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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000338-MR

KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 09-CI-00480

OMNI PERSONNEL, INC.
and ALICE M. HACK — APPELLEES

OPINION
AFFIRMING IN PART AND VACATING IN PART

** ** ** ** **

BEFORE: MOORE, STUMBO, AND WINE, JUDGES.

MOORE, JUDGE: The Kentucky Unemployment Insurance Commission challenges the Grayson Circuit Court's order reversing the Commission's prior determination that Omni Personnel, Inc., was the most recent employer of Alice M. Hack, per 341.530(2), and that Hack was eligible to receive unemployment

benefits charged against Omni's reserve account. The Commission also challenges the circuit court's additional finding that Hack should continue to receive benefits and that Hack is not required to repay unemployment benefits she has already received because those benefits resulted from "agency error." For the reasons set forth below, we affirm the circuit court's decision on the former issue and vacate its decision with respect to the latter.

I. FACTUAL AND PROCEDURAL HISTORY

Omni provides workers to manufacturing and service businesses in the local area around its main office in Elizabethtown, Kentucky. Hack was intermittently employed through Omni, between the dates of October 21, 2008, and December 20, 2008, and again between the dates of March 11, 2009, and March 27, 2009, to work as a sorter in the assembly department of MTD, Inc., a manufacturing business in Leitchfield, Kentucky. Thereafter, Hack applied for unemployment insurance benefits.

On April 5, 2009, the Division of Unemployment Insurance made initial determinations that Hack was entitled to unemployment benefits, that Omni was Hack's most recent employer per Kentucky Revised Statute (KRS) 341.530(2), and that Hack's benefits should be charged against Omni's unemployment insurance reserve account. As an aside, KRS 341.530(2) provides that a claimant's employer is the claimant's "most recent employer" if "the eligible worker to whom benefits are payable shall have worked for such employer in each

of ten (10) weeks whether or not consecutive back to the beginning of the worker's base period."

On April 6 and April 15, 2009, Omni filed objections to the Division's determinations and also filed copies of its payroll sheets relating to Hack. The payroll sheets recited that Omni had paid Hack for working in the weeks ending on the following dates: "10/25/08"; "11/08/08"; "11/15/08"; "12/06/08"; "12/13/08"; "12/20/08"; "3/14/09"; "3/21/09"; and "3/28/09."

On June 9, 2009, this matter was heard before an administrative law judge (ALJ), who took testimony from Hack and Omni's president, Mary Roberts. The relevant parts of that hearing are included in the analysis below. Afterward, the ALJ concluded that Omni qualified as Hack's "most recent employer," as defined by statute and that Hack's benefits were properly chargeable to Omni's reserve account.

Omni subsequently appealed to the Commission. In affirming the ALJ's decision, the Commission found that the testimony taken during the hearing revealed that Hack had worked as a sorter at MTD, Omni's client employer, from October 21, 2008, until December 20, 2008, and again from March 11, 2009, to March 27, 2009. The Commission reasoned that because there are nine weeks between October 21, 2008, and December 20, 2008, and because there are three weeks between March 11, 2009, and March 27, 2009, Hack had worked in each of *twelve* weeks for Omni. Consequently, the Commission held that Hack had

worked for Omni in excess of the ten-week period specified by KRS 341.530(2), and that Omni was, therefore, Hack's "most recent employer."

Omni filed a timely civil action for judicial review in the Grayson Circuit Court appealing the final decision of the Commission. The circuit court reversed the Commission's determination that Omni qualified as Hack's most recent employer after finding that the Commission's determination was not supported by substantial evidence. The circuit court further held that the Commission was precluded from seeking reimbursement of any overpayments of unemployment benefits from Hack or terminating any of Hack's prospective benefits. The Commission now appeals both of the circuit court's determinations.

II. STANDARD OF REVIEW

> 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).

III. ANALYSIS

A. Substantial evidence does not support that Omni was Hack's most recent employer, per KRS 341.530(2).

In relevant part, KRS 341.530(2) provides that "[n]o employer shall be deemed to be the most recent employer unless the eligible worker to whom benefits are payable shall have worked for such employer in each of ten (10) weeks whether or not consecutive back to the beginning of the worker's base period." Hack introduced no documentary evidence supporting that Omni was her most recent employer. Rather, the Commission determined that Omni was Hack's most recent employer based entirely upon two brief exchanges that occurred while the ALJ questioned the parties during the evidentiary hearing at the administrative level. Relying solely upon these two exchanges, the Commission found that substantial evidence supported the conclusion that Hack had worked for Omni, between October 21, 2008, and March 27, 2009, in each of twelve weeks. The first exchange is between the ALJ and Omni's president, Mary Roberts:

> ALJ: Okay. Now on the [Form UI-412] document it states that Ms. Hack began her employment with Omni Personnel on March 11, 2009 and last worked on March 27, 2009, is that correct?
>
> ROBERTS: Yes.
>
> ALJ: Has she worked with Omni Personnel prior to March 11th?

ROBERTS: Yes. She worked in the—in—she worked from 10/21/08 to 3/11/09 and 3/11/09 to 3/27/09.

The second exchange is between the ALJ and Hack, and is to the following effect:

ALJ: Is the last place of employment through Omni Personnel?

HACK: Yeah.

ALJ: Did you work for Omni Personnel October 21, 2008 through December 20, 2008?

HACK: It was off and on whenever they called me to sort parts. That's whenever I would go in is when they would call me to sort parts, and I always went. I never missed.

ALJ: Did you work so many hours each week between those two dates?

HACK: Yes. Whenever they would get parts in me and this other woman would sort parts ever when—ever how long it taken [sic].

We disagree that either exchange provides substantial evidence in support of the Commission's findings. As to the first of these two exchanges, Roberts clarified (on the very next page of her transcribed testimony) that when she represented that Hack had worked from 10/21/08 to 3/11/09 and 3/11/09 to 3/27/09, Hack only worked in each of *nine* weeks during those periods:

ALJ: Well when you stated [Hack] worked October 21, 2008 through March 11, 2009, is that correct?

ROBERTS: Yes. She, she did not work all of the time from that date. She did not work solidly. She worked in, in 2008 she worked the 1, 2, 3, 4, 5—in six different

weeks and some of those times it was for five hours in a week.

ALJ: In each week?

ROBERTS: Well, no. I'm just saying that the total on some of those weeks was, you know five hours or five and a half hours.

ALJ: Okay. But it was during a one week period, separate weeks?

ROBERTS: Separate weeks she worked in six different weeks.

ALJ: Okay. That's what I was trying to find out.

ROBERTS: Okay.

ALJ: Okay. I know it's confusing. Okay. And do you have anything else to add regarding her time of employment with Omni Care?[1]

ROBERTS: Well that in 2009 she only worked three different weeks which makes it a total of nine weeks.

ALJ: From March 11, 2009 to March 27, 2009?

ROBERTS: Yes.

Regarding the second exchange, *i.e.*, the exchange between the ALJ and Hack, the ALJ's question, "Did you work so many hours each week between those two dates?" was at the very least inartfully phrased. Hack's response to this question reemphasized that she worked on an as-needed basis for Omni, but it does not indicate that she understood that the ALJ's purpose behind asking her this question was to ascertain whether she believed that she had worked in each of ten

[1] We presume the ALJ intended to say "Omni Personnel," rather than "Omni Care."

weeks for Omni, per KRS 341.530(2), or that Hack meant to represent that she had worked in each of ten or more weeks for Omni. Indeed, when the issue of how many weeks Hack had worked for Omni was more concisely raised in the hearing shortly after this exchange, Hack testified that she did not know how many weeks she had worked for Omni:

> ROBERTS: Hack worked in the, in the nine weeks instead of the ten weeks required.
>
> HACK: I don't know how many weeks.
>
> ALJ: All right. And, Ms. Hack do you have any questions for Ms. Roberts on the testimony she just gave only?
>
> HACK: Well we can check all this where they hold out my taxes and everything. I don't have all my check stubs, so I can't say.

The burden was upon Hack, as the claimant, to prove her eligibility to receive unemployment compensation; part of that burden entailed proving that Omni was her most recent employer according to the standard of KRS 341.530(2). *Broadway & Fourth Ave. Realty Co. v. Allen*, 365 S.W.2d 302, 304 (Ky. 1962). Yet, Omni's president testified that Omni had employed Hack for each of only nine weeks; Hack testified that she did not know how many weeks she had worked for Omni; and, Hack offered no testimony or other evidence—and the record contains no evidence—demonstrating that Hack worked in each of ten weeks for Omni. The Commission's conclusion that Omni had employed Hack for each of *twelve* weeks, per KRS 341.530(2), is supported by no substantial evidence of

record, and, indeed, runs contrary to the record. As such, we find no error in the circuit court's decision reversing the Commission.

B. The circuit court was not authorized to rule on the issues of whether Hack should continue to receive benefits or be required to repay unemployment benefits she has received.

After finding the Commission erred in determining that Omni qualified as Hack's most recent employer, the circuit court then held:

> Ms. Hack is at no risk of repaying any unemployment benefits she received or of being terminated if she is still drawing benefits. The Commission's own notice on the request for reconsideration provided in capital letters "IF AN OVERPAYMENT IS ESTABLISHED OTHER THAN THROUGH AGENCY ERROR, THE CLAIMANT SHALL BE REQUIRED TO REPAY THIS AMOUNT." If there is an error herein it had to be by the agency[.]

The Commission argues that the circuit court was not authorized to make any ruling on the issues of whether Hack should continue to receive benefits or be required to repay unemployment benefits she has received because the only issue that was ripe for adjudication was whether Hack's benefits, if any, could be properly charged to Omni's reserve account. The Commission further argues that any issues relating to the manner in which Hack should repay any overpayments she received, if at all, must be addressed in a separate administrative proceeding. We agree.

The language referenced in the circuit court's order relating to "agency error" originates from KRS 341.415(1). In relevant part, that statute provides:

> 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. . . . *However, if the benefit was paid as a result of office error as defined by administrative regulation*, there shall be no recoupment or recovery of an improperly paid benefit, except by deduction from any future benefits payable to him under this chapter. *For purposes of this section, overpayments as a result of a reversal of entitlement to benefits in the appeal or review process shall not be construed to be the result of office error*.

(Emphasis added.)

Here, the circuit court sat as an appellate body; reversed the Commission's determination that Hack was entitled to benefits; effectively held that the error its reversing decision was predicated upon constituted office error; and, in light of its finding of office error, declared that Hack was entitled to continue receiving unemployment benefits and that Hack had no responsibility to repay any benefits she received. But, the plain language of KRS 341.415(1) provides that an appellate court's reversal of a claimant's entitlement to benefits cannot qualify as office error. Moreover, a determination that a claimant never should have received benefits to begin with—the sole issue in this matter—is entirely separate from a determination of the manner in which benefits are to be repaid.

Indeed, the initial determinations of what constitutes the receipt of an overpayment of unemployment benefits by virtue of office error, and the manner in which benefits are to be repaid, occur at the administrative level. KRS 341.415(1) provides that "office error" is a term that is "defined by administrative regulation," and, pursuant to this statute, the Division of Unemployment Insurance has promulgated 787 KAR 1:190, Section 1, defining ten instances of what constitutes "office error," and 787 KAR 1:190, Section 2, which provides that "[o]verpayments that result from office error . . . shall be collected solely through deduction from future benefits[.]"

When this litigation is finished, and if it is ultimately concluded that Hack was disqualified from receiving benefits all along, the Division will determine in a separate proceeding whether Hack received any overpayments of unemployment benefits by virtue of office error as the term is defined in 787 KAR 1:190, Section 1. And, in conjunction with that determination, the Division will also determine the method of any repayment of benefits, per 787 KAR 1:190, Section 2. To date, however, there has been no determination of whether an office error occurred in this matter, or, similarly, whether Hack will be required to repay any benefits she might have received. As such, no actual case or controversy existed relating to the issue of office error and repayment; accordingly, this issue was not ripe for judicial review by the circuit court. Therefore, the circuit court's determination in this regard was unauthorized and must be vacated. *Commonwealth v. Maricle*, 15 S.W.3d 376, 380 (Ky. 2000).

IV. CONCLUSION

For these reasons, we AFFIRM that part of the Grayson Circuit Court's order reversing the Unemployment Insurance Commission's decision, and VACATE that part of the circuit court's order described above in part "B" of our analysis.

ALL CONCUR.

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