

STATE OF MICHIGAN
COURT OF APPEALS

ASHLEY G. CAMPBELL,

Claimant-Appellee,

v

BUDDY’S RENDEZVOUS PIZZERIA,

Respondent-Appellee,

and

DEPARTMENT OF LABOR AND ECONOMIC
OPPORTUNITY/UNEMPLOYMENT
INSURANCE AGENCY,

Appellant.

UNPUBLISHED

October 21, 2021

No. 349967

Wayne Circuit Court

LC No. 19-001754-AE

Before: STEPHENS, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

The Department of Labor and Economic Opportunity/Unemployment Insurance Agency (the Agency) appeals by leave granted¹ the circuit court’s order affirming the Michigan Compensation Appellate Commission (MCAC). The circuit court held that the Agency’s redeterminations finding that claimant, Ashley G. Campbell, was partially ineligible for unemployment benefits and violated the Michigan Employment Security Act (MESA), MCL 421.1 *et seq.*, because she intentionally misrepresented her employment status and earnings to the Agency to receive unemployment benefits, were null and void because they were issued beyond the timeframes set forth under § 32a(1) or (2) of the MESA, MCL 421.32a(1) and (2). We affirm.

¹ *Ashley G Campbell v Buddy’s Rendezvous Pizzeria*, unpublished order of the Court of Appeals, entered November 25, 2019 (Docket No. 349967).

I. FACTUAL BACKGROUND

Between October 1, 2011 and June 30, 2012, Campbell received unemployment benefits and certified each week to the Agency that she was unemployed and had no income. However, between October 1, 2011 and June 30, 2012, Campbell was gainfully employed at Buddy's Rendezvous Pizzeria (Buddy's). Buddy's never protested Campbell's receipt of unemployment benefits. In October 2015, the Agency inquired about Campbell's receipt of unemployment benefits while working at Buddy's. On October 6, 2015, the Agency issued and mailed to Campbell four notices entitled "Notice of Redetermination." Two of the notices (eligibility redeterminations) involved the Agency's findings that Campbell was partially ineligible to receive benefits while being gainfully employed at Buddy's. The other two notices (fraud redeterminations) involved the Agency's findings that Campbell intentionally misrepresented her employment status and earnings to the Agency and used fraud to improperly receive unemployment benefits. The Agency also provided Campbell two more documents entitled "Restitution (List of Overpayments)." The documents informed Campbell of her right to appeal the Agency's redeterminations.

Campbell appealed the Agency's redeterminations to an Administrative Law Judge (ALJ). The ALJ concluded that the Agency's redeterminations were null and void because the Agency did not have the authority to reconsider Campbell's eligibility for benefits three years after the benefits were issued to Campbell. The ALJ determined that the Agency did not have the authority to issue the redeterminations under §32(f) of the MESA, MCL 421.32f, because §32(f) was only properly triggered by an employer protest and Buddy's did not protest Campbell's receipt of unemployment benefits. The ALJ also concluded that the Agency did not have the authority to issue the redeterminations under §32a(1) or (2) because it did not issue the redeterminations within 30 days as permitted by § 32a(1) or within one year of the determination upon a showing of good cause as permitted by § 32a(2). The ALJ further concluded that, while Campbell fraudulently received benefits, the Agency did not have authority to recoup those benefits under §62(a) because the Agency failed to meet the procedural requirements and timeframe set forth under § 32(f) or § 32a(1) or (2).

The Agency appealed to the MCAC and the MCAC affirmed the decisions of the ALJ. The Agency appealed to the circuit court and the circuit court affirmed the decisions of the MCAC and ALJ. The circuit court concluded that the Agency's redeterminations were void because they were issued without an employer protest as permitted by §32(f), beyond of the 30-day timeframe set forth under §32a(1), and beyond the one-year with good cause timeframe set forth under § 32a(2). The circuit court concluded that the Agency's authority to recoup improperly paid benefits under § 62(a) did not eliminate the procedural requirements and timeframes set forth under § 32(f) or § 32a(1) and (2). This appeal followed.

II. STANDARD OF REVIEW

The MESA expressly provides for judicial review of unemployment benefit claims by this Court. MCL 421.38(4). This Court reviews a circuit court's review of a decision by the MCAC to determine whether the circuit court "applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clear error standard of review." *Lawrence v Mich Unemployment Ins Agency*, 320

Mich App 422, 431; 906 NW2d 482 (2017) (quotation marks and citations omitted). Substantial evidence means evidence that “a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence.” *Id.* This Court reviews the circuit court’s legal conclusions and statutory interpretations de novo. *Braska v Challenge Mfg Co*, 307 Mich App 340, 352; 861 NW2d 289 (2014). “A decision of the MCAC is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework.” *Lawrence*, 320 Mich App at 432 (quotation marks and citations omitted).

III. ANALYSIS

On appeal, the Agency argues that the circuit court erred by affirming the decisions of the MCAC because the Agency’s eligibility and fraud redeterminations were timely under § 62(a) and the Agency did not have to comply with the procedural requirements and timeframes set forth under § 32a when proceeding under § 62(a). The Agency also argues that § 32(f) is inapplicable to this case. We agree, but conclude that the circuit court reached the right result, albeit for the wrong reason.

The Supreme Court, in *Dep’t of Licensing & Regulatory Affairs/Unemployment Ins Agency v Lucente*, ___ Mich ___, ___ NW2d ___ (2021) (Docket Nos. 160843 and 160844),² recently addressed the Agency’s attempts to recover unemployment benefits improperly paid to two claimants, Frank Lucente and Michael Herzog, on the basis of their false certifications of continuing unemployment. *Id.* at ___; slip op at 2, 11. Lucente received overpayments totaling \$4,794 for the benefit weeks ending February 20, 2010 through June 19, 2010, and Herzog received overpayments totaling \$1,810 for the benefit weeks ending October 15, 2016 through November 12, 2016. *Id.* at ___; slip op at 12 n 8. After discovering the overpayments and suspecting fraud by both claimants, the Agency issued Notices of Redeterminations to Lucente and Herzog on November 30, 2010, and October 11, 2017, respectively. *Id.* The issues before the Court were the procedures the Agency was obligated to follow when it sought to establish that a claimant received benefits to which he or she was not entitled or that the claimant committed fraud for which the Agency could impose penalties. *Id.* at ___; slip op at 2.

The Court explained that when a claimant is paid benefits he or she was not entitled to receive, § 62(a) and (d) of the Michigan Employment Security Act (MESA), MCL 421.1 *et seq.*,³ directs the Agency to recover the overpayments. *Id.* at ___; slip op at 6. Additionally, the Agency is to impose fines and penalties in the event the claimant made a false statement or failed to disclose material information regarding his or her claim. *Id.* at ___; slip op at 8, citing MCL 421.54(b).

² Resolution of the instant appeal was previously held in abeyance pending the Supreme Court’s decision in *Lucente*. *Campbell v Buddy’s Rendezvous Pizzeria*, unpublished order of the Court of Appeals, entered December 11, 2020 (Docket No. 349967).

³ The MESA has been amended multiple times in the last several decades, and different versions of the statutory provisions applied to Lucente, Herzog, and Campbell. We have reviewed the specific statutory language applicable to Campbell and conclude that the amendments have no effect on the *Lucente* Court’s reasoning as applied to this case.

Also relevant to its disposition of the case was the protest (a requested review of an agency decision) process described in MCL 421.32a. *Lucente*, ___ Mich at ___; slip op at 9. To be timely, a protest must generally be made “within 30 days after the mailing or personal service of [the] notice of determination[.]” *Id.*, quoting MCL 421.32a(1) (quotation marks omitted; alternations in original). Section 32a(1) also permits review of an Agency determination on the Agency’s own initiative within the same 30-day period. *Lucente*, ___ Mich at ___; slip op at 9-10. Agency-initiated review of a prior determination can also occur outside the 30-day window as long as good cause is shown and the review is not initiated more than one year from “the date of mailing or personal service of the original determination on the disputed issue” *Id.* at ___; slip op at 10, quoting MCL 421.32a(2) (quotation marks omitted). Each of these reviews can result in a “redetermination” that either affirms, modifies, or reverses the initial determination or, alternatively, transfers the matter for an administrative hearing. *Lucente*, ___ Mich at ___; slip op at 10, citing MCL 421.32a(1) and MCL 421.32a(2). “A claimant or employer who disagrees with a redetermination can appeal to an [ALJ]” within 30 days. *Lucente*, ___ Mich at ___; slip op at 10, citing MCL 421.32a(1) and (3), MCL 421.33. “Appeals can be taken from the ALJ’s decision to the [MCAC],” now the Unemployment Insurance Appeals Commission, “and then from the MCAC to the circuit court.” *Lucente*, ___ Mich at ___; slip op at 10-11 & n 7, citing MCL 421.34 and MCL 421.38.

Returning to the statutory authorization for recovery of wrongfully obtained benefits, the Court explained:

MCL 421.62(a) has long permitted the Agency to recover already-paid benefits when the Agency “*determines* that a person has obtained benefits to which that person is not entitled” MCL 421.62(a), as amended by 1995 PA 125; MCL 421.62(a), as amended by 2016 PA 522. And § 62(b) provides that when the Agency “*determines* that a person has intentionally made a false statement or misrepresentation or has concealed material information to obtain benefits,” the person shall have their right to benefits canceled “in addition to any other applicable penalties,” e.g., the penalties for fraud described in MCL 421.54. MCL 421.62(a), as amended by 1995 PA 125; see also MCL 421.62(a), as amended by 2016 PA 522. Significantly, this language refers to the Agency making a “determination” that the claimant received an overpayment or engaged in fraud.

A “determination” under § 62 is distinguishable from a “redetermination” under § 32a. And the MESA plainly contemplates the issuance of the former before the latter. As § 62(c) states, “any determination made . . . under this section [62] is final unless an application for a redetermination is filed in accordance with section 32a.” (Emphasis added.)

In light of this language, and mindful of the different protest and appeal processes described in §§ 32a and 33, we believe the Agency must issue an original “determination” that either requires restitution for an overpayment or assesses penalties for fraud. To the extent these appellants’ arguments can be construed as requiring the Agency to first make a “redetermination” on these issues under § 32a, that interpretation is incompatible with the text of § 62.

Our conclusion is reinforced by the MESA's various time constraints for Agency action. During the periods here at issue, § 62(a) conditioned the Agency's ability to recover an overpayment on its issuing a "determination requiring restitution" within three years "after the date of receipt of the improperly paid benefits[.]" MCL 421.62(a), as amended by 1995 PA 125; see also MCL 421.62(a), as amended by 2016 PA 522. This is in conflict with the much shorter time limits for making a "redetermination" under § 32a. That is, if the Agency must first make a "redetermination" of the benefit payment before making a "determination" that the claimant received a benefit to which they were not entitled (i.e., a "determination requiring restitution"), then the three-year limit described in § 62(a) is effectively nullified by the much shorter time limits described in § 32a.

For these reasons, we agree with the Court of Appeals that § 62 authorizes the Agency to make original determinations imposing restitution for an overpayment or penalties for fraud. [*Lucente*, ___ Mich at ___; slip op at 17-18 (alterations in original).]

Relying on the notion that the issuance of a "benefit check shall be considered a determination by the unemployment agency that the claimant receiving the check was covered during the compensable period, and eligible and qualified for benefits," MCL 421.32(f), as amended by 2013 PA 144, the *Lucente* claimants argued that the Notices of Redetermination were properly viewed as untimely redeterminations of the determination made under MCL 421.32(f) upon issuance of each benefit check. *Lucente*, ___ Mich at ___; slip op at 19-20. The Court disagreed, reasoning that a decision finding the claimant committed fraud and was therefore subject to fines and penalties could not be a redetermination of the initial decision that the claimant satisfied eligibility criteria because the fraud finding required inquiry into the claimant's state of mind, while the eligibility inquiry did not. *Id.* at ___; slip op at 20. As it related to the decisions finding the claimants were ineligible for benefits, thereby triggering the Agency's right to restitution, the Court reasoned that the decisions could not be construed as a redetermination in the absence of an employer protest. *Id.* at ___; slip op at 23-26. Because the decision regarding the claimant's ineligibility was the product of an Agency-initiated redetermination, it could not have been a redetermination of a § 32(f) "benefit-check-as-determination." *Id.* at ___; slip op at 25-26.

Having determined that the Notices of Redetermination were actually initial determinations of fraud and ineligibility, the Court concluded that the Agency's failure to follow the statutory procedure requiring an initial determination was ground for "setting aside a determinationless 'redetermination.'" *Id.* at ___; slip op at 26-30. The Court emphasized that the MESA treated determinations and redeterminations as distinct decision-making steps, consistent with the ordinary meanings of those words, under which a determination must necessarily precede a redetermination. *Id.* at ___; slip op at 27. Accepting that proposition, the Agency urged the Court not to elevate form over substance when the Notices of Redeterminations were "for all intents and purposes . . . original written 'determination[s]' on the ineligibility and fraud issues[.]" *Id.* at ___; slip op at 28. The Court was unpersuaded:

The Agency's argument *might* be a good one if the question was whether these appellants received constitutionally adequate process. After all, "the right to a hearing before an unbiased and impartial decisionmaker is a basic requirement of

due process.” *Livonia v Dep’t of Social Servs*, 423 Mich 466, 508; 378 NW2d 402 (1985).

But that’s not the question we are answering. Just as we require claimants and chargeable employers to follow the procedural and substantive requirements of the MESA, so too must the Agency. See *In re Reliability Plans[of Electric Utilities for 2017-2021]*, 505 Mich 97, 118; 949 NW2d 73 (2020)]; see also *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582, 589; 50 NW2d 322 (1951) (explaining that an administrative agency cannot “enlarge its authority or exceed the powers given to it by the statute, the source of its power”) (quotation marks and citations omitted).

Here, the MESA provides that “the unemployment agency *shall review* any determination” whenever an interested party makes a timely protest. MCL 421.32a(1) (emphasis added). The determination-and-protest step is not a mere perfunctory step in perfecting the claimant’s right to appeal—the language plainly contemplates *some* degree of agency review in response to a protest, even if the Agency ultimately affirms the prior determination or transfers the case for an administrative hearing. Such review is foreclosed if the Agency can simply begin with a “redetermination.”

The essence of the Agency’s argument is that claimants don’t suffer discernable prejudice if the Agency begins at the “redetermination” step, so long as the claimant is adequately apprised of the issue and their right to appeal the decision. But if that is correct, the Agency could *always* begin at the “redetermination” step, without consequence. If an interested party appeals the redetermination and complains about the lack of an initial determination, the Agency could simply respond that the administrative hearing cures any error. And if a party aggrieved by the “redetermination” fails to take a timely appeal, then the Agency would presumably argue that its “redetermination” is final and a party who is informed of their right to appeal yet fails to exercise it cannot complain about the outcome. See MCL 421.32a(1) (“[T]he redetermination is final unless within 30 days after the mailing or personal service of a notice of the redetermination an appeal is filed with the unemployment agency for a hearing on the redetermination before an administrative law judge”); see also MCL 421.32a(3).

But when we interpret a statute, we try to avoid an interpretation that makes nugatory or surplusage any part of it. See, e.g., *Jespersion v Auto Club Ins Ass’n*, 499 Mich 29, 34; 878 NW2d 799 (2016) (“[W]hen determining [legislative] intent we must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.”) (quotation marks and citation omitted). The Agency’s “no harm, no foul” argument and the Court of Appeals’ endorsement of it are contrary to this basic principle.

We can’t ignore the statutory right to protest a “determination” simply because other sections of the MESA provide further (and arguably greater) process. Affirming the reasoning of the Court of Appeals would allow the Agency to begin

at the “redetermination” step without ever issuing a “determination” in every instance. And while a claimant’s right to protest the original determination and have the Agency review its decision might seem less important than the administrative hearing that follows, the wisdom of the statutory process is a question for the Legislature. [*Id.* at ____; slip op at 28-30 (all but first alteration in original).]

In sum, the *Lucente* Court reached three conclusions with relevance to this appeal. First, that § 62 of the MESA “authorizes the Agency to issue original fraud and restitution determinations that are not subject to the constraints of MCL 421.32a.” *Id.* at ____; slip op at 30. Second, that “the Agency must issue an original determination alleging fraud,” and that failure to make an original determination under § 62 requires invalidating a “redetermination” on that issue. *Id.* at ____; slip op at 31. And third, that Agency must likewise begin with an original determination under § 62 when an “Agency-initiated review of a past-paid benefit results in a decision that the claimant received benefits during a period of ineligibility or disqualification and owes restitution as a result[.]” *Id.*

The issue before the Court in this case is the timeliness of the Agency’s October 6, 2015 redeterminations finding that Campbell was ineligible to receive benefits because she earned income for the benefit weeks ending in October 1, 2011 through June 30, 2012, and that she knowingly failed to disclose material facts to obtain or increase her benefits for that period. *Lucente* confirms that § 62 “authorizes the Agency to make original *determinations* imposing restitution for an overpayment or penalties for fraud,” without being bound by the narrower time constraints in § 32a. *Lucente*, ____ Mich at ____; slip op at 18. Thus, the trial court erred by concluding that the time constraints in § 32a rendered the Agency’s decision untimely.

In pertinent part, the version of § 62 in effect at the time of the redeterminations in this case provided:

(a) If the unemployment agency determines that a person has obtained benefits to which that person is not entitled, or a subsequent determination by the agency or a decision of an appellate authority reverses a prior qualification for benefits, the agency may recover a sum equal to the amount received plus interest *The unemployment agency shall issue a determination on an issue within 3 years from the date the claimant first received benefits in the benefit year in which the issue arose, or in the case of an issue of intentional false statement, misrepresentation, or concealment of material information in violation of section 54(a) or (b) or sections 54a to 54c, within 6 years after the receipt of the improperly paid benefits unless the unemployment agency filed a civil action in a court within the 3-year or 6-year period; the individual made an intentional false statement, misrepresentation, or concealment of material information to obtain the benefits; or the unemployment agency issued a determination requiring restitution within the 3-year or 6-year period. . . .*

* * *

(b) For benefit years beginning on or after October 1, 2000, if the unemployment agency determines that a person has intentionally made a false statement or misrepresentation or has concealed material information to obtain benefits, whether or not the person obtains benefits by or because of the intentional false statement, misrepresentation, or concealment of material information, the person shall, in addition to any other applicable interest and penalties, have his or her rights to benefits for the benefit year in which the act occurred canceled as of the date the claimant made the false statement or misrepresentation or concealed material information, and wages used to establish that benefit year shall not be used to establish another benefit year. . . .

(c) Any determination made by the unemployment agency under this section is final unless an application for a redetermination is filed in accordance with section 32a.

(d) The unemployment agency shall take the action necessary to recover all benefits improperly obtained or paid under this act, and to enforce all interest and penalties under subsection (b). [MCL 421.62, as amended by 2013 PA 147 (emphasis added).]

Because this case involved intentional false statements, misrepresentations, or concealment of material information, the Agency had six years after Campbell received improperly paid benefits in which to issue a determination as to her overpayments and fraud. MCL 421.62(a), as amended by 2013 PA 147. The Agency's notices of redetermination were issued on October 6, 2015, well within six years of the 2011 and 2012 benefits.⁴

That said, the Supreme Court's opinion in *Lucente* demonstrates that the procedures employed by the Agency in this case were faulty, despite the timeliness of its actions. Section 62 speaks in terms of the Agency's ability to "determine[]" issues regarding overpayment and fraud, see MCL 421.62(a) and (b), as amended by 2013 PA 147, and clearly distinguishes between those determinations and a "redetermination" under § 32a. See MCL 421.62(c), as amended by 2013 PA 147 ("Any determination made by the unemployment agency under this section is final unless an application for a redetermination is filed in accordance with section 32a."). See also *Lucente*, ___ Mich at ___; slip op at 18 ("[Section] 62 authorizes the Agency to make original *determinations* imposing restitution for an overpayment or penalties for fraud."). Like in *Lucente*, the Agency issued "redeterminations" to notify Campbell of its decisions, rather than original "determinations." As the Supreme Court explained, this procedural misstep has significant

⁴ We note that *Lucente*, ___ Mich at ___; slip op at 32, spoke of a three-year limit under § 62, presumably because the version of the statute applicable to Herzog had eliminated the six-year time frame applicable to cases involving fraud. See MCL 421.62(a), as amended by 2016 PA 522. Earlier in its opinion, however, the Court acknowledged that that the version applicable to *Lucente* gave the Agency up to six years to make a fraud determination under § 62(a). *Lucente*, ___ Mich at ___; slip op at 18 n 12. The version of the statute applicable in this case retains the same six-year language that was later omitted from 2016 PA 522. See MCL 421.62(a), as amended by 2013 PA 147.

consequences because it forecloses the claimant's right to protest the decision and subject it to Agency review before proceeding to later administrative and appellate reviews. *Id.* at ____; slip op at 29-30. See also MCL 421.32a(1), as amended by 2011 PA 269 (describing right to request Agency review of a determination, which results in a redetermination affirming, modifying, or reversing the prior determination or transfer of the protest for an administrative hearing). Consequently, the Court deemed the procedural irregularity an appropriate ground to set aside the "determinationless 'redetermination.'" *Lucente*, ____ Mich at ____; slip op at 35-36. Following the same reasoning here, we affirm the circuit court's order in this case because it reached the right result—affirming the ALJ's and MCAC's conclusions that the Agency's redeterminations were null and void—albeit for the wrong reason.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Deborah A. Servitto