COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

SENCO BRANDS, INC.,

Appellant, **CASE NO. 15CVF-03-2641**

-vs- **JUDGE YOUNG**

OHIO STATE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION, et al,

Appellees.

DECISION AND ENTRY
AFFIRMING THE DECISION OF MARCH 4, 2015

YOUNG, JUDGE

The above-styled case is before this Court on an appeal of the Decision issued by the Unemployment Compensation Review Commission (hereinafter referred to as Commission) that held that the Appellant Senco Brands was a successor-in-interest to Senco Products, Inc. The Commission's Decision was mailed on March 4, 2015. In this appeal, the Appellant named the Ohio Department of Job and Family Services (hereinafter referred to as the Appellee) and the Commission.

Appellant filed its Brief on June 4, 2015 and its Reply on July 17, 2015. The Appellee filed its Brief on July 10, 2015. The Commission has not made an appearance in this case.

After a review of the pleadings, briefings, and certified record, this Court **AFFIRMS** the decision mailed on March 4, 2015.

I. STATEMENT OF THE CASE:

This appeal arises as a result of the Commission's Decision that held that the Appellant was the successor-in-interest to Senco Products, Inc. pursuant to R.C. §4141.24(G)

and therefore it was appropriate to transfer the prior experience ratings to the Appellant.

II. STATEMENT OF THE FACTS:

The Appellee determined that the Appellant was a successor-in-interest to a company known as Senco Products, Inc. for the purpose of setting the new Appellant's liability and experience rating concerning unemployment compensation. The determination was originally made on September 10, 2009.

That determination was made in 2009, when the Appellant prepared and filed a "Report to Determine Liability – Transfer of Business" form. The Appellant (or its agent) checked the box that stated that Appellant had acquired all of the prior companies business. Ever after September of 2009, the Appellant has been paying the higher rates based on the prior experience rating of Senco Products, Inc.

Complicating the issue was the fact that the prior company had filed for and received bankruptcy protection in May of 2009. The prior company was broken up and a new company; i.e., Appellant, was formed. Parts of the prior business were sold to various entities including a substantial part of the business located in Ohio to the Appellant. The sale of the prior assets was journalized by the Bankruptcy Court in a July 2009 Order. That court's Order stated that the Appellant was not to be a successor to the liabilities of the prior company.

Having finally recognized its alleged mistake, the Appellant tried to get its rate reduced. By a letter dated December 7, 2012, the Appellant sent a 'To Whom It May Concern' letter to the Appellee. In the letter Appellant tried to explain why it should not have been assessed the higher rates related to Senco Products, Inc. Appellant claimed that it was not a successor-in-interest even though it had earlier held itself out to be the successor.

The letter started with the following sentence: "We are requesting a review and

reversal of the 2009 mandatory transfer of experience from SENDCORP . . ." The last line in the first full paragraph of the letter stated: "This determination [2009] was incorrect for the following reasons:" The Appellant then attempted to explain the bankruptcy and its effect on the transfer of the business to the Appellant.

The Appellant's request to change the experience rating was initially accepted. But upon further review it was denied. At that time a hearing was conducted but it was determined by the Commission that the Appellant's request for review was untimely made. Appellant responded by asserting that R.C. §4141.26(H) controlled and that section of the code allowed the Commission to fix the mistake. The matter worked its way through the administrative level and the Appellant was required to file its first appeal to this Court.

The Appellant's first appeal – case no: 13CVF-07-7310 - was commenced on July 3, 2013. The same parties were named in that appeal as named in this appeal. This Court rendered a decision on October 11, 2013 that affirmed in part and remanded in part the Commission's Decision. Please note the following from the October 11, 2103 Decision and Entry in case number 13CVF-07-7310:

> This Court **AFFIRMS** the decision dated June 5, 2013 on the bases of R.C. §4141.26(D)(2) but [is] **REMANDING** the matter to the Commission for further review pursuant to R.C. §4141.24(F) & R.C. §4141.26(H). (Emphasis in the original)

The current Appellee appealed the decision.

On appeal the parties came to an agreement and they entered into a Consent Judgment and Agreed Final Order and Entry. That Final Order was filed on July 21, 2104. The Final Order contained the following:

> **ORDER**
> **ITS IS ORDERED, ADJUDGED, AND DECREED THAT**:
> A. The October 11, 2013, decision issued by the Franklin County Court of Common Pleas Court in Senco Brands Inc. v. Dir., Ohio Dept. of

Job & Family Servs., Case No. 13CV007310, is **VACATED**.

B. This matter is **REMANDED** to the Ohio Unemployment Compensation Review Commission for an evidentiary hearing under R.C. 4141.26(D) to determine whether the appellee, Senco Brands Inc., is a successor-in-interest to Senco Products Inc. on the date of transfer, July 2, 2009. Both the appellant, the Ohio Department of Job and Family Services, and Senco Brands will be permitted to offer witnesses and exhibits, including witnesses and exhibits not presented at this case's earlier administrative hearing, to support their respective positions.
C. After completion of the evidentiary hearing under E.C. 414126(D) to determine whether Senco Brands is a successor-in-interest to Senco Products Inc., the decision of the Ohio Unemployment Compensation Review Commission will be subject to full appeal rights to the Franklin County Court of Common Please under R.C 4141.26(D)(2).
D. The appeal pending in this Court filed by Director, Ohio Department of Job and Family Services, Dir., Ohio Dept. of Job & Family Servs. V. Senco Brands Inc., 10th Dist. No. 2013-AP-000934, is **DISMISSED**.
E. This Court will retain jurisdiction of this action for the purpose of enforcing this Consent Judgment and Order. (Emphasis in original)

Thereafter, the matter was returned to the agency for the required hearing.

On November 18, 2014 the hearing was conducted. The parties appeared and were represented by counsel. A great deal of testimony was taken. After ruling on all of the legal issues, and after weighing the evidence, The Hearing Officer determined that the Appellant was a successor-in-interest. Ultimately, the Commission agreed and applied R.C. §4141.24(G) to the facts of the transfer and confirmed the holding that the Appellant was a successor-in-interest.

The following reasoning was contained within the Decision issued on March 4, 2015:

> A review of the evidence establishes that such a transfer occurred. The evidence establishes that a significant number of the officers/day-to-day managers came from SENCORP and its affiliates. These affiliates included Senco Products. These Officers became day-to-day managers of Senco Brands. The president, treasure, and the majority of the vice presidents who were managing the day-to day operation of Senco Brands were from the

> predecessor. There is substantially common management of both companies. As that is the case, the experience from the predecessor would be transferred to the transferee.
>
> The Commission makes this finding even though the manner with which Senco Holdings/Senco Brands obtained the assets and eventually the employees was through the "363 sale," a sale pursuant to bankruptcy proceedings. This transfer of experience and successorship is permissible in this jurisdiction.

With that Decision the agency review ended.

Appellant timely appealed the Commission's Decision to this Court and the matter has now been fully briefed. This case is ready for review.

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 part, the following:

> 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.

This Court will follow that standard during its analysis of the case.

IV. ANALYSIS:

The Appellant has raised a number of arguments. The Court will address the arguments but not in the order pled. The Court will first address the prior bankruptcy Order and its effect. Next the Court will address Appellant's claim that the hearing exceeded the

agreed scope of the remand. Finally, the Court will address the evidence and the holding pursuant to R.C. §4141.26(D).

A) Appellant claims it is not a Successor-in-Interest pursuant to the authority of the July 2, 2009 United States Bankruptcy Court Order:

The Appellant has asserted that, in no uncertain terms, the Bankruptcy Court has preempted the Appellee's ruling. The Appellant pointed to language in the Bankruptcy Court's Order that it believed clearly and unequivocally stated that the sale of the business to the Appellant was free and clear of any obligations. Appellant asserted that one of those obligations was the prior experience rating. Furthermore the Bankruptcy Order clearly stated that the Appellant was not a successor-in-interest. The Appellant argued that said Order kept thee Appellee from assessing a rate based on the prior experience ratings of the bankrupt entity. (This Court has reviewed the Order and could not find a specific reference to the past or future use of experience rates.)

The Appellant claimed that the language from the Bankruptcy Order showed that neither Appellant nor Senco Products, Inc. intended for the Appellant to assume any claims, liabilities, or interests, of any kind formally associated with Senco Products, Inc. The Appellant argued that included the unemployment compensation experience rate. Appellant went on to support this argument by establishing that the May 7, 2009 Asset Purchase Agreement clearly excluded "any and all Taxes of any other Person that any Seller is liable for as a result of . . . . successor liability". (Asset Purchase Agreement, §2.4, p. 19)

Both sides in this appeal have asserted that the Bankruptcy law is clear. Appellant believes that the Bankruptcy Order controlled and eliminated the Appellee's ability to assess the prior experience rating. The Appellee claimed that *In Re Wolverine*, 930 F.2d 1132 (1991) – a case from the Sixth Circuit - was controlling. The Appellee asserted that

Wolverine stands for the proposition that the Bankruptcy Court's order did not contemplate experience rating. More importantly, *Wolverine* held that experience ratings were a type of interest **not** preempted by section 363(f) of the Bankruptcy code. Therefore, Appellee had the right to assess a higher rate based upon the past experience rating of the prior business.

Appellant advanced a number of cases that looked at the same or similar issues. The cases did lean in favor of Appellant's position that the bankruptcy code has now been viewed in a much more expansive way. Unfortunately, the cases Appellant relied upon were not from the same federal circuit as *Wolverine* and those cases did not overrule *Wolverine*. This Court will follow the opinion of *Wolverine* and hold that the Appellee did have the right to use the prior rate experience of the bankrupt entity in setting the rate for the new entity – subject to the authority granted to the Appellee by R.C. §4141.24.

B) UCRC Lacked Jurisdiction to Consider Successor-in-Interest under R.C. 4141.24(G)(1) due to the settlement reached between the parties:

The Appellant argued that the remand from the Tenth District limited the issue to a new hearing based on R.C. §4141.24(F). Hence, the Appellant asserted that a decision based on R.C. §4141.24(G)(1) was not contemplated by the Appellant nor allowed by the language of the agreement. Appellant's argument is either: 1) The settlement agreement was breached, or, 2) there was never a meeting of the minds because the Appellant thought the remand was limited to the one section of the code.

The Hearing Officer determined that the remand was not going to be limited to just R.C. §4141.24(F). The Hearing proceeded regarding successor-in-interest under either R.C. §4141.24(F) or (G). At best Appellant has established that it thought that the agreement was limited and that would be a unilateral mistake.

Needless to say, the Appellee asserted that there was no agreement to limit the

review on remand. Appellee's argument is supported by the language of the remand. Please note the following:

> B. This matter is **REMANDED** to the Ohio Unemployment Compensation Review Commission for an evidentiary hearing under R.C. 4141.26(D) **to determine whether the appellee, Senco Brands Inc., is a successor-in-interest to Senco Products Inc. on the date of transfer, July 2, 2009.** Both the appellant, the Ohio Department of Job and Family Services, and Senco Brands will be permitted to offer witnesses and exhibits, including witnesses and exhibits not presented at this case's earlier administrative hearing, to support their respective positions. (Emphasis added)

There is no language in the Consent Judgment limiting the review to R.C. §4141.24(F). The clear language remands the matter for a successor-in-interest review and R.C. §4141.24(G) is clearly part of that review.

The Consent Order indicated – and the parties agreed - the Tenth District would retain jurisdiction "for the purpose of enforcing this Consent Judgment and Order". Hence, if the Appellant truly felt that the agreement had been breached during the remand, the proper venue would appear to have been the Tenth District. But for now, this Court will proceed and hold that the language of the Consent Judgment did not restrict the review of the issue of successor-in-interest to only R.C. §4141.24(F) as claimed by the Appellant.

C) Merit of Appeal base on R.C. §4141.26(D) review:

The evidence is in dispute. Appellant feels that its evidence and its arguments concerning who controls the new business should have led to a holding that the Appellant was not a successor-in-interest under any section of the code. The Appellee asserted that evidence does exist in the record that established that the Appellant was a successor-in-interest pursuant to R.C. §4141.24(G)(1). Said statute reads as follows:

> (G) Notwithstanding sections 4141.09, 4141.23, 4141.24, 4141.241, 4141.242, 4141.25, 4141.26, and 4141.27 of the Revised Code, both of the following apply regarding assignment of rates and transfers of experience:
>
> (1) If an employer transfers its trade or business, or a portion

> thereof, to another employer and, at the time of the transfer, both employers are under substantially common ownership, management, or control, then the unemployment experience attributable to the transferred trade or business, or portion thereof, shall be transferred to the employer to whom the business is so transferred. The director shall recalculate the rates of both employers and those rates shall be effective immediately upon the date of the transfer of the trade or business.

It is not uncommon in a fact specific case that the Appellant would advance in its Brief the evidence that supported its belief that it was not a successor-in-interest as defined by the regulatory scheme. The Appellee responded in its brief by pointing to the evidence adduced at the agency level that supported the Commission's determination that the Appellant was a successor-in-interest under R.C. §4141.24(G)(1).

Appellant claimed that the evidence established a lack of 'common management' between the Appellant and Senco Products, Inc. Without that element, the Appellant argued that there could be no successor-in-interest finding. Appellant advanced the evidence that it claimed showed that management was vested in the new Board of Appellant and that new Board was quite different from the prior business. The Appellant claimed that all management authority rested with the Board.

To establish that it was not a successor-in-interest Appellant argued at the hearing that 8 employees, out of several hundred employees of Senco Products Inc., were not transferred to the Appellant. Appellant did not take over a material distribution center in Ohio that belonged to Senco Products Inc. A great deal of the prior contract work was not transferred to the Appellant. Other deposits owed to Senco Products Inc., were not transferred to the Appellant. Appellant also claimed that some stock equity rights did not transfer. Appellant continued to assert that the language of the asset purchase agreement and the Bankruptcy Order precluded the Commission from holding that it was a successor-

in-interest.

Furthermore, the Appellant also argued that there was a corporate structure that precluded the Commissions holding as it did. Appellant pointed out that the company that actually purchased the business of Senco Products Inc. was Wynnchurch Capital. The business was later transferred to Appellant.

Appellee responded to factual arguments of the Appellant by first reminding this Court that it was the Appellant that acknowledged it was a successor-in-interest in 2009. Appellant's change of heart - years later – could not overcome its prior admission. The Appellee produced documents signed during the transfer in 2009 that it claimed showed the commonality of the Directors and officers of the two companies. The Hearing Officer had the opportunity to review and gage the credibility of the witnesses and the effect of the documents.

During the hearing the Hearing Officer was in fact presented with conflicting evidence. In its Brief, the Appellant attacked the Appellee's evidence but never developed any fact that turned the Appellee's evidence into something that could trigger further review. This Court must defer to the agency's findings of fact unless they are " 'internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable.' " *Kimbro v. Ohio Dept. of Adm. Servs*., 10th Dist. No. 12AP-1053, 2013-Ohio-2519, ¶ 7, quoting *Ohio Historical Soc. v. State Emp. Relations Bd*., 66 Ohio St.3d 466, 471 (1993). This Court "must give due deference to the administrative determination of conflicting testimony, including the resolution of credibility conflicts." *ATS Inst. of Technology v. Ohio Bd. of Nursing*, 10th Dist. No. 12AP-385, 2012-Ohio-6030, ¶ 29, *citing Crumpler v. State Bd. of Edn*., 71 Ohio App.3d 526, 528 (10th Dist.1991).

Having reviewed the certified record, this Court holds that the Decision is supported by reliable, probative, and substantial evidence, and is in accordance with the law.

D) Appellant's Subpoena:

The Appellant asserted that it was an error for the Commission to have quashed its subpoena designed to establish some type of disparate treatment. Appellant asserted that had the subpoena been issued, the Certified Record would contain evidence as to how the other companies received refunds from the Appellee in similar cases. Appellant asserted the following at page 20 of its Brief: "Each of these companies had contributions refunded after ODJFS found its original a [sic] successor-in-interest determination was incorrect." The Appellant felt that the subpoena should have been responded to because of its interpretation of R.C. §4141.21.

The Appellee felt that it was appropriate to quash the subpoena and that Appellant's interpretation of the statute is/was 'hyper-literal'. The statute in question reads as follows:

> § 4141.21. Information maintained by or furnished director not open to public - publication in statistical form
>
> Except as provided in section 4141.162 of the Revised Code, and subject to section 4141.43 of the Revised Code, the information maintained by the director of job and family services or furnished to the director by employers or employees pursuant to this chapter is for the exclusive use and information of the department of job and family services in the discharge of its duties and shall not be open to the public or be used in any court in any action or proceeding pending therein, or be admissible in evidence in any action, other than one arising under this chapter or section 5733.42 of the Revised Code. All of the information and records necessary or useful in the determination of any particular claim for benefits or necessary in verifying any charge to an employer's account under sections 4141.23 to 4141.26 of the Revised Code shall be available for examination and use by the employer and the employee involved or their authorized representatives in the hearing of such cases, and that information may be tabulated and published in statistical form for the use and information of the state departments and the public.

This Court finds that the Appellee's interpretation of the above noted statute is correct. The

Appellant was not entitled to discover confidential records concerning the other cases in a vague attempt to prove some type of disparate treatment.

Furthermore the Appellant only asserted in its Brief that the other companies got a refund. Knowing this to be a fact specific area of the law, the Appellant should have produced something more than just that bold assertion to prove the need for the information. The Court is left to speculate how those other decisions would have any relevance to the current inquiry.

There was no error in quashing the subpoena.

V. DECISION:

This Court **AFFIRMS** the decision dated March 4, 2015.

THIS IS A FINAL APPEALABLE ORDER

COPIES TO:

FRANK J REED JR
SUITE 2300
10 W BROAD ST
COLUMBUS, OH 43215
Counsel for the Appellant

Mike Dewine, Esq.
Ohio Attorney General
ERIC A BAUM
OHIO ATTY GENERAL'S OFFC
ONE GOVERNMENT CNTR #1340
TOLEDO, OH 43604
Attorney for Appellee
Ohio Department of Job
And Family Services

Ohio State Unemployment Compensation Review Commission
PO BOX 182299
COLUMBUS, OH 43218-2299
Appellee *pro se*

Franklin County Court of Common Pleas

Date: 07-24-2015

Case Title: SENCO BRANDS INC -VS- OHIO STATE DEPARTMENT JOB & FAMILY SERVI ET AL

Case Number: 15CV002641

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge David C. Young

Court Disposition

Case Number: 15CV002641

Case Style: SENCO BRANDS INC -VS- OHIO STATE DEPARTMENT JOB & FAMILY SERVI ET AL

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes