

S T A T E O F M I C H I G A N
IN THE EIGHTEENTH CIRCUIT COURT FOR THE COUNTY OF BAY

ALFRED H. KLOHA,

Appellant,

v.

File No. 96-4031-AE-B

NOTEBAERT CONSTRUCTION and
MICHIGAN EMPLOYMENT SECURITY
COMMISSION,

Appellees.

OPINION AND ORDER AFFIRMING THE MICHIGAN EMPLOYMENT
SECURITY COMMISSION REFEREE'S OCTOBER 31, 1996 DECISION

RECITAL

This is an appeal from the October 31, 1996 Decision of the MESC Referee wherein the Referee affirmed two (2) MESC Redeterminations requiring appellant to repay benefits and to pay additional penalties. Appellee appeals the Referee's Decision on the basis that the MESC failed to offer substantial proof that appellant knowingly made a false statement or, with intent to defraud, failed to disclose a material fact, for the entire period that penalties were assessed. This is the Court's Opinion and Order AFFIRMING the Referee's Decision.

STATEMENT OF FACTS

Appellant [hereinafter "Mr. Kloha"] received unemployment benefits from January 22, 1995 through August 5, 1995 and again from June 2, 1996 through June 22, 1996.

On September 10, 1996, the MESC issued a Redetermination requiring Mr. Kloha to repay the amount of \$570.00 for the unemployment benefits he received from June 2, 1996 through June 22, 1996. Said Redetermination also required Mr. Kloha to pay an additional \$1,140.00 in penalties for misrepresenting his availability to work.

Similarly, on September 11, 1996, the MESC issued another Redetermination requiring Mr. Kloha to repay the amount of \$7,618.00 for the unemployment benefits he received from January 22, 1995 through August 5, 1995. Said Redetermination also required Mr. Kloha to pay an additional \$22,852.00 in penalties for misrepresenting his availability to work.

Mr. Kloha then requested a Referee hearing regarding both Redeterminations.

At the Referee hearing, Mr. Kloha invoked the Fifth Amendment and refused to testify. The MESC then introduced various evidence regarding Mr. Kloha's unavailability to work during both time periods.

More specifically, with reference to the time period of January 22, 1995 through August 5, 1995, the MESC introduced a note from Dr. Jaffe stating that Mr. Kloha had coronary bypass surgery and was unable to work from January 26, 1995 through July 31, 1995.

The MESC also introduced statements (i.e., certification forms) signed by Mr. Kloha stating that he was able and available to work for the following weeks:

- 1) The week ending January 28, 1995
- 2) The week ending February 18, 1995
- 3) The week ending February 25, 1995
- 4) The week ending March 4, 1995
- 5) The week ending March 11, 1995
- 6) The week ending March 18, 1995
- 7) The week ending March 25, 1995
- 8) The week ending April 1, 1995

- 9) The week ending April 8, 1995
- 10) The week ending May 13, 1995
- 11) The week ending May 13, 1995
- 12) The week ending May 20, 1995
- 13) The week ending May 27, 1995
- 14) The week ending June 3, 1995

No certification forms were provided for the weeks ending June 10, 1995 through August 5, 1995.

With reference to the time period of June 2, 1996 through June 22, 1996, the MESC introduced a note from Dr. Chan that stated Mr. Kloha was unable to work from June 7, 1996 through June 21, 1996 due to gall bladder surgery. The MESC did not produce any certification forms for the period of June 2, 1996 through June 22, 1996.

In addition, the MESC provided two signed statements from Mr. Kloha which were designated as Exhibit 7 and Exhibit 9.

Exhibit 7 states, in relevant part, as follows: "I was in St. Marys [sic] from 2/28/95 thru 3/5/95 for open heart surgery. I did draw [sic] benefits. I didn't have any money coming in and I need the money. I admit I made a mistake." Similarly, Exhibit 9 states, in relevant part, as follows: "...I was in Bay Medical Hospital for gall bladder surgery on 6/7/96. I was released from the hospital on 6/13/96. I had a return appt [sic] with the Doctor on 6/21/96 at which time he released me to return to work. Mrs. LaPan has shown me today that I drew benefits for 6/15/96 & 6/22/96 when I should not have. The MARVIN system is new and I made a mistake with the weeks. I thought that I was claiming other weeks."

After the hearing, the Referee issued his Decision on October 31, 1996 wherein he affirmed both Redeterminations and found Mr. Kloha liable for both the restitution and penalty amounts.

Following the issuance of the Referee's Decision, Mr. Kloha and

the employer, Notebaert Constructions, stipulated to bypass the MESC Board of Review and to appeal the Referee's Decision directly to this Court. It is this appeal which is presently before the Court.

DISCUSSION

In this appeal, Mr. Kloha is not contesting the Referee's finding that he owes restitution in the amount of \$8,188 for the two time periods at issue. Rather, Mr. Kloha is appealing the Referee's finding that he is liable for the penalties assessed for the entire length of both time periods. In support of this appeal, Mr. Kloha contends that the MESC failed to offer substantial proof of his knowingly making a false statement or, with intent to defraud, of his failure to disclose a material fact, for the entire period that penalties were assessed.

This Court has reviewed the entire record on appeal, as well as the relevant pleadings, court rules statutes and caselaw involved in this matter. As a result thereof, this Court finds and holds that the Referee's Decision regarding the assessment of penalties against Mr. Kloha for the entire length of both time periods is supported by competent, material and substantial evidence on the whole record. This conclusion is based upon several factors. Before addressing those factors, however, this Court believes a brief discussion regarding the applicable standard of review is in order.

To begin, it must be remembered that a Circuit Court's review of an MESC Referee or Board of Review's Decision is limited. Indeed, MCLA 421.38(1) specifically states that, "the court may reverse [such] 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 substan-

tial evidence on the whole record." See also, Trumbles Rent-L-Center v. MESC, 197 Mich App 229 (1992); Chrysler Corp. v. Sellers, 105 Mich App 715, 720 (1981).

"Substantial evidence" is that evidence which reasonable minds would accept as adequate to support a decision. It is more than a mere scintilla but may be less than a preponderance of the evidence. In re Kurzyniec Estate, 207 Mich App 531, 537 (1994). If the record is equivocal, the decision must be affirmed. Broyles v. Aeroquip Co., 176 Mich App 175 (1989).

Furthermore, if there is no dispute as to the underlying facts, questions presented on appeal are to be treated as matters of law. Chrysler Corp. v. Sellers, supra.

Finally, in a case such as the one at bar, the MESC has the burden of proof to establish that the claimant knowingly made a false statement or, with intent to defraud, failed to disclose a material fact in order to obtain unemployment benefits.

Keeping the above-cited standards in mind, this Court will now address the reasons why the Referee's Decision must be affirmed.

An individual is eligible to receive unemployment benefits only if he/she is able and available to perform suitable full-time work. MCLA 421.28(1)(c). In the case at bar, it is undisputed that Mr. Kloha was not "able and available" to perform suitable full-time work during the period of January 22, 1995 through August 5, 1995 due to open heart surgery. It is further undisputed that Mr. Kloha was not "able and available" to perform suitable full-time work during the period of June 2, 1996 through June 22, 1996 due to gall bladder surgery.

As a result of the foregoing, the only issue before this Court is

whether the Referee's Decision affirming the imposition of penalties under MCLA 421.54(b) for the entire length of both benefit periods is contrary to law and/or not supported by competent, material, and substantial evidence on the whole record.

MCLA 421.54(b) deals with the imposition of penalties and basically states that if a claimant makes a false statement or representation knowing it to be false, or knowingly and willfully with intent to defraud fails to disclose a material fact, to obtain or increase a benefit or other payment under the Act, then damages may be assessed. Specifically, if the amount fraudulently obtained was under \$1,000.00, the MESC may recover the amount obtained plus damages equal to twice the amount. MCLA 421.54(b)(i). If the amount fraudulently obtained was over \$1,000.00, the MESC may recover the amount obtained plus damages equal to three-times the amount. MCLA 421.54(b)(ii).

In the case at bar, Mr. Kloha was ordered to pay restitution and damages for the entire length of both time periods pursuant to MCLA 421.54(b). Specifically, with reference to the time period of January 22, 1995 through August 5, 1995, Mr. Kloha was ordered to pay restitution in the amount of \$7,618 and damages in the amount of \$22,852. With reference to the time period of June 2, 1996 through June 22, 1996, Mr. Kloha was ordered to pay restitution in the amount of \$570 and damages in the amount of \$1,140.

It is Mr. Kloha's contention that the Referee erred in assessing damages for the entire length of both time periods because the MESC failed to offer substantial proof that he knowingly made a false statement or, with intent to defraud, failed to disclose a material fact. In support of this contention, Mr. Kloha states as follows:

". . . The evidence introduced by the MESC relates to six forms, each of which purport to certify that the claimant was available for work and was seeking work in the immediately preceding two week period. Thus, the MESC has introduced evidence of the Claimant knowingly making a false statement, or with intent to defraud, failing to disclose a material fact to obtain benefits, for only 12 of the 31 weeks alleged. There was no evidence in the record upon which the Referee could affirm the Redeterminations which assessed the penalties levied against the Claimant for the remaining 19 of the 31 weeks alleged." Appellant's Brief at p.5.

It should be noted that the "six forms" mentioned above refer to "Continued Certification by Mail" forms signed by Mr. Kloha which state that he was able and available to perform suitable full time work.

Mr. Kloha further contends as follows:

"Neither the 'Continued Certification by Mail' forms presented by the MESC, nor the statement signed by Mr. Kloha, Exhibit 7, offer substantial evidence upon which the Referee could affirm the Redetermination for the entire period of January 22, 1995 to August 5, 1995. While restitution of the benefits is not contested, the MESC has failed to show that Mr. Kloha knowingly made a false statement or, with intent to defraud, failed to disclose a material fact for the weeks for which no 'Certifications' or any other evidence was offered. There is nothing in the record that gives any indication whatsoever of what statements or disclosures were made by the Claimant during the remaining weeks for which evidence was not introduced. The MESC has failed to substantially meet its burden of proof for these remaining weeks."

Apparently, Mr. Kloha's argument is two-fold. First, Mr. Kloha is arguing that even though the MESC produced several continuing certification forms which were signed by him and which stated he was able and available for work when, in fact, he was not and he knew he was not able and available for work, said forms do not prove that he knowingly made a false statement or failed to disclose a material fact regarding his ability and availability for work. Secondly, Mr. Kloha is arguing that penalties can not be assessed for any of the weeks where no continuing certification forms signed by him were produced by the MESC.

Unfortunately for Mr. Kloha, neither of these two arguments, either separately or collectively, justify a reversal of the Referee's Decision regarding the assessment of penalties.

First of all, with reference to the continuing certification forms signed by Mr. Kloha, said forms specifically state that Mr. Kloha was able and available for work during that week. Mr. Kloha signed these forms knowing that he was not able and available for work. In addition, Mr. Kloha signed a statement saying that he signed the forms because he had had open heart surgery, he didn't have any money coming in, and he needed the money. See, Exhibit 7.

Simply put, this Court is hard-pressed to imagine any evidence which would be more compelling for finding that Mr. Kloha knowingly made a false statement and/or knowingly failed to disclose a material fact. Indeed, said evidence is substantial, compelling and material. It is therefore clear to this Court that the Referee committed no error whatsoever when he found Mr. Kloha liable for damages for those weeks where the MESC produced a continuing certification form signed by Mr. Kloha.

Secondly, with reference to those weeks for which the MESC did not produce a continuing certification form signed by Mr. Kloha, the lack of such forms is not determinative. After all, there was plenty of other substantial, compelling and material evidence produced by the MESC. More specifically, and as correctly stated by the MESC in its brief:

"Even though the actual certifications for the last several weeks of the 1-22-95 through 8-5-95 period were not provided, the medical statement of his inability to work through July 31, 1995 and the confession that he received benefits through this period, coupled with several earlier statements where he certified that he was 'able

and available' gives rise to a permissible inference that he continued to falsely certify that he was able and available for work. Additionally, claimant has cited no cases or other law to warrant finding the decision to be 'contrary to law'.

"It is equally permissible to infer that by the following June of 1996 claimant was aware that he had to be able and available to work to draw benefits. While there is no signed certification for the three week period from June 2 through June 22, 1996, it can be inferred that claimant was aware he received benefits improperly while incapacitated due to [gall bladder] surgery, especially in the absence of any formal rebuttal." Appellee's Brief at p.4.

Clearly, in light of all the other substantial, compelling and material evidence produced by the MESC, the mere fact that the MESC did not produce continuing certification forms for all of the weeks that Mr. Kloha was penalized is not determinative. Simply put, there was more than enough evidence in the record to support the Referee's Decision to impose penalties for all of the weeks involved, regardless of whether or not there was a continuing certification form for each of those weeks. The Court specifically refers to and relies upon the note from Dr. Chan and Exhibit 9.

The note from Dr. Chan states that Mr. Kloha was unable to work from June 7, 1996 through June 21, 1996 due to gall bladder surgery. Similarly, Exhibit 9 is a statement signed by Mr. Kloha which states, in relevant part, as follows: "...I was in Bay Medical Hospital for gall bladder surgery on 6/7/96. I was released from the hospital on 6/13/96. I had a return appt [sic] with the Doctor on 6/21/96 at which time he released me to return to work. * * *" It is this Court's opinion that these two pieces of evidence constitute competent, material and substantial evidence upon which the Referee could rely in finding Mr. Kloha liable for damages for the period of June 2, 1996 through June 22, 1996.

Furthermore, and perhaps more importantly, it must be remembered that for the period of June 2, 1996 through June 22, 1996, Mr. Kloha was filing his claim telephonically via the MESC's new MARVIN System. The MARVIN System replaced the continuing certification form system. Thus, there would not have been any continuing certification forms signed by Mr. Kloha for the period of June 2, 1996 through June 22, 1996 which could have been produced by the MESC.

Finally, this Court is not persuaded by Mr. Kloha's statement, contained in Exhibit 9, wherein he claims that "Mrs. LaPan has shown me today that I drew benefits for 6/15/96 & 6/22/96 when I should not have. The MARVIN system is new and I made a mistake with the weeks. I thought that I was claiming other weeks." The Court is not persuaded by this statement because the record indicates that such a mistake would have resulted in Mr. Kloha not receiving a check. The Court specifically refers to and relies upon pages 45 through 46 of the record on appeal which states, in relevant part, as follows:

Q: Okay. Is it possible to make a mistake in entering information into the MARVIN System?

A: (By Mrs. LaPan) No. Because MARVIN specifically asks you what weeks you are claiming.

Q: And how do you respond? Do you respond verbally?

A: No. By key tone -- touch tone telephone. One for yes. Nine for no. And it repeats that.

Q: All right. But you're saying that it's not possible to punch the wrong button when you're putting information into MARVIN?

A: If you punch the wrong button the you don't get an unemployment check.

Q: All right. What kind of information do you punch into MARVIN?

A: MARVIN asks you, you are claiming weeks ending what-

ever it is, say 07-13 and 07-26. You punch one for yes. And MARVIN again, the interactive voice response, the computer asks you, you are claiming weeks ending September -- July the 13th and July the 20th, you punch in yes.

Then it starts asking the questions, were you able and available for work, indicate by yes, one for yes, nine for no.

Q: Okay.

A: Did you seek work, indicate one for yes, nine for no. So he had to have put one for yes, because of the fact he got paid for those weeks.

(Record on Appeal at pp. 45-46).

This portion of the record indicates that if a claimant accidentally pushes the wrong number, the claimant will not receive an unemployment check. In the present case, Mr. Kloha claims he pushed the wrong number yet he still received his unemployment checks. As a result, this Court believes that the Referee committed no error when he found that the MESC had satisfied its burden of establishing that Mr. Kloha made a false statement or, with intent to defraud, failed to disclose a material fact in order to obtain unemployment benefits.

For all of the aforementioned reasons, this Court is AFFIRMING the Referee's Decision and is dismissing this appeal, accordingly.

ORDER

NOW, THEREFORE, IT IS ORDERED that for all of the reasons herein stated, the MESC Referee's Decision be, and the same hereby is, AF-FIRMED and this appeal is therefore DISMISSED.

Dated: MAY 2, 1997


HONORABLE LAWRENCE M. BIELAWSKI
Circuit Court Judge

