

6

CIRCUIT COURT CERTIFICATION
Nancy Peterson, Circuit Court

Appeal Docket No: 160 268 (e)

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

Board Member and assigned attorney to case

Other:

Referred

Potential Digest Case

38, 29 U(b) Section of the Act

Date: 1/12, 2004

RD

R. Douglas Daligga, Director
MES - Board of Review

PC *[initials]*
REP *[initials]*

Prepared by Nancy Peterson

FORM MESC 9512
(Rev. 5-80)

Department of Labor
UNEMPLOYMENT AGENCY
Legal Division

NOTICE OF DISPOSITION OF APPEAL

March 25, 2003

Appeal Docket No. B2001-09224-160268W

Court Docket No. 02-41720-AE

Claimant: David L. Carter

Employer: MLP MFG., INC.

Social Security No. 363-70-3466

Registration No. 1064597

Address: 637 Riordan Street

Address: P.O. Box 231

Muskegon, MI 49444-2230

Spring Lake, MI 49456-0231

CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

David L. Carter, Claimant-Appellant

v

MLP MFG., INC., Employer-Appellee
and

STATE OF MICHIGAN, BUREAU OF WORKERS' & UNEMPLOYMENT COMPENSATION

DISPOSITION AND REMARKS:

The Redetermination, ALJ, and Board of Review all found that the Claimant was ineligible for benefits due to misconduct based on three consecutive days of not showing up for work and not calling. The Claimant appealed to the Muskegon County Circuit Court. Both the Claimant and Employer were represented by counsel. The Agency did not file a brief or appear at argument.

The Muskegon County Circuit Court entered an Opinion Affirming the Board of Review Decision in an Order dated Feb. 19, 2003. The appeal period has now expired and neither party has filed an appeal. This case can be closed.

TO: Board of Review ATTN: Nancy

File

Branch Office No. 25



Thomas C. Johnson (29195)
Assistant Attorney General
Unemployment Division
(616) 356-0400

Appeal Docket No. B2001-09224-160268W

S.S. No. 363-70-3466

B.O. No. 025

Employer No. 1064597

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 14TH JUDICIAL CIRCUIT
MUSKEGON COUNTY

DAVID CARTER,
Appellant,

Court No. 02-41720-AE
HON. JAMES M. GRAVES, JR.

v

MLP MFG, INC. and STATE OF MICHIGAN, DEPARTMENT
OF CONSUMER & INDUSTRY SERVICES, BUREAU OF
WORKERS' & UNEMPLOYMENT COMPENSATION,
Appellees.

DWAINE C. SUTTON (P41967)
Attorney for Appellant

DANIEL R. MARTIN (P53532)
Attorney for Employer/Appellee

MIKE COX
Attorney General
THOMAS C. JOHNSON (P29195)
Assistant Attorney General
Attorneys for Appellee
Bureau of Workers' & Unemployment Compensation

ORDER AND OPINION

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 14TH JUDICIAL CIRCUIT
MUSKEGON COUNTY

AVID CARTER,

Appellant,

No. 02-41720-AE

v

HON. JAMES M. GRAVES, JR.

MLP MFG., INC. and STATE OF
MICHIGAN, DEPARTMENT OF
CONSUMER & INDUSTRY SERVICES,
BUREAU OF WORKERS' &
UNEMPLOYMENT COMPENSATION,
formerly known as the MESC and the
MICHIGAN UNEMPLOYMENT AGENCY,

Appellees.

Dwaine C. Sutton (P41967)
Attorney for Claimant/Appellant
2010 44th Street S.E.
Grand Rapids, MI 49508
(616) 455-6515

Daniel R. Martin (P53532)
Attorney for Employer/Appellee
3 Washington, Suite 200
Grand Haven, MI 49417-0454
(616) 842-3030

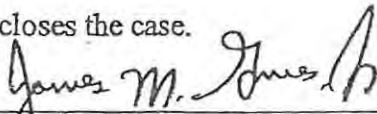
Thomas C. Johnson (P29195)
Attorney for Appellee Bureau of Workers'
& Unemployment Compensation
Michigan Department of Attorney General
Unemployment Division
350 Ottawa Ave., N.W., Suite 4-C
Grand Rapids, MI 49503
(616) 356-0400

ORDER AFFIRMING DECISION BY BOARD OF REVIEW

Appellant filed a claim of appeal of a June 28, 2002 Board of Review decision;

IT IS ORDERED that the June 28, 2002 Board of Review decision is affirmed and the appeal is dismissed.

This Order resolves the last pending claim and closes the case.



Hon. James M. Graves, Jr.
Circuit Judge
Muskegon County

Dated: FEBRUARY 19, 2003

STATE OF MICHIGAN
MUSKEGON COUNTY CIRCUIT COURT

DAVID CARTER,
Claimant-Appellant,

File No 02-41720-AE

OPINION

v

MLP MFG.,
Employer-Appellee,

and

MICHIGAN DEPARTMENT OF CONSUMER &
INDUSTRY SERVICES, BUREAU OF WORKERS
AND UNEMPLOYMENT COMPENSATION,

Appellee,

DEPARTMENT OF
ATTORNEY GENERAL

FEB 2 02003

AND RABIN

At a session of court held at the courthouse
in Muskegon, Michigan, on
February 19, 2003.

PRESENT: Honorable James M. Graves, Jr., Circuit Judge

Claimant-appellant, David Carter, appeals a decision of the Board of Review of the Bureau of Workers and Unemployment Compensation which denied claimant unemployment benefits due to disqualification for misconduct under MCL 421.29(1)(b). Claimant also asserts that the Board of Review erred in denying claimant's motion to reopen when, in violation of the rules, claimant's attorney, who had submitted an appearance, was not given notice of the denial of request for rehearing.

As to this latter issue, the record establishes that the administrative law judge issued an opinion dated July 20, 2001 which affirmed an agency determination denying

claimant unemployment benefits because of misconduct. Claimant's agent, Allen Burkall, filed a timely appeal to the Board of Review on August 13, 2001. The Board of Review issued an opinion and order on November 9, 2001 which affirmed the decision of the ALJ. On December 10, 2001, claimant's counsel filed his appearance and a timely request for a rehearing of the November 9, 2001 decision with the Board of Review. The Board issued an order denying the application for rehearing on January 24, 2002, and indicated that the order would become final unless a written appeal was filed with the circuit court on or before February 25, 2002. However, the Board of Review failed to send a copy of the January 24, 2002 order to claimant's attorney. Consequently, on April 29, 2002, claimant's attorney moved the Board to reopen the matter so that claimant could file a timely appeal with the circuit court. The Board denied the application for reopening and review in an order dated June 28, 2002. In that order, the Board acknowledged sending a copy of the January 24, 2002 order only to claimant and claimant's agent, Mr. Burkall, but not to claimant's attorney. On July 2, 2002, claimant filed the instant appeal to the circuit court.

The Court finds that the Board of Review erred in failing to send claimant's counsel a copy of the January 24, 2002 order. Administrative Rule 421.1101(1) provides in part: "A decision, notice, or order shall be served on each party and on the agent or attorney of record of each party ...". The record establishes that claimant's agent, Mr. Burkall, never withdrew his appearance, and that a copy of the January 24, 2002 order was sent to both the claimant and to Mr. Burkall. The Board and the employer argue that the disjunctive "or" in the rule means that, when both an agent and an attorney have filed an appearance, service of the order on just one of them fulfills the

requirements of the rule.


The Court disagrees. "In construing administrative rules, courts apply principles of statutory construction." AG v LS Wood Preserving, Inc., 199 Mich App 149, 155 (1993). "There is, however, an exception to this fundamental rule of statutory construction that arises when a literal reading of the statutory language would produce an absurd and obviously unjust result and would be clearly inconsistent with the purposes and policies of the act in question." The purpose and policy of the aforementioned rule is to provide notice. A literal reading of the rule as advocated by the Board and employer would produce an unjust result as to the facts in this case. Regardless of the fact that Mr. Burkall had never withdrawn his appearance, claimant's counsel was entitled to a copy of the January 24, 2002 order which denied the motion which was clearly filed by claimant's counsel, and not Mr. Burkall, on December 10, 2001. In light of the failure of the Board to provide claimant's counsel with notice of the January 24, 2002 order, the Court finds that the 30-day appeal period of MCL 421.38(1) was tolled until the Board of Review issued its final order on June 28, 2002. Thus, the Court finds that the July 2, 2002 filing of this appeal was timely, and the Court will adjudicate the appeal on the merits.

In his opinion dated July 20, 2001, the ALJ found that claimant had failed to call in to his employer regarding his absences on May 8, 9, and 10, 2001, and that his absences were not due to circumstances beyond his control. Thus, the ALJ found claimant to be disqualified for benefits for misconduct as provided by MCL 421.29(b). The Board of Review affirmed. After a review of the record and the briefs of both parties, the Court finds that the ALJ's decision was not contrary to the provisions of MCL

421.38(a), i.e., the decision was not contrary to law and was in fact supported by competent, material, and substantial evidence on the whole record. The Court gives great deference to the ALJ's determination of the credibility of the witnesses. Kotmar v Liquor Control Comm, 207 Mich App 687, 689 (1994). The ALJ apparently believed the testimony of claimant's supervisor, Mr. Quinn. In so doing, he found that claimant had engaged in three "no-call, no-show" absences which constitutes "misconduct" within the meaning of MCL 421.29(1) and Carter v Employment Security Comm, 364 Mich 538, 541 (1961).

Affirmed.

Dated: February 18, 2003.



Hon. James M. Graves, Jr., (P24233)
14th Circuit Court Judge

- cc. Dwaine G. Sutton, 2010 44th Street SE, Grand Rapids, MI 49508
Daniel R. Martian, P.O. Box 454, Grand Haven, MI 49417
Thomas C. Johnson, 350 Ottawa NW, Suite 4C, Grand Rapids, MI 49503

PROOF OF SERVICE

Service of a copy of this document was made this date upon all parties who have appeared or their attorneys of record by delivery or mail pursuant to MCR 2.107(C). I declare that the statements above are true to the best of my information and belief.

Date: 2/19/03 Signed: [Signature]
via: first class mail hand delivery fax
 other