

CIRCUIT COURT ORDER/OPINION
Stephine Gwin, Circuit Court Clerk

S, J, M.

Appeal Docket No: 189568

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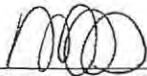
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Potential Digest Case

28 W(C) Section of the Act

Date: 9/18, 2007



R. Douglas Daligga, Director
MES - Board of Review

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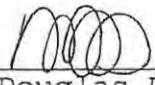
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R. Douglas Daligga, Director
MES - Board of Review

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR

GENEVIEVE RODZIK,

Appellant,

-vs-

Case No. 07-000683-AE

TRI-HOSPITAL, EMS, and STATE OF
MICHIGAN, DEPARTMENT OF LABOR
& ECONOMIC GROWTH,
UNEMPLOYMENT INSURANCE
AGENCY,

Appellees,

OPINION

This is an appeal from a decision of the State of Michigan Employment Security Board of Review. On March 2, 2007 a divided panel of the Board ruled that appellant Genevieve Rodzik was ineligible to receive unemployment benefits for the period of January 1, 2006 through February 17, 2006. Appellant filed a claim of appeal with this Court on March 26, 2007. Because the Board's decision was not supported by competent, material and substantial evidence, that decision is reversed.

Appellant was employed by appellee Tri-Hospital EMS as a paramedic for a number of years. (Record of Proceedings 6:19-23, 37:10-16 (May 8, 2007)). On April 29, 2005 she began a disability leave from her job (*Id* 6:24-8:12). Appellant requested additional leave under the Family Medical Leave Act, in August 2005. (*Id* 8:13-19). Appellant believed her leave was to extend to January 2006. (*Id*

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

9:17-19). However, on November 4, 2005 Tri-Hospital EMS placed appellant on "inactive status." (*Id* 9:20-10:28, 39:13-40:9, 79).

Appellant filed for unemployment insurance benefits on December 2, 2005. (*Id* 83, 85, 87) On January 18, 2006 the Bureau of Workers & Unemployment Compensation denied appellant benefits, finding that she was disqualified from receiving benefits due to misconduct, and ineligible to receive benefits due to her inability to work. (*Id* 87). On March 15, 2006 the Bureau "redetermined" that appellant was disqualified from receiving benefits, but made no finding regarding her eligibility (*Id* 83). On May 31, 2006 the Bureau reissued, on its "own motion" another redetermination, this time finding that appellant was ineligible to receive benefits because she was unable to work, but making no finding regarding her qualification. (*Id* 87). On June 23, 2006, appellant timely appealed the May 31, 2006 redetermination. (*Id* 61). Accordingly, a hearing before an administrative law judge was held on August 24, 2006 (*Id* 1, 3, 61). On August 25, 2006, the ALJ held, in a written opinion, that:

Medical documentation provided shows that [appellant] was suitable to perform full-time work on January 1, 2006. Consequently, claimant has established by a preponderance of the evidence her eligibility for benefits from January 1, 2006 under the ability provisions of Section 28(1)(c) of the [Michigan Employment Security] Act. (*Id* 62).

Tri-Hospital appealed this decision to the State of Michigan Employment Security Board of Review. (*Id* 93). On March 2, 2007 a divided panel of the Board held that:

The claimant here offered conflicting evidence and did not credibly establish her health problems were resolved in January 2006. She did not establish she was able to return to work. (*Id* 94).¹

The Board majority based its decision on its conclusion that:

The claimant had two statements from her doctor, which were conflicting. One statement indicated the claimant was able to return to work without restriction on January 1, 2006. The other

¹ One dissenting member of the panel found that the ALJ's decision "is in conformity with the law and facts and should be affirmed" (Record of Proceedings 95)

statement indicated the claimant could return to work on February 17, 2006. (*Id* 93)

On March 26, 2007, appellant filed a claim of appeal with this Court. (Claim of Appeal (March 26, 2007)). The question presented in the appeal is: "Did the MESC Board of Review err when it used evidence not in the record and reversed the ALJ without competent, material, and substantial evidence." (Appellant's Brief on Appeal v (May 24, 2007)).

MCL 421.38 governs this Court's review of a decision of the Board of Review. MCL 421.38(1). That statute provides, in pertinent part

The circuit court... may review questions of fact and law on the record made before the referee and the board of review involved in the final order or decision of the board... but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. *Id*.

Substantial evidence is evidence "that a reasonable mind would accept as sufficient to support a conclusion." *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994). While it may be less than a preponderance of the evidence, it must be more than a scintilla of evidence. *Id*. Where there is sufficient evidence to support the Board's findings, this Court may not substitute its discretion for that of the Board. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1989).

At the August 24, 2006 hearing, appellant provided two statements from her physician. (*Id* 90, 91). The first statement was based on an examination that took place on December 1, 2005. (*Id* 90). Following that examination, appellant's physician indicated that appellant was not able to work at that time. (*Id*). The physician also indicated that appellant's disability had begun on November 3, 2005 and estimated that appellant's disability would continue until February 17, 2006. (*Id*). While the statement was not signed by the physician until February 15, 2006, the statement is clear that appellant was not examined by her physician following December 1, 2005, and it plainly appears that the conclusions in the

statement are based upon that examination.² (*Id*) The second statement, dated July 5, 2006, unequivocally states that appellant was physically able to return to work on January 1, 2006 (*Id* 91).

In addition to submitting statements from her physician, appellant also testified at the hearing that she was physically able to work beginning in December 2005. (*Id* 14:10-13). Additionally, Robert Wyatt, the general manager of Tri-EMS testified at the hearing. (*Id* 37:2-9). Both appellant and Wyatt testified that she was negotiating with Tri-EMS for a new position with the company. (*Id* 11:19-24, 41:1-42:7). Additionally, appellant submitted other evidence that she was actively seeking other employment during this time period. (*Id* 14:15-17). Finally, Wyatt testified that he had no evidence that appellant was disabled and had no knowledge of whether appellant was physically able or not. (*Id* 35:9-36:3, 42:8-11).

The first issue on appeal is whether the Board properly considered the physician's statement dated February 15, 2007. Appellant argues that this statement was not considered by the ALJ and should therefore not have been considered by the Board. However, the record is clear that the ALJ did consider this statement as appellant testified regarding the statement's contents. (Record of Proceedings 24:24-26:1). Moreover, the Michigan Employment Security Act expressly provides that the Board may base its decision on "evidence previously submitted" or "additional evidence as it requires." MCL 421.34. Consequently, the Board's consideration of this statement was not contrary to law.

The only other issue on appeal is whether the Board's decision was supported by competent, material and substantial evidence. This Court concludes that it was not. The Board placed great weight on the "conflicting" statements of appellant's physician. However, it is clear to this Court that the statements do not conflict. The first statement, made after an examination, prospectively estimated that appellant's disability would last until February 17, 2006. While the second statement retrospectively reported that appellant had been physically able

² Appellant also testified that she did not see her physician on February 15, 2006 and that she had not seen her doctor since December 1, 2005 (Record of Proceedings 27:10-12, 28:6-8)

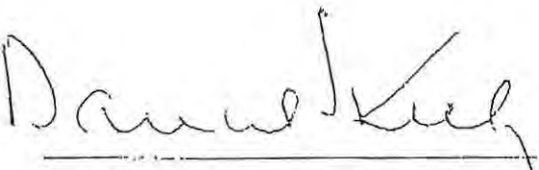
beginning on January 1, 2006. There is nothing conflicting about an educated guess that is later reported to have not been entirely accurate. Furthermore, the only evidence presented in this case has been that appellant was physically able beginning on January 1, 2006. Appellant's physician provided a statement that appellant was able. Appellant testified that she was physically able at this time. Appellant and Wyatt both testified that she was in negotiations with her employer for a position, and appellant testified and provided supporting evidence that she was seeking employment from other employers, both of which imply that appellant was able to accept employment. And finally, there was no evidence that appellant was physically disabled. Wyatt confirmed that Tri-Enterprise had no evidence to suggest that appellant was disabled.

In this case, the only evidence presented was that appellant was physically able to work. There was not even a scintilla of evidence that appellant was disabled from January 1, 2006 to February 17, 2006. Because there was no evidence that appellant was disabled, a reasonable mind could not conclude from the evidence presented that appellant was not physically able. Consequently, the Board's decision was not supported by substantial evidence. See *Payne, supra*. Because the Board's decision was unsupported by substantial evidence, this Court reverses that decision. See MCL 421.38.

For the foregoing reasons, the decision of the State of Michigan Employment Security Board of Review is REVERSED.

An Order consistent with this Opinion may be presented for entry as provided by Michigan Court Rule.

Dated: 9-7-07



Hon. Daniel J. Kelly, Circuit Court Judge