RENDERED: DECEMBER 9, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000326-MR

WESTERN KENTUCKY COCA-COLA
BOTTLING COMPANY, INC. APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE A. WILSON, JUDGE
ACTION NO. 09-CI-01701

KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION AND
TREVOR RUNYON APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, STUMBO, AND WINE, JUDGES.

MOORE, JUDGE: Western Kentucky Coca-Cola Bottling Company, Inc. (WKCC), appeals from a judgment of the Warren Circuit Court upholding the Kentucky Unemployment Insurance Commission's decision to grant a claim for

unemployment insurance benefits to WKCC's former employee, Trevor Runyon. Finding no error, we affirm.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

WKCC is in the business of operating a soft drink distributorship. Runyon worked for WKCC as a night loader from June, 2006, through March 26, 2009. As a night loader, Runyon worked from 12 p.m. until about 10 p.m. Runyon was attending school, and WKCC scheduled him every day of the week except Wednesday and Saturday. However, Runyon had been coming on Wednesdays for over a month to work extra hours.

WKCC's policy, of which Runyon was aware, requires employees to report any absences prior to the start of their shift to their supervisor. WKCC uses a progressive disciplinary process that consists of a verbal warning, a written warning, suspension, and termination. On June 11, 2008, WKCC suspended Runyon for tardiness, absenteeism, and his failure to notify a supervisor of same prior to his shifts.

On Sunday, March 22, 2009, Runyon was absent from work. He claims that he called WKCC prior to his shift that day and notified his supervisor, Justin Mercer, that he would not be at work because he was sick. On Monday, March 23, 2009, Runyon claims that he called WKCC prior to his shift and notified his supervisor, Cecil Webb, that he was still sick and would not be working that day, either. However, Webb disputes that Runyon called him.

On Tuesday, March 24, 2009, Runyon worked his shift. On Wednesday, March 25, 2009, Runyon began work at approximately 12 p.m. However, after telling Webb that he "had some business to take care of," Runyon left work at about 3 or 3:30 p.m. As Runyon left, Webb told Runyon that he could not just come and go as he pleased.

On Thursday, March 26, 2009, Runyon arrived at work; Webb told him that he was being discharged for not coming in, always being late, and leaving without giving a reason the day prior. Runyon filed for unemployment insurance benefits that same day.

On April 17, 2009, the Division of Unemployment Insurance determined that Runyon had not been discharged by WKCC for misconduct. The employer appealed this determination, and a referee set it aside. Runyon appealed to the Unemployment Insurance Commission, which reversed the referee after determining that WKCC had failed to meet its burden of proof that Runyon was discharged for misconduct.

Subsequently, WKCC filed an action in Warren Circuit Court to appeal the Commission's decision, per Kentucky Revised Statute (KRS) 341.450. Runyon filed no answer in response to WKCC's complaint. On January 14, 2011, the circuit court entered an order of default judgment in favor of WKCC. However, the circuit court entered another order into the record on January 14, 2011, which appears immediately after its order of default judgment in favor of

WKCC; this latter order affirms the Commission's administrative decision in favor of Runyon.

This appeal followed. Additional information relating to this matter will be discussed below, as it becomes relevant to our analysis.

II. STANDARD OF REVIEW

In reviewing an agency decision, the reviewing court may only overturn that decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 300-01 (Ky. 1972). When reviewing issues of law, the court may review them *de novo* without any deference to the agency. *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 266 (Ky. App. 1990).

On questions of fact, the court's review is limited to an inquiry of "whether the agency's decision was supported by substantial evidence or whether the decision was arbitrary or unreasonable." *Cabinet for Human Resources, Interim Office of Health Planning and Certification v. Jewish Hospital Healthcare Services, Inc.*, 932 S.W.2d 388, 390 (Ky.App.1996). Substantial evidence means "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

If there is substantial evidence in the record to support the agency's findings, the court must defer to those findings even though there is evidence to the contrary. *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). Likewise, a court may not substitute its own judgment as to the inferences to be drawn from the evidence of record for that of the administrative agency. *Railroad Commission v. Chesapeake & Ohio Ry. Co.*, 490 S.W.2d 763, 766 (Ky. 1973). If the court finds the rule of law was applied to facts supported by substantial evidence, the final order of the agency must be affirmed. *Brown Hotel Company v. Edwards*, 365 S.W.2d 299, 302 (1963). The function of the court in administrative matters "is one of review, not of reinterpretation." *Kentucky Unemployment Insurance Commission v. King*, 657 S.W.2d 250, 251 (Ky. App.1983).

III. ANALYSIS

The circuit court's order of default judgment effectively reversed the Commission's administrative decision in favor of Runyon, while the circuit court's subsequent order, entered on the same date, affirmed it. Initially, the parties dispute the collective meaning and effect of these two orders. The Commission argues that the circuit court's order of default judgment is a nullity, and that the circuit court's subsequent order affirming its administrative decision is the only order at issue in this appeal. WKCC, on the other hand, argues that the circuit court's order of default judgment against Runyon disposed of this case in WKCC's

favor, and that because the circuit court's default judgment order went unappealed, default judgment in favor of WKCC is now the law of the case.

The problem with WKCC's argument is that it assumes that the circuit court's two orders in this matter both remained effective. WKCC's argument overlooks that a circuit court has the inherent authority to modify its orders on its own initiative "not later than 10 days after entry of judgment[.]" CR 52.02. And,

> [a] Corrected Judgment stands alone. Unless it clearly is evident otherwise, its effect is not merely to complement the previous judgment but rather to serve alone as the entire disposition of the case. CR 52 grants to the court the unlimited power to alter its judgment. When that authority is exercised, the slate is wiped clean, thereby removing any force the earlier judgment may have carried. The court becomes free to enter a separate and independent judgment governed, as was the first, by the Rules of Civil Procedure.

Pattie A. Clay Infirmary Ass'n v. First Presbyterian Church of Richmond, 605 S.W.2d 52, 54 (Ky. App. 1980).

Here, the circuit court's order granting default judgment in favor of WKCC appears in pages 147 and 148 of the record. Within 10 days, the circuit court entered a subsequent order of judgment in favor of Runyon; that order begins on page 149 of the record. Due to the mutually exclusive nature of these two orders, the latter order represents a correction of the former. Per CR 52.02, the circuit court was authorized to correct its former order within 10 days of entering it. This correction did not result in two separate, equally effective, and mutually exclusive orders. Rather, this correction wiped the slate clean, and the default

judgment in favor of WKCC was entirely replaced by the circuit court's judgment affirming the Commission's administrative decision in favor of Runyon. Consequently, the circuit court's order of default judgment in favor of WKCC became a legal nullity; there was no need for any party to appeal it. The circuit court's ultimate judgment is represented only in its order affirming the Commission's decision in favor of Runyon.

This leads to the other issue before us on appeal, namely, whether the Commission's decision in favor of Runyon, based upon its finding that Runyon was not discharged for engaging in misconduct, is supported by substantial evidence of record. We hold that it is supported by substantial evidence, and we find no error.

The employer bears the burden, in a discharge case, to prove misconduct by a preponderance of the evidence. *Brown Hotel Co. v. Edwards*, 365 S.W.2d 299, 301 (Ky. 1962). KRS 341.370(6) provides a non-exclusive list of reasons, within the context of unemployment compensation, for why an employee may be discharged for misconduct. Among these reasons, and at issue in this case, are the following: "knowing violation of a reasonable and uniformly enforced rule of an employer; unsatisfactory attendance if the worker cannot show good cause for absences or tardiness[.]" WKCC claims that it discharged Runyon for misconduct arising from three such incidents of misconduct, which occurred on March 22, March 23, and March 25, 2009, respectively.

As it relates to the March 22 and 23 incidents, Webb testified that Runyon's failure to work his shifts on those days was a violation of company policy only because Runyon did not notify a supervisor, prior to the starting times of those shifts, that he was going to be absent. However, Runyon testified that he had telephoned Mercer prior to his March 22 shift and Webb prior to his March 23 shift to explain that he was too sick to work on those days. Runyon's testimony qualifies as substantial evidence. The only evidence to the contrary was Webb's testimony that Runyon had not called on those days, and Webb admitted to having no personal knowledge of whether Runyon had called in on March 22. The Commission, as the ultimate fact-finder, was entitled to assign greater weight to Runyon's testimony.

As it relates to the March 25 incident, WKCC points to where the referee's order states, "[T]he employer [WKCC] and the claimant [Runyon] had reached a mutual agreement that the claimant would work until 6 pm on Wednesdays, which the employer had come to rely upon." Thus, WKCC argues that Runyon had agreed to work on Wednesday, March 25, 2009, from 12 p.m. until 6 p.m.; that WKCC relied upon him to do so; and that Runyon was insubordinate when he chose to leave work that day, without explanation, at or about 3:30 p.m. instead.

However, there is no indication from the record that WKCC actually expected or relied upon Runyon to work on Wednesdays, let alone for any definite period of time on Wednesdays. To the contrary, the record demonstrates that

Runyon's attendance at work on Wednesday would have been in addition to WKCC's regularly scheduled staff, and that WKCC was merely allowing Runyon the option of picking up extra hours. As Webb related in his testimony:

> Webb: [Runyon] would usually work on Wednesday till about six o'clock part of the day; not the full day.
>
> ALJ: What was the reason for him only working till six o'clock on Wednesdays?
>
> Webb: It was his day off, and he was just coming in to try to keep his status at full-time employe[e]; to get his hours up to forty a week because he was going to school.
>
> ALJ: All right. So that was a set schedule that you had made with him or was this kind of just a kind of on-going no set schedule really? It was just practice?
>
> Webb: It really was no set schedule.

Similarly, Runyon testified he made no representation to WKCC that he was going to work all day on Wednesday to make up the hours he missed on Sunday and Monday.

Moreover, nothing demonstrates that WKCC indicated to Runyon that it would discipline him for leaving at or about 3:30 p.m. that day; Webb testified that he made no such suggestion to Runyon while Runyon clocked out; and, Runyon himself testified that, had he "any hint whatsoever that [he] would be discharged or ever suspended or anything for leaving early Wednesday which [he] had never been confronted about leaving early then [he] would not have left." In short, substantial evidence of record also supports the Commission's finding that

Runyon did not engage in misconduct when he decided to stop working at or about 3:30 p.m. on Wednesday, March 25, 2009.

IV. CONCLUSION

For these reasons, the respective orders of the Warren Circuit Court and the Kentucky Unemployment Commission are AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frank Hampton Moore, Jr.
Matthew P. Cook
Bowling Green, Kentucky

BRIEF FOR APPELLEE, KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION:

Amy F. Howard
Frankfort, Kentucky