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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002229-MR

KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION — APPELLANT

v.

APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 06-CI-00184

BETTY JO WHEELER AND
FLYNN ENTERPRISES, INC. — APPELLENTS

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CAPERTON, AND CLAYTON, JUDGES.

CLAYTON, JUDGE: Kentucky Unemployment Insurance Commission (hereinafter "Commission") appeals from the October 9, 2009, opinion and order of the Todd Circuit Court that reversed the Commission's order, which stated that, because Betty Jo Wheeler had not timely filed for trade adjustment assistance (hereinafter "TAA") and trade readjustment allowance (hereinafter "TRA"), she

was ineligible for the benefits. Because we agree that substantial evidence supports the Commission's findings and that it correctly applied the law, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

Wheeler worked for Flynn Enterprises as a repair woman at its factory in Elkton, Kentucky, for seventeen (17) years. On December 28, 2005, Flynn Enterprises closed its facility. The closing of the facility resulted in Wheeler and five hundred co-workers losing their jobs. Thereafter, Wheeler applied for and received unemployment insurance benefits from the Kentucky Division of Unemployment Insurance (hereinafter "Division").

Besides unemployment insurance, the Division administers a federal program for the United States Department of Labor. The program allows persons who lose their jobs because of foreign competition to receive additional unemployment benefits, which as explained above, are known as TAA and TRA benefits. Although the states administer the programs, it is a federal program that is subject to federal law.

TAA benefits include job training, job counseling, job placement assistance, and other similar services designed to help qualified persons make finding new jobs easier. TRA benefits are monetary allowances similar to regular unemployment insurance benefits. These benefits help support unemployed workers after the initial unemployment insurance benefits are exhausted while they seek new employment and receive TAA services.

Under the TAA/TRA programs, once an employer's layoff is certified as having been caused by foreign competition, its employees may be eligible for the program's benefits. The process is for the employer to give the names of the affected employees to the Division. Then, the Division sends these employees written notice of their possible eligibility for TAA/TRA benefits and instructions for filing for the benefits, including the deadlines for application. If an administering body, here the Division, is unable to substantiate all the employees' names and addresses, it may publish general notices through local media outlets.

Employees must file for the benefits prior to the deadlines established by federal law. The deadlines in effect at the time of the plant closing, December 2005, required a TRA applicant to file within either sixteen (16) weeks of losing a job or eight (8) weeks of certification that the job loss had been caused by foreign competition. The Division maintains that federal law provides no exception to the application deadline even if the employee never received written notice of the deadline.

In late 2005, Flynn Enterprises announced that it would close its Elkton facility because of foreign competition. Then, several of Flynn's employees, including Wheeler, signed a petition for the closure to be certified as eligible for TAA and TRA benefits. The petition, numbered 58197, was granted and became effective on December 8, 2005.

Before the plant closed, the Division sent its Rapid Response Team to Flynn Enterprises several times to inform the employees of eligibility for benefits

after the plant's closure. Wheeler and several other employees were not informed about the meetings, and thus, did not attend them. In addition, Flynn Enterprises provided the Division with a list of employees affected by the plant closure. On December 22, 2005, the local office of the Division mailed notices to the employees on the list. The letter informed recipients that they may be eligible for TAA/TRA benefits and set forth the deadline for enrollment. The deadline was the sixteenth week after the worker's most recent total separation or the last day of the eighth week after certification is issued. Besides the letter to employees, the Frankfort office of the Division also published notice about applying for benefits through the local media, including newspapers, radio and television stations.

It is disputed as to whether Wheeler's name was on the employer's list, but it is undisputed that Wheeler did not receive written notice from the Division. In fact, at the hearing on the matter, administrative notice was taken that the Division's electronic records do not show that Wheeler ever received a letter giving her notice of her right to the benefits. Further, administrative notice was taken that no proof existed that the benefits had ever been discussed with Wheeler.

While Wheeler was in general aware of her potential eligibility for TAA/TRA benefits, she did not know the application deadline. She applied for the TRA benefits on May 25, 2006, when her regular unemployment benefits ended. That date, however, was after the deadline of sixteen (16) weeks following her job separation. Subsequently, Wheeler received a notice of determination, on July 7,

2006, that TRA benefits were unavailable to her because she failed to meet the application deadline.

Wheeler appealed the decision to the Appeals Branch of the Division, which held a hearing on September 11, 2006. The Referee entered a decision on September 13, 2006, affirming the initial notice of determination. Then, Wheeler appealed the Referee decision to the Commission, which issued an order unanimously affirming the Referee's decision.

Next, pursuant to Kentucky Revised Statutes (KRS) 341.450, Wheeler appealed the Commission's decision to the Todd Circuit Court and joined Flynn Enterprises as a party. At that time, Flynn Enterprises presented new evidence. The evidence was the list of employees that Flynn Enterprises alleges it provided the Division, and the list had Wheeler's name on it. But the court correctly noted in its October 9, 2009, opinion and order that since the list was not included in the certified administrative record provided to the court on appeal, it could not use it.

At any rate, the court reversed the Commission. The court held that the decisions of the Referee and the Commission were arbitrary and capricious. Clearly, Wheeler did not receive notice of the deadlines for applying for TAA/TRA benefits, and hence, was denied the benefits for which she was otherwise qualified. Wheeler's failure to receive notice of the application deadline was due to agency's error, and thus, the court held a violation of its statutory duty. It concluded that Wheeler had a property interest in her TAA/TRA benefit claim, and thus due process required that she receive timely notice and eligibility

requirements for the benefits. The court deemed the failure for Wheeler to have the opportunity to file for these benefits as a violation of her due process.

The Commission appeals the Todd Circuit Court order. According to the Commission, it does so at the behest of the United States Department of Labor because the Commission is obligated to administer the program for the Labor Department.

ISSUE

The issue is whether an administrative agency's failure to give written notice of the deadline for application of benefits to an employee, who was otherwise qualified, is fatal to her receipt of such benefits when the employee files after the deadline. The Commission maintains that its findings of fact were supported by substantial evidence and that it correctly applied the federal law, and therefore the court erred when it reversed the Commission. In contrast, Wheeler argues that the Commission violated her due process rights. And Flynn Enterprises, as appellee, highlights that Wheeler, due to error on the part of the Division and not Flynn Enterprises, did not receive proper notice, and therefore, the Division is responsible for the error. We will now review the decision of the Todd Circuit Court.

STANDARD OF REVIEW

The judicial standard of review of an unemployment benefit decision is twofold. First, it must be ascertained whether the Commission's findings of fact were supported by substantial evidence, and next, whether the agency correctly

applied the law to the facts. *See Thompson v. Kentucky Unemployment Ins. Com'n*, 85 S.W.3d 621, 624 (Ky. App. 2002). Substantial evidence is defined as evidence, taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the minds of reasonable people. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Moreover, as stated in *Kentucky Unemployment Ins., Com'n v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 579 (Ky. 2002), "[w]e must also determine whether the decision of the administrative agency was arbitrary or clearly erroneous, which is defined as "unsupported by substantial evidence." *Danville-Boyle County Planning and Zoning Com'n v. Prall*, 840 S.W.2d 205, 208 (Ky. 1992).

Hence, our review is such that a final order of an administrative agency will be affirmed if this Court finds the agency applied the correct rule of law to facts supported by substantial evidence. *Vanhoose v. Com.*, 995 S.W.2d 389, 392 (Ky. App. 1999). Therefore, the fundamental question before us is whether the facts found by the Commission are "supported by substantial evidence," *Kentucky Unemployment Ins. Com'n v. Springer*, 437 S.W.2d 501, 502 (Ky. 1969), and, if so, whether the Commission "incorrectly applied the correct rule of law to the facts presented to it." *Kentucky Unemployment Ins. Com'n v. Stirrat*, 688 S.W.2d 750, 751-52 (Ky. App. 1984).

ANALYSIS

The initial question before the Court is whether the Commission's findings of fact were supported by substantial evidence. With regard to this question, we observe that the parties do not dispute the Referee or the Commission's factual findings. Some disagreement exists as to whether Wheeler's name was on the employer's list provided to the Division for written notification. The list itself, however, was not a part of the administrative record, and therefore, not considered. Moreover, it is stipulated that Wheeler, for whatever reason, did not receive written notice and was not made aware of the Rapid Response Team meetings at the plant. At any rate, an appellate court will uphold a Commission's decision that is supported by substantial evidence even in the presence of conflicting evidence. *Kentucky Com'n. on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981)

Having determined that the Commission's findings are supported by substantial evidence, we next review whether the Commission applied the correct rule of law. *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Com'n*, 437 S.W.2d 775, 778 (Ky. 1969). Our decision in the present case turns on the application of federal law because TAA/TRA is a federal program. Both the Division and the Commission are bound by federal law in the administration of the program.

In the administration of these programs, federal law requires that affected employees must apply for benefits prior to the deadline. The relevant

version of 19 United States Code Annotated (U.S.C.A.) § 2291 (2009), that was in effect at the time of facts herein required application deadlines as follows:

> (a) Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification . . . if the following conditions are met:
>
> . . . .
>
> (5) Such worker –
>
> (A)(i) is enrolled in a training program approved by the Secretary . . . and
>
> (ii) the enrollment required . . . occurs no later than the latest of –
>
> . . . .
>
> (I) the last day of the 16th week after the worker's most recent total separation from adversely affected employment[.]
>
> (II) the last day of the 8th week after the week in which the Secretary issues a certification covering the worker[.]

That is to say, the deadlines in effect at the germane time period required applicants to for TRA benefits to apply within sixteen (16) weeks of losing the job or eight (8) weeks of the date the layoffs were certified as having been caused by foreign competition. Wheeler lost her job on December 8, 2005. The petition was certified as of December 8, 2005. The last day of the sixteenth week of Wheeler's unemployment was April 1, 2006. Thus, Wheeler, under the deadlines in effect in 2006, had to apply for TRA benefits by April 1, 2006. Inopportunely, she applied for the TRA benefits on May 25, 2006.

Close perusal of the administrative law governing the benefits shows that federal law does not place an absolute obligation upon administrative agency to ensure that written notice is received by all affected employees. Because incidents will occur where administrative agency will not be supplied with a complete and accurate list of all employees, other means of giving notice are allowed. Federal law states:

> (2) Newspaper notices.
>
> (i) Upon receipt of a copy of a certification issued by the Department affecting workers in a State, the State agency shall publish a notice of such certification in a newspaper of general circulation in areas in which such workers reside. Such a newspaper notice shall not be required to be published, however, in the case of a certification with respect to which the State agency can substantiate, and enters in its records evidence substantiating, that all workers covered by the certification have received written notice required by paragraph (d)(1) of this section.

20 Code of Federal Regulations (C.F.R.) § 617.4(2)(i) (1986). Here, the Division did use local media, including newspaper, radio, and television, to publicize the certification. The publication of the certification permits employees, who for some reason did not receive written notice, constructive notice. The Division did so advertise the certification and its benefits, and therefore, Wheeler had constructive notice.

Furthermore, even though federal law provides that employees who do not apply for benefits by the deadline are unable to receive them, the statutory scheme allows for an extension of the deadline for certain conditions and under a

specific time frame. The pertinent version of 19 U.S.C. § 2291(a)(5)(A)(ii)(III) provides that even though an affected employee is required to enroll in training either within eight weeks of employer's certification or sixteen weeks after complete separation from work in order to receive TRA cash benefits, extenuating circumstances might merit a forty-five day extension. But to take advantage of the time extension, Wheeler would have had to apply for the extension by May 16, 2006, which was a little over a week before she applied for the benefits on May 25, 2006. Additionally, the grant of an extension is limited to very specific conditions, and failure to receive written notification from the administrative agency about the deadline is not one of the conditions. *See* U.S.C.A. § 2291(c)(1).

Furthermore, we observe that state law may not be used to circumvent Trade Act time limits. As provided in 20 C.F.R. § 617.50(d):

> (d) Use of State law. In making determinations or redeterminations under this section, or in reviewing such determinations or redeterminations under § 617.51, a State agency shall apply the regulations in this part 617. As to matters committed by this part 617 to the applicable State law, a State agency, a hearing officer, or a State court shall apply the applicable State law and regulations thereunder, including procedural requirements of such State law or regulations, except so far as such State law or regulations are inconsistent with this part 617 or the purpose of this part 617: Provided, that, no provision of State law or regulations on good cause for waiver of any time limit, or for late filing of any claim, shall apply to any time limitation referred to or specified in this part 617, unless such State law or regulation is made applicable by a specific provision of this part 617.

Hence, as to the specified time limits state law does not control. In essence, the federal regulations prohibit state law exceptions to the time limits in those regulations, and consequently, state law may not be used to circumvent Trade Act time limits. 20 C.F.R. § 617.50(d). Other jurisdictions have so held, too. *See Reed v. State Dept. Labor,* 272 Neb. 8, 717 N.W.2d 899, 906 (Neb. 2006); *Lowe v. Unemployment Compensation Bd. of Review,* 877 A.2d 494, 498 (Pa. Cmwlth. 2005); *Schultz v. Division of Employment Security*, 293 S.W.3d 454, 461 (Mo. App. E.D. 2008).

A public policy rationale for such seemingly inflexible provisions is that it fosters uniform administration by the states of federal programs. Allowing states to deliver federal programs necessitates that particular deference be paid to the interpretations of the responsible federal agencies. *See Ford v. Com., Unemployment Compensation Bd. of Review*, 48 Pa. Cmwlth 580, 409 A.2d 1209, 1211 (Pa. Cmwlth 1980). In addition, as noted in this jurisdiction, if the Commonwealth fails to follow federal regulations, it might risk losing Trade Act funding. *See Lowe*, 877 A.2d at 496.

In fact, as explained by the U.S. Supreme Court in *Chevron*, whether a court must defer to an agency's interpretation of a statute depends first on whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104

S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984). The statutory language of the Trade Act of 1974 is unambiguous, and we must follow it.

While we recognize and sympathize with Wheeler's contention that the Commission's decision was arbitrary and capricious, and as such, violated her due process rights, our review of an administrative agency's adjudicatory decision is somewhat limited. And as we have pointed out, 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. *Burch v. Taylor Drug Store*, *Inc*., 965 S.W.2d 830, 834-35 (Ky. App. 1998), citing *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Com'n*, 437 S.W.2d 775, 778 (Ky. 1969). Further, we must resolve whether the decision of the administrative agency was arbitrary or clearly erroneous. A decision is said to be of such character if it is "unsupported by substantial evidence." *Prall*, 840 S.W.2d at 208. Moreover, if there is any substantial evidence to support the decision of the administrative agency, "it cannot be found to be arbitrary and will be sustained." *Taylor v. Coblin*, 461 S.W.2d 78, 80 (Ky. 1970). Consequently, a final order of an administrative agency will be affirmed if this court finds the agency applied the correct rule of law to facts supported by substantial evidence. *Vanhoose*, 995 S.W.2d at 392. We have so determined that the agency had substantial evidence and correctly applied the rule of law. Therefore, we conclude that the Commission's decision was not arbitrary. This reasoning also applies to the court's reversal of the Commission's decision. In that

opinion, the court held that the decisions of the Referee and the Commission were arbitrary and capricious. Again, we understand the reasoning of the court. Clearly, as noted by the court, Wheeler did not receive notice of the deadlines for applying for TAA/TRA benefits, and hence, was denied the benefits for which she likely was otherwise qualified. But we must disagree with the court's determination that Wheeler had a property interest in her TAA/TRA benefit claim, and thus due process required that she receive timely notice and eligibility requirements for the benefits. While this Court is sympathetic to the Todd Circuit Court's judgment, we are required to review *de nov*o the proper interpretation of statutes, such as the Trade Act of 1974. We conclude that the Referee and the Commission did not err in denying Wheeler benefits since she did not apply for these benefits by the deadline. Federal law controlling this program provides no remedy for Wheeler's late filing for the benefits. The Commission correctly applied the law, and the Todd Circuit Court erred in reversing the Commission's order.

CONCLUSION

In this case, even though the equities weigh heavily in favor of Wheeler, the Court cannot ignore the clear provisions of the prevailing federal statutory scheme. Accordingly, we conclude that substantial evidence supports the Commission's findings and that it correctly applied the law. We reverse and remand the Todd Circuit Court's opinion and order.

ALL CONCUR.

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