unemployment Compensation Review Commission is hereby **REVERSED**.

Judgment in favor of Appellant with costs to be paid by Appellee. Pursuant to Civil Rule 58, the Clerk of Court shall serve upon all parties notice of this judgment and its date of entry.

IT IS SO ORDERED.

THIS IS A FINAL APPEALABLE ORDER

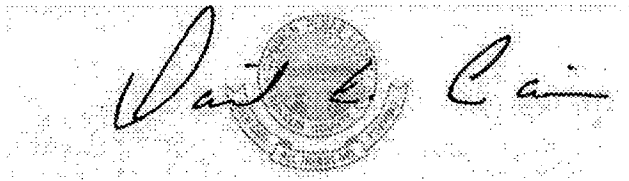
JUDGE DAVID CAIN

Electronic copies to all counsel of record

Franklin County Court of Common Pleas

Date: 10-17-2017
Case Title: CLEVELAND PLATING LLC -VS- OHIO DEPARTMENT JOB & FAMILY SERVICES
Case Number: 17CV000091
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in cursive script, reading "David E. Cain", is written over a circular official seal. The seal is partially obscured by the signature and has a textured, dotted appearance.

/s/ Judge David E. Cain

Court Disposition

Case Number: 17CV000091

Case Style: CLEVELAND PLATING LLC -VS- OHIO DEPARTMENT
JOB & FAMILY SERVICES

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes