

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001010-MR

ASHLAND HOSPITAL CORPORATION,  
D/B/A KING'S DAUGHTERS MEDICAL  
CENTER

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 03-CI-00964

COMMONWEALTH OF KENTUCKY,  
KENTUCKY UNEMPLOYMENT  
INSURANCE COMMISSION; BOBBI B.  
SMYSER

APPELLEES

### OPINION REVERSING AND REMANDING

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BEFORE: HOWARD<sup>1</sup> AND WINE, JUDGES; BUCKINGHAM,<sup>2</sup> SENIOR JUDGE.

WINE, JUDGE: Ashland Hospital Corporation, d/b/a King's Daughters Medical Center (KDMC), appeals from a judgment of the Boyd Circuit Court affirming a decision of the

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<sup>1</sup> Judge James I. Howard concurred in this opinion prior to the expiration of his term of office on December 6, 2007. Release of the opinion was delayed by administrative handling.

<sup>2</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Kentucky Unemployment Insurance Commission (KUIC) that awarded unemployment insurance benefits to Bobbi B. Smyser. Because KUIC's findings of fact are not supported by substantial evidence and as it misapplied the law to those facts, we reverse and remand for further hearing.

The facts are straightforward and uncomplicated. Smyser was an employee of KDMC from August 1994 until she was fired for misconduct in June 2002. At the time of her termination, Smyser was employed as an Intensive Care Unit nurse, working approximately 36 hours per week at \$21.19 per hour.

The first incident of misconduct occurred in December 2001. KDMC claims that Smyser made an inappropriate comment to a family member of a patient. Smyser admitted her misconduct in this regard. As a result of the incident, Smyser was given a disciplinary suspension and placed on "decision making leave." Following the disciplinary action, Smyser was required to "maintain fully acceptable performance in every area of [her] job, whether related to the [inappropriate comment] issue or not, since any further issues [requiring] disciplinary action" would establish sufficient cause for terminating her employment.

In June 2002, another incident occurred involving Smyser and a patient's family members. Smyser requested that the family members leave the room of a terminally ill patient. The family members complained Smyser was rude to them and did not answer their questions. After the incident, the family complained to Smyser's supervisor, Mary Adams. Adams stated that she requested Smyser apologize to the

family, but Smyser refused to do so because she felt that they had overacted. Adams also claims Smyser refused her order after the incident to move to another station farther from the family members. Further, Adams testified the family members later complained that Smyser again engaged in misconduct toward them.

Smyser filed a claim for unemployment benefits, which was denied.

Following a hearing in August 2002, the referee determined that Smyser was disqualified from receiving benefits and affirmed the denial. Smyser appealed the referee's decision to KUIC, which in turn reversed that decision and awarded benefits to Smyser. When KUIC reversed the referee, the commission found: "Although hearsay testimony is admissible in administrative hearings, the direct, sworn testimony of the claimant must be assigned greater weight than the hearsay testimony offered by the employer." In September 2003, KDMC filed an appeal of the KUIC decision in the Boyd Circuit Court pursuant to Kentucky Revised Statute (KRS) 341.450. In October 2003, the court remanded the case to the KUIC for a new hearing before another referee because the audiotape recording from the first referee hearing had been damaged and was inaudible.

In March 2004, a different referee conducted a new hearing. KDMC introduced testimony from Adams, who testified as to what she claimed the patient's family told her and what actions Smyser took in her presence, and from Elizabeth Loan, an ICU nurse, who testified that she was aware that the patient's family was upset with Smyser and that she could hear Smyser tapping her pen while in the hallway, although

Loan was in the patient's room. Smyser testified on her own behalf. During the hearing, the referee stated hearsay evidence "[is] not going to be any amount of weight at all."

The second referee likewise awarded benefits to Smyser. In April 2004, the KUIC entered its order affirming the referee's decision. The commission adopted the referee's report which included the following statement:

The evidence regarding the claimant was hearsay evidence because it was based on the account of the patient's family members. Hearsay is admissible but cannot be assigned greater weight than the claimant's direct, sworn testimony to the contrary.

Shortly thereafter, KDMC filed an amended verified complaint with the Boyd Circuit Court. In April 2006, the court affirmed KUIC's order, finding there was substantial evidence to support KUIC and stating:

[KDMC] offered hearsay testimony of its Director of Intensive Care in support of the disciplinary action taken against the claimant, Bobbi Smyser. While the employer also offered the testimony of a second witness, such witness did not witness nor was able to substantiate misbehavior by the claimant. In Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406 (Ky.App. 1994) the Kentucky Court of Appeals stated: "In weighing the substantiality of the evidence supporting an agency's decision, a reviewing court must hold fast to the guiding principle that the trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it. . . ." In weighing the testimony provided by [KDMC's] witnesses and the claimant, the [KUIC] was correct in finding that the employer failed to substantiate the allegations of misconduct.

This appeal by KDMC followed.

Upon review of an administrative agency's adjudicatory decision, our authority is somewhat limited. *See American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964) (stating judicial review involves whether an administrative agency's decision is arbitrary). The judicial standard of review of an unemployment benefit decision is whether the KUIIC's findings of fact were supported by substantial evidence and whether the agency correctly applied the law to the facts. *Burch v. Taylor Drug Store, Inc.*, 965 S.W.2d 830, 834-35 (Ky.App. 1998), *citing Southern Bell Telephone & Telegraph Co. v. Kentucky Unemployment Insurance Commission*, 437 S.W.2d 775, 778 (Ky. 1969); *Kentucky Unemployment Insurance Commission v. Stirrat*, 688 S.W.2d 750, 751-52 (Ky.App. 1984); *Tackett v. Kentucky Unemployment Insurance Commission*, 630 S.W.2d 76, 78 (Ky.App. 1982).

Substantial evidence is defined as evidence that, taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable people. *See Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998); *Piper v. Singer Co., Inc.*, 663 S.W.2d 761, 763 (Ky.App. 1984); *Barren River Mental Health-Mental Retardation Board, Inc. v. Bailey*, 783 S.W.2d 886, 888 (Ky.App. 1990), *quoting Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). If there is substantial evidence to support the agency's findings, a court must defer to those findings even though there is evidence to the contrary. *See generally Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999); *Kentucky Commission on*

*Human Rights v. Fraser*, 625 S.W.2d 852, 855 (Ky. 1981). A court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence. See *Burch*, 965 S.W.2d at 834; *Energy Regulatory Commission v. Kentucky Power Co.*, 605 S.W.2d 46, 50 (Ky.App. 1980); *Railroad Commission v. Chesapeake & Ohio Railway Co.*, 490 S.W.2d 763, 766 (Ky. 1973).

A court's function in administrative matters is one of review, not reinterpretation. See *Kentucky Unemployment Insurance Commission v. King*, 657 S.W.2d 250, 251 (Ky.App. 1983); *Piper*, 663 S.W.2d at 763. "The fact that a reviewing court may not have come to the same conclusion regarding the same findings of fact does not warrant substitution of a court's discretion for that of an administrative agency." *Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 582 (Ky. 2002).

KDMC argues that the court erred when it found that the KUIC had correctly applied the law to the facts of the case regarding hearsay evidence that KDMC had presented. We agree.

The first KUIC order, as previously noted above, stated that "[a]lthough hearsay testimony is admissible in administrative hearings, the direct, sworn testimony of the claimant must be assigned greater weight than the hearsay testimony offered by the employer." Although that ruling was rendered moot when the motion was remanded, the referee apparently still believed hearsay evidence is subservient to direct testimony. The

second KUIC order stated that “the Commission adopts the referee’s findings and conclusions of law as its own, the same as if fully set forth herein.”

While the second referee order, which was adopted by the second KUIC order, stated that “[h]earsay is admissible but cannot be assigned greater weight than the claimant’s direct, sworn testimony to the contrary,” the referee during the hearing clearly opined that hearsay testimony would not be given any weight at all. While the trier of fact may decide what evidence to believe, or how much weight to give it, the decision should be based on the witness’s testimony or exhibit, not general categories. Thus, the trier of fact can decide to give greater weight to hearsay testimony.

The referee further stated that “[t]he employer has failed to meet the burden of proof to show misconduct.” The evidence in this regard consisted of Adams’ testimony concerning what the patient’s family told her and her testimony of what she alleged Smyser did in her presence. A referee could simply believe one witness and not another. Here, the referee found that Adams’ statements were not corroborated and thus not believable. Yet, the referee found Smyser’s direct testimony believable even though not corroborated. Again, the trier of fact is free to believe or disbelieve testimony so long as there is substantial evidence to support the decision. However, there must be uniformity in evaluating the testimony.

The goal of the administrative process must be to insure uniformity of treatment by administrative agencies to all persons who are similarly situated. “Without

the application of uniform standards, uniformity of treatment is difficult to achieve.”

*Pearl v. Marshall*, 491 S.W.2d 837, 839 (Ky. 1973).

Parties must be assured the referee and KUIC will weigh all testimony appropriately. Because 78 KAR 1:40 requires unemployment compensation hearings to be conducted informally, erroneous statements by both the second referee and the KUIC as to the weight to be given to hearsay statements are contrary to the provision in the administrative regulation that “all issues relevant to the appeal *shall be considered* and passed upon.” (*Emphasis added*). Further, to require the testimony of some witnesses to be corroborated but not others is both inconsistent and contrary to the requirement of uniformity.

For these reasons, we reverse the judgment of the Boyd Circuit Court and remand this matter for an additional hearing. It shall be within the discretion of KUIC as to whether a new referee should be assigned to consider this case, although a different referee would alleviate any concerns that a final decision had been tainted by previous findings.

HOWARD, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, DISSENTS.

BRIEFS FOR APPELLANT:

Leigh Gross Latherow  
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