THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-115885-XA (June 30, 2011) – Glass replacement company, which bought only the remaining third of the predecessor's enterprise, may not be assigned the predecessor's experience rating under G.L. c. 151A, sec. 14(n), because it did not acquire all or substantially all of the predecessor's assets.

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), which found the employer to be a successor business under G.L. c. 151A, §§ 8(d) and 14(n). We review pursuant to our authority under G.L. c. 151A, § 12, and reverse.

On May 12, 2010, the DUA Employer Liability Unit determined that the employer was deemed to be a successor which inherited the contribution rate of a predecessor employer. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's determination and upheld the assignment of the predecessor's contribution rate to the employer, in a decision rendered on September 13, 2010. We accepted the employer's application for review.

The predecessor employer's contribution rate was assigned to the employer after the review examiner determined that the employer had acquired all or substantially all of the predecessor's assets and was, therefore, deemed to be a successor under G.L. c. 151A, § 14(n). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue on appeal is whether the employer bought all or substantially all of the predecessor's assets when it purchased what had been one third of the predecessor's prior business, the other two thirds of which had been sold to other purchasers a few months earlier.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. On September 21, 2009, [Employer], the instant employer and successor employer, a glass replacement company for motor vehicles and dwellings, purchased the following assets of [Predecessor Employer], also a glass replacement company and predecessor employer that had assigned to it the Department of Workforce Development (DWD) Employer Identification number [XX-XXXXX-X]: franchise right; customer list; goodwill; utility vehicles; equipment; and supplies.

2. On January 30, 2009, the predecessor employer [Predecessor Employer], sold approximately one-third (1/3) of its assets to a first glass replacement company that, by agreement, was to restrict its business operations to the western part of Massachusetts.

3. On June 10, 2009, the predecessor employer [Predecessor Employer], sold approximately one-third (1/3) of its assets to a second glass replacement company that, by agreement, was to restrict its business operations to the greater Worcester area of Massachusetts.

4. On September 21, 2009, [Employer] purchased all of the remaining assets of [Predecessor Employer], and by agreement, [Employer] was to restrict its business operations to the eastern and southeastern parts of Massachusetts, excluding Essex County.

5. All of [Predecessor Employer]'s four (4) employees working in the predecessor's eastern Massachusetts sites continued their employment with [Employer].

6. As of September 21, 2009, [Predecessor Employer] was still an employer having DWD Employer Identification number XX-XXXXX-X.

7. In an "Employer Status Report" to the DWD dated September 15, 2009, [Employer] stated that it was acquiring all of the assets of the predecessor business, [Predecessor Employer], on September 21, 2009.

8. Both the predecessor employer and the successor employer were incorporated separately, with no common ownership or common corporate officers.

9. On May 12, 2010, the Business Transfer Unit of the DWD issued a written notice to the instant employer ([Employer]), informing the

> employer that it was determined to be subject to the provisions of Section 14(n)(1) of MGL Chapter 151A, because [Employer] acquired a business, or the substantial assets of a business, that was a subject employer at the time of the acquisition. The notice also informed the employer that it was assigned the Employer Account Number [YY-YYYYY-Y], and that the experience rating or account balance of the predecessor organization ([Predecessor Employer]) had been transferred to the employer.

10. The successor employer ([Employer]) appealed the May 12, 2010, determination.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

The review examiner issued his decision pursuant to G.L. c. 151A, §§ 8(d) and 14(n). The relevant portion of G.L. c. 151A, § 8 provides as follows:

> Any employing unit, . . . shall be subject to the provisions of this chapter who or which, or whose agent: . . . (d) Has acquired the organization, trade, or business, or substantially all the assets thereof, of another employing unit which at the time of such acquisition was an employer; . . .

G.L. c. 151A, § 14(n) provides, in pertinent part, as follows:

> (1) If the entire organization, trade or business of an employer, or substantially all the assets thereof, are transferred to another employer . . . , the transferee shall be deemed a successor . . . .
>
> (2) The successor shall take over and continue the employer's account, including its plus or minus balance and all other aspects of its experience under this chapter. . . .

The review examiner concluded that since the employer acquired all of the remaining assets of the predecessor on the date of transfer, the employer was a successor under G.L. c. 151A, § 14(n)(1). However, this ignores the fact that two other business entities had just acquired large shares of the predecessor's business as well.

The Supreme Judicial Court has held that where a single predecessor transfers its assets to more than one successor, but no one of the transferees has acquired substantially all of the predecessor's assets, the predecessor's experience rating may not be transferred to any of them under G.L. c. 151A, § 14(n). Community Feed Stores, Inc. v. Dir. of the Division of

Employment Security, 391 Mass. 488, 493 (1984) (two corporations which acquired the assets of a partnership could not acquire the experience rating of the predecessor under § 14(n)(1), because the predecessor partnership was a single entity); *see* McNear v. Dir. of the Division of Employment Security, 327 Mass. 717 (1951) (before enactment of present G.L. c. 151A, § 14(n), declined to allow an individual proprietorship to transfer its experience rating to two corporations, neither of which took over all or substantially all of the predecessor's enterprise).

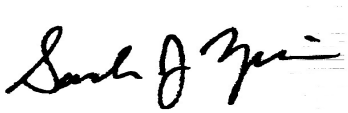
In this case, the employer bought only the remaining third of the predecessor's original enterprise. Therefore, the employer did not acquire all or substantially all of the predecessor's assets and it may not be assigned the predecessor's experience rating. By ignoring the entire dissolution of the predecessor, the DUA ignores established Supreme Judicial Court precedent, which survives under the current version of G.L. c. 151A, § 14(n). Moreover, the Court's rule acknowledges the reality of today's business transfers to more than one entity, which often involve separate transactions on separate dates.

We, therefore, conclude as a matter of law that the employer did not acquire all or substantially all of the predecessor's assets within the meaning of G.L. c. 151A, § 14(n), when it purchased what had been only one-third of the predecessor's prior business.

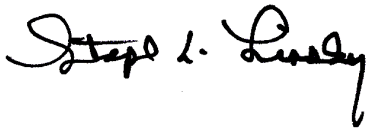
The review examiner's decision is reversed. The employer shall not be assigned the contribution rate of the predecessor employing unit.

BOSTON, MASSACHUSETTS
DATE OF MAILING – June 30, 2011

John A. King, Esq.
Chairman



Sandor J. Zapolin
Member



Stephen M. Linsky, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 12, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT- August 1, 2011

AB/es