

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001780-MR

KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 98-CI-00384

DEANNA L. BARNETT AND
MANPOWER OF INDIANA LIMITED PARTNERSHIP

APPELLEES

1999-CA-001813-MR

MANPOWER OF INDIANA LIMITED PARTNERSHIP AND
KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION

APPELLANTS

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 98-CI-00384

DEANNA L. BARNETT

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: GUDGEL, CHIEF JUDGE; DYCHE, AND MILLER, JUDGES.

MILLER, JUDGE: Kentucky Unemployment Insurance Commission (Commission) brings Appeal No. 1999-CA-001780-MR and Manpower of Indiana Limited Partnership (Manpower) brings Appeal No. 1999-CA-001813-MR from a July 6, 1999, Order of the Taylor Circuit Court. We reverse and remand.

Deanna L. Barnett, an employee of Manpower, was discharged on June 23, 1998. She subsequently filed a claim for unemployment insurance benefits. On July 9, 1998, the Division of Unemployment Insurance (Division) issued a notice of determination finding that Barnett was discharged from employment for misconduct and thus disqualified from receiving unemployment insurance benefits. Barnett appealed the determination to an unemployment insurance referee. Kentucky Revised Statutes (KRS) 341.420. The referee conducted a hearing, set aside the Division's determination, and held Barnett entitled to unemployment insurance benefits. Manpower, thereafter, appealed the referee's decision to the Commission. KRS 341.430. On October 15, 1998, the Commission entered an order reversing the referee and entered its own findings of fact, which were contrary to the referee's. The Commission found the evidence to be more credible that Barnett was, indeed, discharged for reasons of misconduct and thus barred from receiving unemployment insurance benefits. Barnett then sought review of the Commission's decision in the Taylor Circuit Court. KRS 341.450. The circuit court reversed the Commission and specifically concluded as follows:

The Commission reversed the Referee and in its statement of the reasons for this reversal, it relies on its determination of credibility of the witness. An appellate body may not reverse the finder of fact on an issue of credibility, particularly where another hearing was not held.

. . . The Commission cannot substitute its own findings for those of the Referee . . .
. . .

This appeal follows.

APPEAL NO. 1999-CA-001780-MR

The Commission contends the circuit court committed error by holding that the Commission had no independent fact finding authority. We agree.

In Burch v. Taylor Drug Store, Inc., Ky. App., 965 S.W.2d 830 (1998), the Court noted the Commission's role in reviewing unemployment insurance cases is "substantially different" from other administrative review boards.

Specifically, the Court observed:

Unlike a conventional appellate body, the Commission conducts a *de novo* review of applications. . . Thus, while the Commission generally does not hear evidence directly from witnesses, **it has the authority to enter independent findings of fact.** (Citation omitted.) Necessarily, such authority allows the Commission to judge the weight of the evidence and the credibility of witnesses and to disagree with the conclusion reached by the referee.

Id. at 834 (Emphasis added). Barnett, however, urges this Court to adopt a narrow construction of Burch and limit its application only to situations where the Commission ordered "additional proof." We decline to do so. We believe such narrow

construction contradicts the plain language of not only Burch but of KRS 341.430(1) and 787 Kentucky Administrative Regulations (KAR) 1:110 §2(4) (a).

KRS 341.430(1) provides as follows:

The Commission may on its own motion affirm, modify, or set aside any decision of a referee on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it.

787 KAR 1:110 §2(4) (a) states as follows:

(a) Following the conclusion of a hearing the commission shall promptly announce its decision, which may be either an affirmation of the decision of the referee, or **a separate finding of facts**, decision and reasons therefor. The decision shall be in writing and shall be signed by the members of the commission who heard the appeal. At the discretion of the commission, its decision may be designated as representing precedent for future cases of similar circumstance. Decisions designated as precedent shall be binding on all lower levels of determination. (Emphasis added.)

We believe it clear the Commission has unique authority to enter independent findings of fact from that of the referee and necessarily the ability to judge the weight and credibility of evidence. As such, we are of the opinion the circuit court

committed reversible error by concluding the Commission did not possess such independent fact finding authority.

The Commission next asserts that its decision was not arbitrary. It specifically argues that its findings of fact were supported by substantial evidence of probative value. Evidence is deemed substantial:

[W]hen taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men.

Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972), *citing* Blankenship v. Lloyd Blankenship Coal Company, Inc., Ky., 463 S.W.2d 62 (1970). While the facts were certainly disputed, we think Manpower presented sufficient evidence to prove that Barnett was discharged for reasons of misconduct. Barnett's supervisor, one Tracy Robideaux, testified that excessive tardiness was a reason for Barnett's termination and an exhibit was introduced detailing such tardiness. In sum, we hold there exists substantial evidence of probative value to support the Commission's decision. We thus reverse in Appeal No. 1999-CA-001780-MR.

APPEAL NO. 1999-CA-001813-MR

Based upon the above reasoning, we likewise reverse in Appeal No. 1999-CA-001813-MR.

For the foregoing reasons, the Order of the Taylor Circuit Court is reversed, and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT, KENTUCKY
UNEMPLOYMENT INSURANCE
COMMISSION:

Randall K. Justice
Frankfort, Kentucky

BRIEF FOR APPELLANT, MANPOWER
OF INDIANA LIMITED
PARTNERSHIP:

Paul V. Hibberd
Louisville, Kentucky

BRIEF FOR APPELLEE:

Stephen B. Humphress
Lebanon, Kentucky