

COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
EIGHTH DIVISION  
CIVIL BRANCH  
NO. 13-CI-3988



TREE TOP LANDSCAPING,  
D/B/A VESICO'S SPORTS

PETITIONERS

v.

OPINION and ORDER

GENE SMITH

RESPONDENT

\*\*\*\*\*

This matter has come before the Court pursuant to KRS 341.450 on appeal of an Order entered September 6, 2013 by the Kentucky Unemployment Insurance Commission ("KUIC"). The Court having taken it under advisement and having duly considered the motions and responses, the arguments of counsel, and the applicable law:

It is hereby **ORDERED** that the KUIC's Order is **AFFIRMED**.

FACTS

Gene Smith was hired by Vesico's Sportfields ("VSF") around May 7, 2012 as a general laborer, which included performing duties such as shoveling and laying pipes. The record demonstrates that VSF believed Mr. Smith to be an undependable employee. He refused to work unless expressly told what to do, and even after a year of

employment he had to constantly be provided with step-by-step instructions. VSF alleges that Mr. Smith was warned he needed to take more of an initiative, yet repeatedly failed to adequately perform his job functions.

After almost one (1) year of employment, the president of VSF had a discussion with Smith, after witnessing him standing around on the job. Mr. Smith explained that he “was waiting to see what they wanted me to do.” (Employer’s Statement filed on June 27, 2013 and Claimant Statement filed on June 13, 2013). Finally, on June 5, 2013, Kevin Gordon, VSF’s foreman on the job to which Smith was then assigned, informed Smith that they would not need him to work the next day. While Smith inquired if he should look for another job, VSF merely informed Smith that that may be a good idea, but it was up to Smith to make that decision. Id.

Subsequently, on July 16, 2013, the KUIC made the initial findings that Mr. Smith qualified for benefits because he was discharged for failing to adequately perform job functions. On July 29, 2013, VSF appealed the decision to a referee, however, Mr. Smith and VSF’s President failed to attend the hearing. The record indicates that VSF’s President was out of the office and not feeling well.

Later, on August 15, 2012, the Referee affirmed the decision that Smith qualified for benefits, finding that he was discharged for reasons other than misconduct. The same day, VSF appealed the Referee’s decision to the full KUIC and requested a rehearing of the matter. On September 6, 2013, the full KUIC affirmed the Referee’s decision based upon its finding that VSF set forth “no reasons ... to constitute good

cause for the failure to attend the scheduled hearing,” and affirmed the decision of the referee. (September 6, 2013 Order of the KUIC).

## **DISCUSSION**

### **I. Standard of Review**

The standard of review for a decision of the KUIC is the same as other administrative actions. Kentucky Unemployment Ins. Com’n v. Cecil, 381 S.W.3d 238, 245 (Ky. 2012). Thus, the standard to be applied in this case is whether the decision was arbitrary or clearly erroneous. Kentucky Unemployment Ins. Com’n v. Landmark Community Newspapers of Kentucky, Inc. 91 S.W.3d 575, 579 (Ky. 2002). “Arbitrary or clearly erroneous” is defined as being not supported by substantial evidence. Id. “Substantial evidence” is “evidence which has sufficient probative value to induce conviction in the minds of reasonable people.” Kentucky Unemployment Ins. Com’n v. Cecil, 381 S.W.3d at 246.

### **II. The Court is Limited to Decide Only Upon the Issues in the Record Certified by KUIC**

Pursuant to KRS 341.450(3): Such actions, and the questions so certified, shall be heard by the court in a summary manner upon the record certified by the commission. The court does not have the authority to consider evidence outside the record or to incorporate new proof into the record. Travelodge International Inc. v. Kentucky Unemployment Insurance Commission, 710 S.W.2d 232 (Ky.App. 1986). A reviewing

court decides unemployment cases based on the certified record from the Commission.  
Id.

Here, VSF argues that Smith is disqualified from receiving unemployment compensation benefits because he was discharged for misconduct. However, there were no factual findings made by the Commission nor did the Commission's Order discuss whether the claimant was discharged for misconduct. Because the employer failed to appear at the referee hearing, there was no evidence submitted concerning the misconduct issue. Therefore, this particular issue is not before the Court to rule upon.

### **III. The Commission properly applied the law**

Under 787 KAR 1:110 Section 1(5)(a)2, a referee is required to affirm a Notice of Determination when a party, that has appealed, fails to appear at the administrative hearing. Discretion is not allowed for anything other than affirming the Notice of Hearing.

Here, a Notice of Determination was issued which awarded unemployment benefits to Mr. Smith. After the employer appealed the decision, a referee hearing was scheduled for August 12, 2013. A Notice of Administrative Hearing was mailed to the employer on August 2, 2013 and the employer still failed to attend the hearing. (Administrative Record p. 39).

According to 787 KAR 1:110 Section 3(2)(c)1-4, there can be good cause for why a party who fails to appear at a hearing, should be granted another. Yet, the employer

argues that the examples of good cause set out in 787 KAR 1:110 Section 3(2)(c)1-4 are not the only circumstances that could constitute good cause.

However, the employer's argument is not convincing. The Commission's construction of KRS Chapter 341 and its implementing regulations at 787 KAR 1:110 are entitled to deference in this case. *See Metzinger v. Kentucky Retirement Sys.*, 299 S.W.3d 541, 545 (Ky. 2009). Based upon this, traditional tools of statutory interpretation cannot resolve the ambiguity.

Moreover, nothing in the record indicates there was a medical emergency which required Appellant to miss the hearing. Simply, he stated that he had "been out of the office and not feeling well and missed the notice." (Administrative Record p. 45). Ten (10) days elapsed between notice of the hearing and the hearing itself. The employer did not explain how being sick would have prevented it from viewing the notice of hearing with a 10 day time span. Accordingly, the employer had ample opportunity to have viewed the notice of the hearing and the record does not indicate his absence was due to an emergency.

### **CONCLUSION**

For the foregoing reasons, it is clear that the KUIC's decision must be upheld. It is not the duty of the court to substitute its own judgment. Consequently, the Commission's decision is supported by substantial evidence. Thus, it is hereby **ORDERED** that the Commission's Order is **SUSTAINED**.

Entered this 19 day of May 2015.

/S/ THOMAS L. CLARK  
A TRUE COPY  
ATTEST, VINCENT RIGGS, CLERK  
FAYETTE CIRCUIT COURT

BY *Thomas Clark* D.C.

Honorable Thomas Clark  
Fayette Circuit Court, 8<sup>th</sup> Division

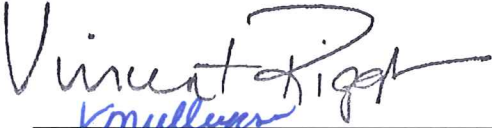
CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing has been mailed on  
MAY 19 2015 to the following:

Hon. Patrick Shirley  
Office of Legal and legislative Services  
500 Metro Street  
Capital Plaza Tower - 3<sup>rd</sup> Floor  
Frankfort, KY 40601

Hon. Carroll M. Redford, III  
271 West Short Street, Suite 600  
Lexington, KY 40507

Gene Smith  
15837 Highway 27 South  
Waynesburg, KY 40489

  
Clerk of Fayette Circuit Court