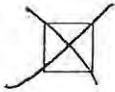


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CIRCUIT COURT ORDER/OPINION  
Stephine Gwin, Circuit Court CLERK

C, J

Appeal Docket No: 198091WA



Please enter and distribute along with Board of Review Decisions/Orders and Referee Decision/Orders.



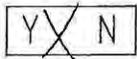
Board Member and assigned attorney to case (Individual Copies)



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Potential Digest Case

*affirm*

29(1)(i) Section of the Act

Date: 8/6, 2009

R. Douglas Daligga, Director  
MES - Board of Review

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

WINFIELD MACHINE SERVICES LLC,

Employer-Appellant,

Case No. 2009-0342-AE

vs.

DENNIS B. HAVENS and  
STATE OF MICHIGAN, DLEG  
UNEMPLOYMENT INSURANCE  
AGENCY,

Claimant – Appellees.

OPINION AND ORDER

Appellant timely filed a claim of appeal of the decision of the Michigan Employment Security Board of Review, dated October 17, 2008, setting aside its decision of May 7, 2008, in which it was found that Claimant/Appellee Dennis Havens was not disqualified from receiving unemployment benefits under MCL 421.29(1)(i).

I.

Claimant was employed by Appellant Winfield Machine, a small business located in Roseville, Michigan, from January, 1994 to October 17, 2007, as a truck driver and machine transporter. Claimant's employment was terminated on October 17, 2007 after the owner of Appellant company discovered that Claimant had allegedly stolen a hydraulic pump and sold it to a third party, Jason Shelton. Mr. Shelton, a former employee of Appellant company, recognized the pump, contacted the owner and returned the pump.

On October 27, 2007, Claimant applied for unemployment benefits. A determination was made on December 5, 2007 by the Michigan Unemployment Insurance Agency ("Agency") that

Claimant was qualified for unemployment benefits under MCL 421.29(1)(i). Appellant company timely appealed the Agency's decision; subsequently, on January 14, 2008, Administrative Law Judge Marshall C. Disner ("Referee") held a telephonic hearing on the appeal. The Referee reversed the December 5, 2007 determination by the Agency, and held that Claimant was *disqualified* for benefits pursuant to the theft provisions in MCL 421.29(1)(i).

Claimant appealed the Referee's decision to the Michigan Employment Security Board of Review ("Board"), which reviewed the entire record and found the Referee's decision in conformity with the facts as developed at the hearing. The Board further found that the Referee properly applied the law to the facts, and affirmed the Referee's decision in the Order issued May 7, 2008.

Claimant requested a rehearing. The Board, in its Order issued October 17, 2008, set aside its May 7, 2008 decision, reversed the January 14, 2008 decision of the Referee and held that Claimant was *not* disqualified for benefits under MCL 421.29(1)(i). Appellant company requested a rehearing of the Board's decision; the request was denied in an Order issued December 29, 2008. Consequently, Appellant company filed the instant claim of appeal.

## II.

An administrative agency decision is reviewed by the circuit court to determine whether the decision was authorized by law and supported by competent, material and substantial evidence on the whole record. MCL 421.38(1); *MEAPAC v Secretary of State*, 241 Mich App 432, 444; 616 NW2d 234 (2000). Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence. *Id.* On review of unemployment benefit cases, the circuit court may reverse the appeal board's decision when and only when that

decision is contrary to the great weight of the evidence. *Miller v FW Woolworth Co*, 359 Mich 342, 351; 102 NW2d 728 (1960). Because of the limited scope of review, the [Board's] action must be upheld if it is supported "by such evidence as a reasonable mind would accept as adequate to support the decision"; a preponderance of the evidence is not required. *Tenbusch v Department of Civil Service*, 172 Mich App 282, 292-293; 431 NW2d 485 (1988).

An appeal to the board of review from the findings of fact and decision of the referee or from a denial by the referee of a motion for rehearing or reopening, shall be a matter of right by an interested party. The board of review, on the basis of evidence previously submitted and additional evidence as it requires, shall affirm, modify, set aside, or reverse the findings of fact and decision of the referee or a denial by the referee of a motion for rehearing or reopening. MCL 421.34. The circuit court is not permitted to review board decisions de novo. *Grand Rapids Public Schools v Falkenstern*, 168 Mich App 529; 425 NW2d 128 (1988).

### III.

The Michigan Employment Security Act ("Act") requires that claimants be disqualified from receiving unemployment benefits for "theft connected with the individual's work." MCL 421.29(1)(i). The Act, however, fails to define "theft." In this instance, the Board determined that an element of theft was felonious intent, and Appellant company failed to establish that Claimant had acted with the requisite intent. The proofs demonstrate that Claimant did not know that he was not in proper possession of the hydraulic pump. Claimant testified that the pump had been given to him by Mr. Fackler, and Mr. Fackler testified that Claimant had no knowledge of the origin of the pump, and that the pump was among items given to Claimant that numbered over 200. No ownership was ever established by the Referee or the Board. Without ownership determination, it could not be proven that Appellant company was deprived of its alleged

property, thus there can be no disqualification of benefits as a matter of law under MCL 421.29(1)(i).

The Court notes that the Referee found the witnesses for both parties gave conflicting testimony, therefore, ownership could not be established. Some of the issues addressed, but unconfirmed, were how long the pump had been missing, where the pump had been kept while at Appellant company, policy and practices with respect to "community" versus "individual" tool boxes, and policies regarding employees taking tools or materials left on job sites. In the end, the Board determined that ownership of the pump was unclear, and Appellant company had failed to meet its burden of demonstrating Claimant's felonious intent. This Court is prohibited from substituting its judgment on the facts for that of an administrative tribunal, and will only reverse when it is contrary to law or not supported by competent, material, and substantial evidence on the whole record. *Williams v Arnold Cleaners Inc*, 25 Mich App 672; 181 NW2d 625 (1970). In the instant case, the Court is convinced that the Board's decision was supported by competent, material and substantial evidence on the whole record, and clearly conformed to the law.

IV.

Based on the foregoing, it is hereby

ORDERED the claim of appeal is DISMISSED; the Michigan Employment Security Board of Review's decision is AFFIRMED. This *Opinion and Order* resolves the last pending claim and closes this case. MCR 2.602(A)(3).

SO ORDERED.

DATED:

**PETER J. MACERONI**  
CIRCUIT JUDGE

JUL 13 2009  
Peter J. Maceroni,  
Circuit Judge

A TRUE COPY  
CARMELLA SABAUGH, COUNTY CLERK

BY: [Signature] Court Clerk