

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOHN P. WELMS)	CASE NO. CV 14 836252
)	
Appellant,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JUDGMENT ENTRY REVERSING</u>
)	<u>THE OHIO UNEMPLOYMENT</u>
ADMIN. OF THE UNEMPLOYMENT)	<u>COMPENSATION REVIEW</u>
COMPENSATION REVIEW)	<u>COMMISSION'S DECISIONS</u>
COMMISSION, <i>et al.</i>)	<u>DISALLOWING BENEFITS</u>
)	
Appellees.)	

John P. O'Donnell, J.:

This is an appeal by John Welms from three decisions of the Ohio unemployment compensation review commission that denied his request to review determinations by the Ohio Department of Job and Family Services that he was not entitled to unemployment benefits. Welms filed a merit brief. The ODJFS filed a brief defending its position and Welms filed a reply brief. The record here also includes the transcripts of the proceedings and testimony at the administrative level. I have considered all of that evidence and the briefs and this judgment entry follows.

STATEMENT OF FACTS

John Welms was the owner and president of Arrow Landscaping and Construction, Inc. During landscaping season – the spring through the fall – he was also a paid employee, but he did not work during the winter and filed applications on December 11, 2007 and November 8, 2010 for unemployment compensation benefits. Those applications were allowed and benefits were paid.

After the last of the benefits was paid the ODJFS received an April 2, 2010 email from "Lax Smith" saying that Welms worked during the winter months at the same time he got unemployment compensation. The email claimed that Welms made several thousand dollars each month by performing snowplowing services for both personal and commercial accounts, including an account with K&D Group. The email further alleged that Welms was paid by check for all of this work.

After getting this information the ODJFS undertook the semblance of an investigation. On August 1, 2011 Loretta D. Jones, an investigator from the ODJFS, sent a letter to Welms at 312 Richmond Road, Richmond Heights. She used that address despite information in her file showing Arrow's address as 308 Richmond Road. The letter informed him that the department was "conducting a review of your business records" and asked him to be at his place of business – 312 Richmond Road, as far as Jones was concerned – on August 16 at 9:00 a.m. for a record audit. Welms did not appear at the set time.

Two years later, on August 14, 2013, Dave Lakatos, another ODJFS investigator, sent K&D Group a request for wage information for Arrow Landscaping and Construction, Inc. Karen Lauber of K&D replied by producing a copy of the company's detailed check register showing payments to Arrow throughout the year. Lauber explained that the monthly payments to Arrow were for contracted landscaping services and not weekly wages. After obtaining this information, Lakatos on October 31, 2013 sent another letter to Welms at 312 Richmond asking him to appear at the ODJFS's Richmond Heights office on November 18 for a record audit. Once again Welms did not appear.

On December 12, 2013 the ODJFS emailed Welms at arrow2627@hotmail.com with a notice that the department's records showed that he claimed unemployment benefits he may not have been entitled to and asking him to provide information. Welms did not respond.

On December 31, 2013 the ODJFS issued determinations¹ finding that Welms had been overpaid unemployment benefits because he had not met the definition of "unemployed" for the pertinent time periods. The department ordered Welms to repay a total of \$9,075.00 in unemployment compensation benefits. Once again, the determinations were sent to 312 Richmond Road.

Welms appealed the determinations on March 28, 2014. By then the administrative appeal deadline of January 21, 2014 had passed. For the lateness of the appeal, Welms explained that a March 18 collection letter from the attorney general's office was the first communication he received about this matter because he had not resided at the Richmond Heights address for two years and he no longer used the Hotmail address. On the merits, Wells said that Arrow paid him as an employee every other week during the summer months and he would go on unemployment during the winter months. He asserted that he never received a paycheck during the time he got unemployment compensation.

The ODJFS denied his appeal on the basis that he had missed the appeal deadline. That decision was sent to Welms's correct address in Euclid. Welms appealed that decision on May 9, 2014 and the ODJFS transferred jurisdiction to the unemployment compensation review commission under R.C. 4141.281.

After receiving evidence the commission found that Welms never had notice of the ODJFS's determination before the appeal deadline and that he did file his March 2014 appeal

¹ The determination numbers are 226895299-1, 226895300-1, and 226895372-1.

within 21 days of actual notice. So the appeal was allowed as timely and a hearing on the merits was held on July 28, 2014.

At the hearing – conducted by telephone – Lakatos testified that the only person he spoke with during the investigation was Karen Lauber,² and the determination that Welms was not unemployed was based solely on the information he received from her³ showing that K&D made payments to Arrow on contract.⁴ He testified that he found no evidence indicating Welms personally received a single dollar during any of the benefit periods.⁵ Lakatos explained that the November 2013 audit was intended to allow him to review records of Arrow and Welms to ascertain whether Welms was unemployed.⁶

Welms testified that the source of the email that started the investigation was a “scorned ex-girlfriend” who was in jail for fraud.⁷ He said that during the months he applied for and received unemployment compensation benefits he was not working for Arrow or any other employer.⁸ He described the contract with K&D Group as a 12-month agreement to provide landscaping and snowplow services.⁹ But because Arrow did not do snowplowing he subcontracted that portion of the work, at no profit to his company.¹⁰

Based upon all of this evidence the hearing officer affirmed the ODJFS’s three determinations that Welms was employed at the time he received benefits and supported her decision with the following findings of fact:

An anonymous tip to the ODJFS alleged that the claimant was self-employed and filing for benefits. The ODJFS conducted an

² Transcript of testimony, page 10.

³ *Id.* at 14.

⁴ *Id.* at 10.

⁵ *Id.* at 11.

⁶ *Id.* at 12.

⁷ *Id.* at 16.

⁸ *Id.* at 17.

⁹ *Id.* at 18.

¹⁰ *Id.*

investigation. Claimant was notified that the ODJFS was requesting an in person interview on November 13, 2013. The claimant did not appear at the designated location. The ODJFS determined that the claimant's business Arrow Landscape & Construction Inc had an annual contract with K&D Group to provide ground services to a complex. Claimant (*sic*) issued the finding that the employee-employer relationship was never severed.

The hearing officer concluded that Welms "has not established that he did not engage in employment year round." The hearing officer memorialized her conclusions in three nearly identical decisions, one for each of the three redeterminations made by the ODJFS. Those three decisions of the hearing officer, mailed August 27, 2014, are as follows: the commission's docket number H2014-9613 for \$710.00 in unemployment benefits; number H2014-9614 for \$9,702.00; and number H2014-9615 for \$9,075.00.

Welms's subsequent request for a review by the entire commission of the hearing officer's decision was denied and he filed this lawsuit.

LAW AND ANALYSIS

Welms filed this appeal of those three decisions pursuant to Ohio Revised Code § 4141.28. Section 4141.282(H) states as follows:

The court shall hear the appeal on the certified record provided by the commission. If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.

Welms argues that the commission's decisions denying his requests to review the hearing officer's decisions and the hearing officer's decision itself that he was not unemployed and thus not eligible for benefits were both unlawful, unreasonable and against the manifest weight of the evidence.

The hearing officer's findings of fact cite only to 1) the email from Lax Smith, 2) Welms's failure to appear for the November 2013 audit and 3) the annual contract between Arrow and K&D Group.

As to the first piece of evidence, Lakatos testified that he never tried to find Lax Smith because her email had no bearing on the investigation.¹¹ Smith was never questioned at the investigation stage and never testified at a hearing. While her email may have justified the department in looking into whether Welms was really employed during times he claimed unemployment, the email is not substantive evidence of anything, and it was unreasonable for the hearing officer to rely on it to conclude Welms was working.

The second piece of evidence is Welms's failure to appear at Lakatos's office for the November 2013 audit. The department's investigation was civil in nature, not criminal, so a refusal by Welms to cooperate could be used to justify an inference that he was conscious of wrongdoing. But Welms testified that Lakatos's attempts to contact him were sent to an old street address and an email address he no longer used.¹² The commission deemed those same assertions as credible to the point of allowing the late appeal on the merits. It is inconsistent for the same fact finder – the commission – to on the one hand find that Welms could file a late appeal because he did not get anything sent to 312 Richmond Road, but on the other hand make an adverse inference by his failure to go to an audit he didn't know about. It was thus unreasonable for the hearing officer to use evidence of the failure to cooperate in November 2013 as the second pillar supporting her decision.

That leaves as probative evidence only the final fact considered by the hearing officer: the contract between Arrow and K&D Group. Initially, it is worth noting that the contract itself

¹¹ *Id.* at 10.

¹² *Id.* at 19.

was never reviewed by the hearing officer. That hole in the evidence doesn't necessarily favor either side, but it does leave Welms's testimony as the only evidence of the terms of the contract and the reasons for the year-round payments. The hearing officer was within her discretion to reject Welms's testimony as not credible but, if she did, she would be left with nothing on which to base inferences that 1) the payments were for services done during the months that Welms claimed unemployment compensation and 2) the money was passed on to him in the form of wages. In short, the single fact of an annual contract between Arrow and K&D Group is not nearly sufficient to support a finding that Welms was not unemployed.

The hearing officer was charged with considering the evidence and deciding whether Welms was unemployed – i.e., performed no services and received no wages – at the time he filed his applications for benefits and that he met the other requirements of R.C. 4141.01. The evidence she relied on in concluding that he was not unemployed is patently insufficient to make such a finding. That is true even if she disregarded Welms's own testimony as not credible because she had no countervailing evidence. Accordingly, her decision was unreasonable. Moreover, considering that the commission found Welms to be credible about not getting any of the ODJFS's communications, the hearing officer's decision is also against the manifest weight of the evidence. The only evidence in the record is that Welms performed no services and received no wages: the exact evidence the ODJFS had when it approved Welms's applications for unemployment compensation.

CONCLUSION

For all of the reasons given here, the unemployment compensation review commission's decisions in docket numbers H-2014009613, H-20149614 and H-2014009615 finding overpayments to Welms of \$710.00, \$9,702.00 and \$9,075.00, respectively, are reversed, and the redeterminations of the ODJFS ordering Welms to repay those amounts are vacated.

IT IS SO ORDERED:



Judge John P. O'Donnell
5/31/2017

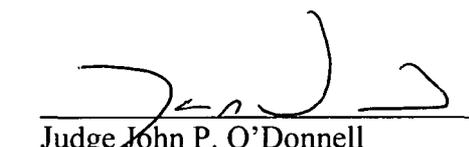
May 31, 2017
Date

SERVICE

A copy of this journal entry was sent by email on May 31, 2017 to the following:

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Judge John P. O'Donnell
5/31/2017