

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001838-MR

MARY PETERMAN

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 08-CI-011033

KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION; AND KENTUCKY
HORSEMAN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, JUDGE; HENRY AND ISAAC,¹ SENIOR JUDGES

ACREE, JUDGE: Mary Peterman challenges the Kentucky Unemployment

Compensation Commission's denial of her claim for unemployment benefits which

¹ Senior Judges Michael L. Henry and Sheila R. Isaac sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580. Senior Judge Henry concurred in this opinion prior to the expiration of his term of senior judge service. Release of the opinion was delayed by administrative handling.

was affirmed by the Jefferson Circuit Court. On appeal, Peterman contends the circuit court erred for a variety of reasons set forth below. Finding merit in none of these arguments, we affirm.

The record reflects that Peterman began her most recent employment with the Kentucky Horseman's Benevolent and Protective Association (Association) in August 2003. Following her separation from that employment in October 2007, Peterman applied for unemployment benefits. A preliminary investigation conducted by the Division of Unemployment Insurance resulted in an initial determination that Peterman was entitled to benefits, and she began receiving weekly benefit payments.

The employer appealed the determination. Following two hearings conducted on February 4, 2008, and June 25, 2008, an appeals referee ruled Peterman had been discharged for misconduct related to the employment and was therefore disqualified from receiving unemployment benefits. More specifically, the referee found Peterman had been fired because she had refused to comply with a reasonable request of her supervisor.

The employer's evidence consisted primarily of the testimony of two people also employed by the Association, Martin Maline and Elizabeth Payne.

Maline was Executive Director of the Association for all times relevant to the instant dispute. He testified that Peterman had been discharged following repeated refusals to assume duties associated with maintaining the employer's membership roster. Maline stated the roster was essential to the employer's

operations and vital for its funding source. There had become a need to reallocate the duties of various employees because of recent personnel changes. He further testified that Peterman had been responsible for maintaining the roster in the past and had recently retained some duties which required her to use the roster, and that she was therefore the best-suited employee to assume responsibility for maintaining it.

Maline testified that, upon learning of her new responsibilities, Peterman initiated a series of angry confrontations with Maline, the president of the Association, and several members of the Board of Directors, during which she refused to assume responsibility for the membership roster. Maline told the referee that on one occasion Peterman refused to do the task, referring to it as the “f***ing roster.” On another occasion, Peterman told Maline he was an “f***ing idiot.”

Maline’s testimony was corroborated in part by that of Payne, a former employee of the Association who had come out of retirement to assist with administrative matters. Payne testified to overhearing Peterman raise her voice in a conversation with Maline and the Association’s president, at one time shouting, “I’m not doing the f***ing roster[.]” Payne stated she was unable to hear most of the rest of the conversation.

Peterman’s testimony contradicted that of the employer. She stated she had never refused to handle the roster. Rather, she claimed, she had repeatedly asked what her duties would be given the recent personnel changes, but never received an answer.

Partway through the June 2008 hearing, the recording became inaudible, and the transcriptionist was unable to certify pages 59-82 of that transcript. The only testimony affected by this recording failure was that of Mary Ann Cooper, an Association board member and a witness for Peterman. None of her testimony was certified for purposes of the appeal.

Peterman appealed the referee's decision to the Commission, which affirmed the referee and adopted her findings of fact and conclusions of law as its own. The Commission also ruled Peterman had been afforded a full and impartial hearing, despite Peterman's assertion that the referee had acted unfairly in several respects.

Peterman appealed to the circuit court on various grounds. The circuit judge affirmed on all matters, determining that the administrative decisions were based upon substantial evidence and correct application of the law; that Peterman had not been denied procedural due process in her hearing before the referee; that KRS 341.415(1) was not an unconstitutional delegation of legislative power to the executive branch; and that, at any rate, the decision that Peterman was required to repay the benefit amounts she has received, pursuant to KRS 341.415(1), was not ripe for adjudication.

Peterman now appeals to this Court, presenting the following arguments: (1) the referee's refusal to permit extended cross-examination of Payne regarding her hearing impairment deprived Peterman of procedural due process; (2) the failure of the Commission to properly certify the record of the June 25, 2008, hearing deprived Peterman of procedural due process by impairing meaningful

appellate review; (3) the administrative determination that she refused a reasonable request from a supervisor was not based on substantial evidence; (4) it was error for the circuit court to rule the issue of repayment was not ripe; and (5) the circuit court erroneously determined KRS 341.415(1) does not constitute an unconstitutional delegation of legislative authority to the executive branch.

Standard of review

The extent of our review of administrative determinations is clearly established.

The judicial standard of review of an unemployment benefit decision is whether the [Commission]’s findings of fact were supported by substantial evidence and whether the agency correctly applied the law to the facts. Substantial evidence is defined as evidence, taken alone or in light of all the evidence, that has sufficient probative value to induce conviction in the minds of reasonable people. If there is substantial evidence to support the [Commission]’s findings, a court must defer to that finding even though there is evidence to the contrary. A court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence. A court’s function in administrative matters is one of review, not reinterpretation.

Thompson v. Kentucky Unemployment Insurance Commission, 85 S.W.3d 621, 624 (Ky. App. 2002) (citations omitted). The legal conclusions of an agency, however, are entitled to no deference. *Reis v. Campbell County Board of Education*, 938 S.W.2d 885-86 (Ky. 1996).²

² It is also worth directing the parties’ attention to KRS 341.420(5), which provides:

No finding of fact or law, judgment, conclusion, or final order made with respect to a claim for unemployment compensation

However, the above-cited standards of review apply to appeals to this Court from administrative agencies only when: (1) the issue was preserved before the administrative body, *Urella v. Kentucky Bd. of Medical Licensure*, 939 S.W.2d 869, 873 (Ky. 1997), and (2) an appellant has complied with Kentucky Rule(s) of Civil Procedure (CR) 76.12(4)(c)(v) by telling this Court in the brief where and how the issue was preserved. No portion of Peterman's brief asserts that her arguments were properly preserved before the administrative body; we are under no obligation to scour the record on appeal to ensure that an issue has been preserved. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003).

Under these circumstances, this Court is authorized to ignore the unpreserved argument entirely by striking the brief or portions of it. CR 76.12(8)(a). We also have the discretion to review the issues on appeal for manifest injustice only. *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. 1990). In this case, we have chosen the latter course.

Cross-examination of Elizabeth Payne

Peterman objects that when the referee cut short her cross-examination of Elizabeth Payne, she was deprived of the due process right to cross-examine the witness. In particular, Peterman wished to bring forth additional evidence of

under this chapter may be conclusive or binding in any separate or subsequent action or proceeding in another forum, except proceedings under this chapter, regardless of whether the prior action was between the same or related parties or involved the same facts.

KRS 341.420(5). This opinion falls within the scope of the statute.

Payne's hearing impairment. The relevant portions of the exchange before the referee, much of which is set forth in Peterman's brief, are as follows:

Counsel for Peterman: . . . I noticed when the [referee] asked you a question a moment ago you leaned in. Do you have some kind of hearing impairment?

Witness Payne: I have hearing aids.

Counsel for Peterman: Okay. Okay. And what, what is the nature of your hearing impairment?

Witness Payne: What do you mean the nature?

Counsel for Peterman: Well, what kind of hearing loss do you have?

Witness Payne: Tonal.

Referee: Okay. Hold on a second. Did you say you wear hearing aids?

Witness Payne: Yes.

Referee: Okay. She's confirmed she wears hearing aids to help with her hearing. That's as far as we need to go into that. Any other questions that you have?

Counsel for Peterman: During the conversation that you said you overheard I believe on, I think the [referee] ascertained Thursday, October 18, you said you heard Ms. Peterman yell, "something f'ing

roster.” Did you hear the entire conversation or just hear –

Witness Payne: (Interrupting) No. No.

Counsel for Peterman: (Continued) – part of it, just that part?

Witness Payne: Just that part that blared out.

Counsel for Peterman: So you did not hear what occurred after that?

Witness Payne: Before or after. No.

Peterman asserts in her appellate brief that Payne suffers from a severe hearing impairment, but that the referee deprived her of the ability to fully place the impairment into evidence.

“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 1021, 25 L. Ed. 287 (1970) (citations omitted). “Without such opportunity, the search for truth may very well be impeded and restricted.” *Kaelin v. City of Louisville*, 643 S.W.2d 590, 592 (Ky. 1982). Peterman is correct to assert that she was entitled to cross-examine Payne.

Here, Peterman did have the opportunity to put some evidence of Payne’s hearing impairment before the referee via cross-examination. The referee learned that the witness suffered from hearing loss which required her to wear a hearing aid, though the extent of the impairment and its effect on Payne’s ability to

accurately perceive the events to which she testified were not placed into evidence. Perhaps there was additional evidence which could have been brought forth had cross-examination into the nature of the impairment continued.

Nevertheless, we find Peterman has not demonstrated error.

First, Peterman never requested permission from the referee to ask any more questions about the extent of Payne's hearing loss; nor did she object to the referee's order to "move on" from the line of questioning. It is not apparent from the record that Peterman had any desire to ask further questions. Nor was Peterman prevented from asking specifically what portions of the relevant conversation Payne could and could not hear. She simply did not ask such questions. It thus appears that Peterman was allowed to present through Payne's cross-examination all the evidence she chose to present.

Second, there is no reason to believe Peterman suffered prejudice from the referee's actions. Peterman has never advised any tribunal – not the Commission nor the circuit court nor this Court – of the specific questions she should have been permitted to ask or the evidence those questions would have produced. In any event, any error here was harmless and did not rise to the level of manifest injustice. *See generally, 2 Am. Jur. 2d Administrative Law* §351 (2010) (“Any right to cross-examine may be waived by inaction. Absent a showing of prejudice, an abridgement of the right to cross-examination may constitute harmless error.”)(citations omitted).

Certification of the record

Peterman's next argument is that the Commission failed its statutorily prescribed duty to preserve the administrative record. KRS 341.450(2). This argument stems from the fact that a portion of the recording of the hearing was inaudible and pages 59 to 82 of the transcript could not be certified. Peterman believes this constitutes a violation of her due process right to a meaningful appeal.

Under circumstances in which the record is so lacking that meaningful review is impossible, reversal of the decision of an administrative agency would be appropriate, provided, however, that the claim of error has been timely raised. This is not such a case.

Interested parties to a hearing are entitled to a free copy of the hearing audiotapes by sending a blank tape to the address listed at the end of the referee's decision. 787 Kentucky Administrative Regulation(s) (KAR) 1:110 Section 4(6). In this case, the referee's decision was mailed to Peterman on June 26, 2008. On September 30, 2008, the Commission affirmed the referee's decision based on the record before it which included the original audiotape of the hearing but not a transcript.

If Peterman objected to the poor quality of the audiotape, she never indicated to this Court nor to the circuit court that she had. Our review of the record failed to reveal that any objection was made.

When Peterman initiated her appeal in Jefferson Circuit Court on October 17, 2008, she did not identify the inaudibility of the hearing audiotape as a basis for her appeal.

On October 27, 2008, the court reporter provided a transcript of the hearing to the Commission although, as previously noted, she could not certify pages 59 to 82. Those uncertified pages, however, reasonably identify the portions of the audiotape that this particular court reporter could not understand.³

On April 20, 2009, Peterman briefed her allegations of error to the circuit court. She failed to raise any objection to the transcript in that brief. She also failed to raise any objection on the grounds that the tape was inaudible. In fact, she cited exclusively to the audiotape when she referred to testimony. It was not until June 24, 2009, when she filed a reply brief to the Commission's and the employer's response briefs, that Peterman for the first time objected to the court reporter's transcription.

Furthermore, Peterman has failed to tell the circuit court, and again fails to tell this Court, how the lack of any of the inaudible portions of the transcript is prejudicial to this appeal. We believe it incumbent upon one urging reversal of an administrative decision on the basis of omitted portions of the record to identify the omission and how its absence from the record prejudices her appeal. Otherwise, we are entitled to presume the omissions are inconsequential. Peterman never attempted to represent to the appellate courts either the contents of the missing testimony or how it would have altered the outcome. Simply describing the testimony as "exculpatory" is not enough to demonstrate the likelihood of prejudice. Given these circumstances, we presume the inaudible portions of the

³ The court reporter who transcribed the hearing audiotape was not present at the hearing. Pages 59 through 82 transcribed testimony no doubt as accurately as was possible for the court reporter.

hearing audiotape are inconsequential to Peterman's appeal. The imperfect transcription here does not constitute manifest injustice.

Because we find any shortcoming in the hearing audiotape inconsequential, we need not address the appellees' arguments that Peterman could have remedied the record by utilizing CR 75.13. Nor need we address the Commission's strong argument that the certification required by KRS 341.450(2), which is undertaken by the Commission, and the certification of a transcript, which is undertaken by a court reporter, are two entirely different concepts.

Findings of fact

Peterman also objects that the referee's factual determinations that Peterman refused a request of the employer and that the request was reasonable were not based on substantial evidence. Specifically, she contends that her testimony that she never refused to perform the duties at issue should have prompted the referee to conclude she had demonstrated by a preponderance of the evidence that she had not refused a reasonable request. Her argument, however, makes it obvious that Peterman actually wants this Court to engage in a reweighing of the evidence before the fact-finder to reach a different conclusion. That is not the function of a reviewing court. *Thompson*, 85 S.W.3d at 624. We may neither reweigh evidence nor reevaluate credibility determinations of a fact-finder.

While there was evidence which supports Peterman's version of events, there was also competent evidence which contradicted her account. The sworn

testimony of Maline and the corroboration of that testimony by Payne constitute substantial evidence. We will not usurp the role of the fact-finder.

Constitutionality of KRS 341.415(1)

Finally, Peterman urges us to determine that KRS 341.415(1) is an unconstitutional delegation of legislative authority to the executive branch because it permits the Secretary to determine, entirely in her discretion, the manner in which claimants who were wrongly paid benefits must repay them.

KRS 341.415(1) provides in relevant part,

Any person who has received any sum as benefits under this chapter ... while any condition for the receipt of such benefits was not fulfilled in his case, or while he was disqualified from receiving benefits, ... shall, in the discretion of the secretary, either have such sum deducted from any future benefits payable to him under this chapter or repay the Office of Employment and Training, Department of Workforce Investment, for the fund a sum equal to the amount so received by him.

KRS 341.415(1). Clearly, this statute delegates some decision-making authority to the secretary. Pursuant to this authority, the Division of Unemployment Insurance has promulgated 787 KAR 1:190: “Overpayments that result from office error or that in the discretion of the secretary shall be collected solely through deduction from future benefits shall not be subject to the filing of a lien or reporting to credit

reporting agencies.” 787 KAR 1:190, Section 2.⁴ Peterman made this argument before the circuit court.

The circuit court found the matter was not ripe for adjudication because the decision about how Peterman will be required to repay benefits she received, if at all, has not yet been made. Peterman contends on appeal that the decision has been made, because the referee found, “KRS 341.415 provides for repayment to the Division an amount equal to the sum of benefits received by a worker during the weeks for which the worker was disqualified or held ineligible. Claimant has received benefits during the now[-]imposed period of disqualification and must repay the Division.”

If there is no actual case or controversy, an issue is not ripe for judicial review. *Commonwealth v. Maricle*, 15 S.W.3d 376, 380 (Ky. 2000). This dispute is not ripe because no controversy has yet arisen on the issue of the manner of Peterman’s repayment. Peterman has apparently misunderstood the referee’s decision and the Commission’s order. A ruling from the Commission or one of its referees that a claimant “must repay the Division” is not a determination of the manner in which benefits are to be repaid, and the Commission has asserted as much. *See* 787 KAR 1:190, Section 2. Rather, it is a corollary of the determination that Peterman never should have received benefits to begin with.

⁴ Incidentally, Section 1 of the same statute defines “office error” to include “payment during a period of disqualification.” 787 KAR 1:190, Section 1(8). If it is ultimately determined that Peterman received the \$9,794 in benefits during the period in which she was disqualified for misconduct connected with the work, she would be given the more favorable of the two repayment plans. In other words, she would be required to repay the benefits received only by a deduction from future unemployment benefits.

When this litigation is finished, and if it is ultimately concluded that Peterman was disqualified from receiving benefits all along, the matter will be sent back to the Division for a determination of the method of repayment as mandated by 787 KAR 1:190, Section 2.

Because there is no justiciable controversy, we need not address whether KRS 341.415(1) is constitutional, and we decline to do so.

Conclusions

The circuit court properly affirmed the Commission's denial of Peterman's claim for unemployment benefits. Accordingly, we affirm.

ALL CONCUR.

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