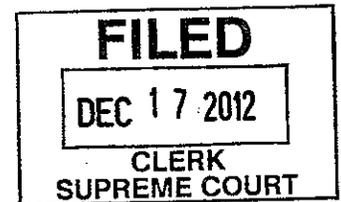


COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2011-SC-000784-DG



WESTERN KENTUCKY COCA-COLA
BOTTLING CO., INC.

APPELLANT

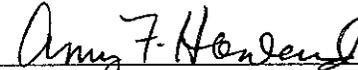
v. FROM THE COURT OF APPEALS
CASE NO. 2011-CA-326
(WARREN CIRCUIT COURT NO. 09-CI-1701)

KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION,
AND
TREVOR RUNYON

APPELLEES

**BRIEF FOR APPELLEE – KENTUCKY
UNEMPLOYMENT INSURANCE COMMISSION**

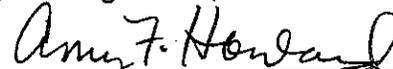
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that ten copies of this Brief for Appellee were filed with the Clerk of the Supreme Court, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, KY 40601; I also certify that copies of this Brief for Appellee were served upon the following named individuals by mailing same, postage prepaid, on this the **17th day of December 2012**: Honorable Steve A. Wilson, Warren Circuit Court, Warren County Justice Center, 1001 Center Street, Bowling Green, KY 42101; Hon. Frank Hampton Moore, Jr., Hon. Matthew P. Cook, Cole & Moore, P.S.C., 921 College Street—Phoenix Place, P.O. Box 10240, Bowling Green, Kentucky 42102-7240; and Trevor Runyon, 523A Lost Circle, Bowling Green, KY 42101.



Amy F. Howard, Attorney for Appellee

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee, Kentucky Unemployment Insurance Commission does not desire oral argument. The Commission believes the issues on appeal are governed by existing case law, statutes and regulations. However, the Commission would not object to participation in oral argument if the Court believes it would be helpful.

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COUNTERSTATEMENT OF THE CASE

Appellant, Western Kentucky Coca-Cola Bottling Company, Inc., appealed a final decision of the Kentucky Unemployment Insurance Commission, dated September 23, 2009, to the Warren Circuit Court pursuant to KRS 341.450. In its Order Reversing, the Commission held that Trevor Runyon (hereinafter referred to as the "claimant" or Runyon) was discharged from employment for reasons other than misconduct connected with the work, and was not disqualified from receiving benefits.

On March 26, 2009, the claimant was discharged from employment as a night loader at Western Kentucky Coca-Cola Bottling, Inc. (hereinafter referred to as the "employer"). On that date, claimant filed for unemployment insurance benefits. The Division of Unemployment Insurance issued a Notice of Determination on April 17, 2009 granting the claimant benefits, determining that the discharge was not for misconduct connected with the work. The employer appealed on April 22, 2009, and a referee hearing was conducted via teleconference on June 2, 2009. The referee set aside the determination on June 4, 2009.

The claimant appealed the Referee Decision to the Commission. After reviewing the record, including evidence previously submitted, the Commission determined that the employer failed to meet its burden of proof that the claimant was discharged for misconduct connected with the work. Thus the Commission reversed the referee decision, and held that the claimant was not disqualified from receiving benefits.

The Commission Order, dated September 23, 2009, set forth its findings of fact as follows:

FINDINGS OF FACT¹

The employer is in the business of operating a soft drink distributorship. [TE19] The claimant worked for the employer as a night loader from June 2006, through March 26, 2009. [TE 20, 32-33] As a night loader, the claimant worked from 12 pm until the trucks were loaded, usually about 10 pm. [TE 20-21, 33] The claimant was attending school and the captioned employer scheduled him everyday of the week except Wednesday and Saturday. [TE 21, 33]

However, the claimant had been coming in on Wednesdays for over a month to pick up extra hours. [TE 36] He normally worked until 6 p.m. [TE 40]. He had no set schedule on Wednesdays because he was not scheduled to work on Wednesdays. [TE 40]

The employer's policy, of which the claimant was aware, requires employees to report any absences prior to the start of their shift to their supervisor. [TE 26, 38] The employer uses a progressive disciplinary process that consists of a verbal warning, a written warning, suspension, and termination. [TE 26] In June 2008, the claimant was suspended for alleged tardiness and no call/no shows. [TE 26, 38] The suspension was issued by Cecil Webb, the night supervisor and the claimant's immediate supervisor. [TE 19-20, 27, 38] The claimant was not advised his job was in jeopardy at this time. [TE 27, 31]

On Sunday and Monday, March 22, and 23, 2009, the claimant was absent because he was sick. [TE 22] On Sunday, the claimant called in and spoke with Justin Mercer, supervisor, at about 7 a.m. and told him that he would not be at work because he was sick. [TE 34-35] Mr. Webb was scheduled off from work that Sunday, and Mr. Mercer was the claimant's supervisor that day. [TE 23] On Monday, the claimant called in and spoke with Mr. Webb at around noon and told him that he would not be at work because he was sick. [TE 34-36]

On Tuesday, March 24, 2009, the claimant worked his scheduled hours. [TE 22] On Wednesday, March 25, 2009, the claimant came in and worked for about two (2) hours before he left to attend

¹ Citations to the Transcript of Evidence (TE) dated June 2, 2009, and record have been included for the Court's convenience in reviewing the certified administrative record.

to school-related issues. [TE 37, 41] The claimant advised Mr. Webb that he had some business to take care of. [TE 37] Prior to the claimant leaving, Mr. Webb told him that he could not just come and go as he pleased. [TE 25, 37]

On Thursday, March 26, 2009, the claimant arrived at work and Mr. Webb told the claimant that he was being discharged for not coming in, always being late, and leaving without giving a reason the day prior. [TE 22, 28, 33-34]

The Commission then cited the applicable law that a claimant who has been discharged from employment for reasons of misconduct connected with the work is disqualified from receiving benefits. The Commission noted that under KRS 341.370(6), "discharge for misconduct" includes "knowing violation of a reasonable and uniformly enforced rule of an employer" and "unsatisfactory attendance if the worker cannot show good cause for absences or tardiness." @The Commission also observed that Kentucky unemployment insurance law is humanitarian in spirit and in purpose; and should be narrowly construed so as to avoid forfeiture of benefits, citing Ford Motor Co. v. Kentucky Unemployment Ins. Comm'n, 243 S.W. 2d 657, 659 (Ky.1951); Vance v. Kentucky Unemployment Ins. Comm'n, 814 S.W. 2d 284 (Ky. App. 1991); and Alliant Health Sys. v. Kentucky Unemployment Ins. Comm'n, 912 S.W. 2d 452, 454 (Ky. App. 1995).

The Commission stated that the employer bore the burden in a discharge case of proving misconduct by a preponderance of the evidence pursuant to Brown Hotel Co. v. Edwards, 365 S.W. 2d 299 (Ky. 1962), and held that the employer failed to meet its burden of proof:

In the case herein, the claimant was discharged for alleged absenteeism/tardiness, and for allegedly failing to give a reason for leaving work early on March 25, 2009.

In accordance with KRS 341.370(6), ...unsatisfactory attendance constitutes misconduct if the worker cannot show good cause for his absences. With regard to the alleged unsatisfactory attendance aspect of this case, the burden of proving the unsatisfactory attendance rests with the employer. Once the employer has sufficiently established that the worker's attendance was unsatisfactory, the burden shifts to the claimant to show good cause for his absences and tardiness.

Although the claimant was suspended in June 2008, for alleged absenteeism and/or tardiness, the captioned employer could provide no dates or details of the alleged occurrences which culminated in the warning. It is also noted that the claimant was not discharged in June 2008, nor was he advised that his job was in jeopardy due to (alleged) absenteeism.

Based on the limited evidence at hand, the occurrences of absence/tardiness which culminated in the claimant's suspension cannot be used to sustain a finding of misconduct.

The only absences on record are claimant's absences of March 22, 2009, and March 23, 2009. This is insufficient to show the claimant's attendance was unsatisfactory. As the employer has failed to meet its burden in establishing the claimant's attendance as unsatisfactory, there is no need to analyze the reasons for the claimant's absences.

As a result, the claimant cannot be disqualified based on the unsatisfactory attendance example of misconduct as set forth in the statute.

Mr. Webb testified that the claimant did not properly report his absences of March 22, 2009, and March 23, 2009, which is against the employer's policy. Even though this reason was not cited when discharging the claimant, the Commission will address this allegation.

The employer's policy requiring workers to report an absence to his supervisor is reasonable and necessary for scheduling purposes. The claimant was aware of the policy.

However, the testimony regarding the claimant reporting these absences is at equipoise. (Equipoise is described above.) Because the employer has failed to provide a preponderance of evidence to the contrary, the claimant must prevail. The claimant testified he properly contacted his supervisor on both dates to

report his absences. Without evidence to the contrary, it must be held he properly reported these absences and he cannot be disqualified on this basis.

The final reason for the claimant's discharge was for his alleged failure to provide a reason for leaving work early on Wednesday, March 25, 2009.

Evidence of probative value indicates that the claimant was not scheduled to work on Wednesdays, and that he only reported to work on Wednesdays to pick up extra hours. Because the claimant was not actually scheduled to work Wednesday, March 25, 2009, his attendance at work would have been in addition to the captioned employer's regularly scheduled staff.

The claimant had no set schedule on Wednesdays. With no set schedule, it cannot be determined that the claimant actually left *early* on March 25, 2009; thereby negating the reason to report his reason for leaving early. However, the claimant did advise Mr. Webb that he had to attend to personal business. Once again, because he was not scheduled to work this date, he did not need to provide further detail.

The Commission does not deny the right of the employer to discharge the claimant. However, the Commission is confined to the testimony and evidence found in the record of the case. The record in this case does not reflect that the claimant committed misconduct, as defined by law, for Kentucky unemployment insurance purposes.

Therefore, because the employer has failed to meet its burden of proof, as required by Brown Hotel, *supra*, the claimant must prevail. The claimant was discharged from the employment for reasons other than misconduct connected with the work, and is not disqualified from receiving benefits.

(Emphasis in original).

The employer did not request reconsideration of the Commission's Order pursuant to 787 KAR 1:110 Section 2(5). On October 2, 2009, the employer filed an appeal with the Warren Circuit Court.

The employer asked the Warren Circuit Court to enter a default judgment against co-defendant Trevor Runyon when he did not file an answer. The court entered a default judgment on January 18, 2011, while closing its Order with the statement: "This court is unaware of what effect, if any, the default judgment has in this matter." The Warren Circuit Court entered an order on January 18, 2011, affirming the order of the Commission on the basis that its findings were supported by substantial evidence.

The employer appealed. In the Court of Appeals, the employer argued that the Warren Circuit Court's entry of a default judgment against the claimant precluded entry of any judgment "in favor of Mr. Runyon on the merits of the unemployment appeal." The employer further argued that the decision of the Commission was not supported by substantial evidence.

The Court of Appeals concluded that the default judgment and the Order affirming the Commission were mutually exclusive in nature, and so the Order Affirming the decision of the Commission served to correct the order granting the default judgment which was entered in the record just before the Order Affirming. The Court of Appeals determined that the Commission's Order was supported by substantial evidence and was a correct application of the law.

This Court granted discretionary review on September 12, 2012.

ARGUMENT

I.

The default judgment against co-defendant Runyon was not authorized by the Civil Rules or the Unemployment Insurance statutes, and has no authority to preclude review of the Kentucky Unemployment Insurance Commission's order, or prevent Runyon from receiving benefits for which he was found eligible.

Statement as to preservation

Appellant alleges that the Commission never argued against the entry of a default judgment, and that once one was entered did not challenge the default judgment thereafter. The Commission emphatically disagrees with this assessment. The Commission immediately argued against entry of the default judgment. The employer first asked for a default judgment against Runyon in its reply brief in the circuit court, at which time it also argued that the court should not consider the Commission's brief as it was not timely filed.² The Commission immediately filed a motion for enlargement of time to file brief, in which it further opposed the entry of a default judgment. A copy of the Commission's response is attached as an exhibit to this brief. [Appx. A]

Even after the court entered the default judgment, the Commission's Order granting unemployment insurance benefits to the claimant was affirmed. The Commission therefore perceived no need to appeal since the Commission had been affirmed in all respects. Moreover, the default judgment had not

² The brief of the Commission, while mailed before the deadline, did not timely arrive in the Warren Circuit Court Clerk's office by briefing deadline. The employer argued in its reply brief that the court should not consider the Commission's brief and that it should grant a motion for default judgment against Runyon. After the Commission's motion, the employer responded that it had no objection to the Commission's motion for enlargement of time to file the Commission's brief, and the Warren Circuit Court granted the motion.

named the Commission, nor imposed any remedy involving the Commission, and so it was uncertain that the Commission had the requisite standing to even challenge this anomalous judgment.

Once the employer appealed to the Court of Appeals, the Commission argued once more in that Court that the default judgment was improper, unauthorized by Rule or statute, and had no power to prevent Runyon from receiving his duly authorized benefits. (Commission's brief to the Court of Appeals pp. 8-11). As the Commission was the prevailing party in the Warren Circuit Court, with its Order granting benefits having been affirmed, there was no need for a cross-appeal. This Court has affirmed that "[w]here the prevailing party seeks only to have the judgment affirmed, it is entitled to argue without filing a cross-appeal that the trial court reached the correct result for the reasons it expressed and for any other reasons appropriately brought to its attention." Fischer v. Fischer, 348 S.W.3d 582, 591-92 (Ky. 2011), quoting Com., Corrections Cabinet v. Vester, 956 S.W.2d 204, 205-206 (Ky. 1997). Thereafter, when the Commission was the prevailing party in the Court of Appeals, with its Order granting benefits having been affirmed, it did not need to file a cross-motion for discretionary review.

The Commission has consistently opposed the entry of the default judgment against Mr. Runyon, and argued at every stage of this case that its effect was a nullity. The Commission's arguments are preserved and the employer's claims that the default judgment was "unchallenged" are not reflected in the record in this action.

Standard of Review

On appeal from the circuit court, the appellate court's "task is to determine whether or not the circuit court's findings upholding the [administrative decision] are clearly erroneous." Runner v. Kentucky Unemployment Ins. Comm'n, 323 S.W.3d 7, 10 (Ky.App. 2010). At the appellate court level of review, the employer "has the burden of demonstrating that the trial court was clearly erroneous in finding that the Commission's decision was supported by substantial evidence." Id. If the record contains substantial evidence supporting the agency's decision, the court must defer to the administrative agency, even if conflicting evidence is present. Id. at 10, citing Kentucky Comm'n on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981). As will be shown, the employer fails to demonstrate that the Warren Circuit Court was clearly erroneous in concluding that there was substantial evidence to support the Commission decision.

The employer argues that the portion of this appeal dealing with the effect of the default judgment should be considered under the law-of-the-case doctrine. That doctrine, however, has no application to this question. "The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions of law and not questions of fact." Fischer, 348 S.W.3d at 593 (quoting 5 Am.Jur.2d, Appeal and Error § 744). The "law-of-the-case doctrine is aimed at future appeals." Id. at 594. This is the original appeal of this case, not a subsequent or "future" appeal, and so the law-of-the-case doctrine does not come into play at this stage.

A Default Judgment is in Conflict with the Statute Granting Review

The employer argues that the Warren Circuit Court order affirming the Commission Order Affirming “cannot stand” as a result of entry of the default judgment, and the effect of it was to put an end to the case in favor of the employer. The employer cites only the Civil Rules’ authorization of default judgments for its assertion that the court could not enter a judgment favoring Mr. Runyon. The Commission will show that the Civil Rules do not authorize a default under these circumstances where the court action is pursuant to a special statutory proceeding. The determination of eligibility for benefits is a function of the Commission, subject to review. Moreover, a default judgment is not authorized since the Commission has appeared, and participated and raised defenses to the allegations in the complaint. The Commission will show the default judgment should properly be considered to have no effect on the decision granting Mr. Runyon benefits.

The employer cites Brown Hotel Co. v. Edwards, 365 S.W.2d 299 (Ky. 1963), as authority that the Civil Rules apply to the proceedings for judicial review of Commission decisions in the circuit court under KRS 341.450. However, the statute on which that portion of the Brown Hotel opinion is based has been repealed. The Commission submits that Brown Hotel is no longer good law on that point, and that instead the question of the application of the Civil Rules to a proceeding pursuant to KRS 341.450 is found in Civil Rule (CR) 1.

CR 1 states that the Civil Rules “govern procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory

proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules.” Actions pursuant to KRS 341.450 are just such special statutory proceedings in which the statutory requirements prevail over the Civil Rules in the event they are in conflict. It is readily apparent that the default judgment rule is a remedy in conflict with the judicial review of a Commission decision.

KRS 341.450(1) provides that “any party aggrieved” by a decision of the Commission may “secure judicial review thereof” by filing a complaint with the court. The position of the circuit court in administrative matters is that of review, not reinterpretation. Kentucky Unemployment Ins. Com’n v King, 657 S.W.2d 250 (Ky.App. 1983). Thus the statute only provides for the review of the Commission decision, not for a de novo benefits determination.

KRS 341.450(3) specifically provides for the *only* judgments which may be entered by the reviewing court in its special statutory review of an order of the Commission:

The court shall enter judgment, affirming, modifying, or setting aside the order and the decision appealed from or determining the question of law certified to it by the Commission, and may in advance of judgment, remand the case to the Commission for further proceedings in accordance with the direction of the court.

Clearly, there is no provision for a default judgment to be entered. Nor is concluding the case prior to review of the Commission record contemplated by this statute. When an administrative order by the Commission is appealed to the circuit court, the circuit court must examine the Commission's order to determine whether it was reasonably supported by substantial evidence and correctly

applied the law. KRS 341.450. The statute governing this procedure assumes a meaningful review on the actual issues before the court. The statute charges the court with proceeding, regardless of the presence or absence of a party³, with its statutory review. After which the only possible judgment which “shall” be entered according to the statute is one “affirming, modifying, or setting aside” the Commission’s order.

The Default Judgment Rule Should Not Have Been Used against the Claimant

Even if CR 55.01 is determined to apply to a Chapter 341 proceeding, the Commission further submits that by its very terms, it is not operative in the case at bar. CR 55.01 states, in pertinent part: “When a party *against whom a judgment for affirmative relief is sought* has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply to the court therefore.” (Emphasis added). In this case, the employer was not seeking affirmative relief from the claimant, but sought relief from the Commission in the form of an order denying benefits. The employer’s request for relief in its complaint prayed “[t]hat the decision of the Kentucky Unemployment Insurance Commission be reversed and that the prior decision of the Referee be reinstated to relieve the Petitioner’s reserve account from responsibility for Respondent Runyon’s claim.” (Complaint p. 4) This prayer for affirmative relief could not be fulfilled by the claimant, but only by the Commission pursuant to an order of the circuit court. Even if the claimant had

³ KRS 341.450 states that “Summons shall issue upon the complaint directing the commission to file answer within twenty (20) days after service thereof.” It makes no mention of any requirement of the other party to respond.

been ordered to repay benefits, they are not paid to the employer but to reimburse the unemployment insurance fund.

The employer accordingly did not seek this affirmative relief from the claimant. The Commission has appeared and defended its Order against *the affirmative relief sought* in this case. By its terms, CR 55.01 plainly does not control a KRS 341.450 appeal of an order of the Commission in which the Commission has answered; therefore, the employer could not obtain a default judgment which would invalidate or otherwise affect the Commission's Order. Under these circumstances, the Commission submits that the default judgment was improvidently granted by the court, and should be recognized as a nullity.

The Commission's Participation Precludes Default Judgment

The employer's position ignores the fact that the Commission has filed an answer and defended its Order which found in favor of the claimant's right to benefits. The Commission has therefore addressed the same issues and raised the same common defenses as the co-defendant. The Commission notes also that the presence of the claimant was not necessary to the court's review. The review as outlined by the statute is of the administrative record only. In unemployment insurance cases:

[t]he court has no authority to consider evidence outside the record or to incorporate new proof into the record. Thus, any hearing before the circuit court serves the limited purpose of argument and argument alone on points of law.

Travelodge Int'l, Inc. v. Kentucky Unemployment Ins. Com'n, 710 S.W.2d 232, 234 (Ky.App. 1986). The claimant could not have provided new evidence, and any attempt to do so would not have been permissible. Therefore, while a

claimant is a necessary party under the statute, Mr. Runyon's participation in the court case, which was limited solely to argument on points of law, would not have differed from that of the Commission.

The consequence of an employer or employee who does not participate in the judicial review process should be that they are not heard by the court, and they have no means to complain if the decision is adverse to that which was found below, not that the other party's failure to participate brings about a mandatory reversal of the agency decision. This comports with the longstanding rule in cases involving multiple defendants and joint liability:

The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence; he cannot be heard at the final hearing.

Frow v. De La Vega, 82 U.S. 552 (1872).

In cases involving joint liability of co-defendants, the rule is that where the defense interposed by an answering defendant is not personal to himself, but common to all, or questions the merits of the validity of the plaintiff's cause of action in general, or questions plaintiff's right to sue, such defense inures to the benefit of any defaulting defendant both in actions at law and suits in equity, with the result that the eventual judgment applies not merely to the answering defendant but also any defaulting defendants. Haddad v. Louisville Gas & Elec. Co., 449 S.W.2d 916, 920 (Ky. 1969), citing Beddow's Adm'r v. Barbourville Water, Ice & Light Co., 252 Ky. 267, 66 S.W.2d 821 (1933); Tackett v. Green, 187 Ky. 49, 218 S.W. 468 (1920). While this is not a case involving joint liability, the logic of that rule should persuade here, where the defense to the action

propounded by the Commission is the equivalent of that of the non-answering defendant and should thus inure to its benefit. This court should also apply such a rule in this case because otherwise the Commission's right under the statute as a party to support its Order is wholly dependent on the participation or non-participation of the other defendant in the case.

In the case at bar, the employer attempt to end the case by default judgment also serves to negate the statutory standards. These results, therefore, have the effect of undoing not just the decisions of the Commission, but the legislative determination of who is eligible for benefits in the Commonwealth. Moreover, extending the employer's position to all unemployment appeals, in a case where the non-answering defendant was an employer, rather than an employee, its failure to answer and the entry of a default judgment against the employer would have the aberrant result that the employee could receive benefits the Commission had determined were unavailable under the unemployment insurance statutes.

Employers and Employees Have No Prior Rights to Unemployment Benefits

Additionally, the statutes pertaining to unemployment insurance make clear that only the Commission determines eligibility for benefits, subject to judicial review. The unemployment insurance chapter provides that employers and employees do not have prior rights or claims to the amounts in the unemployment insurance fund. KRS 341.530(1) states:

The Office of Employment and Training, Department of Workforce Investment, shall maintain a reserve account for each subject employer making contributions to the fund ... and shall, except as provided in KRS 341.590, credit to such account the total amount of

all contributions or benefit reimbursement paid by the employer on his own behalf. *Nothing in this section or elsewhere in this chapter shall be construed to grant any employer or individual who is or was in his employ prior claims or rights to the amounts paid by him into the fund.*

(Emphasis added). As such, employers and employees do not have a claim or right of determination as to whether benefits are payable or whether they must be credited to the employer. Thus, the result of the employer's obtaining a default judgment cannot be that the employer obtains a right or claim to the funds that it was not entitled to by the statutes. It is clear from the above statutes that the determination as to eligibility is made by the Commission, and not the parties before it.

It is axiomatic that default judgments are not favored. Bargo v. Lewis, 305 S.W.2d 757 (Ky. 1957); Green Seed Co. v. Harrison Tobacco Storage Whse., Inc., 663 S.W.2d 755 (Ky.App. 1984). With this disfavor of default judgments in mind, and for all of the foregoing reasons, this court is urged to recognize that the default judgment rule, CR 55.01, is not applicable in this statutory proceeding for review of a Commission Order. Further, it is urged that this Court should determine that default judgment entered by the Warren Circuit Court was null and void as not authorized pursuant to statute and the Civil Rules, that its entry had no effect on the Warren Circuit Court's valid final judgment affirming the Commission's Order allowing benefits, which should be recognized as the only proper and authorized judgment authorized by KRS 341.450.

II.

In the alternative, the Court of Appeals correctly applied Kentucky law in determining that only one of the orders entered by the Warren Circuit Court could be given effect, and second judgment was a correction of the first.

The employer challenges the Court of Appeals' conclusion that, since the remedies in the judgments are in conflict, the Order which was placed in the record later represents the Order of the Warren Circuit Court. The movant asserts without basis that the clerk determined the order of the judgments rather than the judge. On this record, there is no evidence that the clerk was the one to determine the order of the judgment and so the Commission believes that no such assumption may be relied on. The Commission submits that the court purposely made its order affirming the Commission the last word in the case. The Warren Circuit Court expressed uncertainty about the intended effect of the default judgment's entry, but no such ambiguity regarding the entry of the Order affirming the Commission's order. This Court has stated that a trial court has "unlimited power to amend and alter its own judgments." Gullion v. Gullion, 163 S.W.3d 888, 891-892 (Ky. 2005). The purpose of having a final judgment is to finally determine the court's holding so that litigants are not thereafter arguing over which ruling of a court takes precedence. The Court of Appeals surely had this in mind when holding that the sequence of the court's entry of orders was determinative.

The Commission also notes that the default judgment entered in this case was an interlocutory order under CR 54.02 because it adjudicated less than all of the claims against multiple parties. Although the default judgment order recited

that it was final and appealable and there was no just cause for delay, this order was in fact interlocutory as it adjudicated less than all of the claims against the parties and it did not finally terminate the litigation as to *any* of those parties. An order may be interlocutory by its terms notwithstanding that such "finality" language is present. The Commission believes that this is even more reason for determining that the court's order affirming the Commission was properly determined by the Court of Appeals to correct the earlier default judgment.

III.

The Commission Order was supported by substantial evidence since the employer's representative testified that he did not warn Runyon that he would be terminated for the next absence, and claimant was not scheduled to work but was putting in extra hours.

Again, the standard of review is "whether or not the circuit court's findings upholding the [administrative decision] are clearly erroneous." Runner v. Kentucky Unemployment Ins. Comm'n, 323 S.W.3d at 10. The employer alleges that the Commission erred because there was not substantial evidence to support its finding that the claimant had not been advised that his job was in jeopardy at the time of his suspension the previous June. The employer cites the claimant's testimony. However, the Commission could rely on testimony of the employer's representative, Mr. Cecil Webb, who testified that the claimant had not been so warned. The Commission is the finder of fact and has the authority to make determinations of credibility. The Commission conducts a *de novo* review of the entire record and considers all the evidence and testimony previously presented. In Thompson v. Kentucky Unemployment Ins. Comm'n, 85

S.W.3d 621, 626 (Ky.App. 2002), the Court of Appeals explained that: “[a]s the fact-finder, the KUIC has the exclusive authority to weigh the evidence and the credibility of the witnesses.”

In this instance, the Commission found Webb’s testimony on this point to be more credible than the claimant’s. The testimony from Mr. Webb was as follows:

Hearing Officer: Did you tell him – did you give him any warnings during this conversation on Tuesday?

Webb: He had been warned several times before. He had been suspended three days for the same thing, so I kind of told him, you know, that it needed to quit happening.

[TE 24]

Hearing Officer: Did you say anything to him about why he wasn’t staying to work?

Webb: Yes, I did. I asked him if something was wrong, why he was leaving and if he was going to be back, and he said, “Probably not.”

Hearing Officer: All right. Did you make any, any suggestions to him that if he left that day that he would be discharged?

Webb: No, ma’am. I didn’t.

[TE 25]

Hearing Officer: All right. Is there any type of discipline action that the employer uses in, for, I guess, failing to follow this policy?

Webb: Yes. We give verbal warnings, then we do write-ups up to suspension then discharge.

Hearing Officer: All right. And had the claimant received any warnings or suspensions regarding his failure to follow this policy?

Webb: Yes, ma’am. He’d been warned several times about his tardiness and his not calling in and not coming to work, and he was sent home three days on June the 11th for the same thing.

Hearing Officer: June 11th?

Webb: Yes, ma'am.

Hearing Officer: He was suspended?

Webb: Yes. For three days.

Hearing Officer: Of 2008?

Webb: Yes.

Hearing Officer: What were the terms of the claimant's suspension?

Webb: Unexcused absences.

Hearing Officer: No, what were the terms? How long was he going to be off work? Was there any type of consequences if another incident occurred? What kind of terms was he given?

Webb: Just the three day suspension.

Hearing Officer: At that time, was he told any other incidents would lead to a discharge?

Webb: **No, he wasn't.**

[TE 26-27]

On cross-examination by the claimant, Webb testified in the same way:

Runyon: If I was suspended the previous year for that reason and you had said that I was being terminated next time I did that, wouldn't I have been fired for missing Sunday and Monday for the same reason?

Webb: **I didn't tell you that when I suspended you.**

Runyon: Isn't that what you said, though? Did you not say that was the last straw; that suspension was the last level before you'd be terminated next?

Webb: **I don't recall saying that, Trevor.**

[TE 31]

The claimant argued at the hearing that he hadn't been fired for missing work for illness two days earlier even though, as he asserted, he had been told one more absence and he would be terminated. Yet Mr. Webb, who was his supervisor, stated repeatedly that the claimant had *not* been told that his job was in jeopardy for another incident. Additionally, the Employee Action Report from Western Kentucky Coca-Cola contained in the record, which was issued concurrent with the suspension, does not state that another incident would result in the claimant's termination. [See Certified Administrative Record] The Commission relied on the testimony of Mr. Webb, the employer's representative, in deciding that the claimant had not been warned at the time of his suspension that his job was in jeopardy.

In addition, the Court of Appeals cited the evidence from Runyon that the employer never confronted him about leaving early nor made any suggestion to him that he would be terminated or suspended merely for clocking out early on that Wednesday. Claimant testified that if he had thought that was a consequence he would not have left early. Thus, there was substantial evidence to support this finding of the Commission. Moreover, the Warren Circuit Court adjudged correctly that all of the Commission's findings were supported by substantial evidence.

The employer may focus on portions of the claimant's testimony rather than its own representative on appeal, but the employer does not determine which facts to believe. As Thompson stated, the Commission has the *exclusive* authority to weigh the evidence. At the appellate level of review, the employer

“has the burden of demonstrating that the trial court was clearly erroneous in finding that the Commission's decision was supported by substantial evidence.” Id. If the record contains substantial evidence supporting the agency's decision, the court must defer to the administrative agency, even if conflicting evidence is present. Id. at 10, citing Kentucky Comm'n on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981). Merely pointing out a conflict in the evidence is not the equivalent of showing clear error in the Commission's assessment of the evidence.

“Although a reviewing court may arrive at a different conclusion than the trier of fact in its consideration of the evidence in the record, this does not deprive the agency's decision of support by substantial evidence. Simply put, ‘the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes.’” Commonwealth Transp. Cabinet v. Shadrick, 956 S.W.2d 898 (Ky. 1997), citing Transportation Cabinet v. Thurman, 897 S.W.2d 597, 600 (Ky.App. 1995).

In determining eligibility for unemployment benefits, the inquiry as to an employee who was terminated is limited to whether it was for misconduct. In its Order dated September 23, 2009, the Commission noted that the employer bore the burden of proving misconduct by a preponderance of the evidence. Brown Hotel Co., 365 S.W. 2d at 301. According to KRS 341.370(6), unsatisfactory attendance constitutes misconduct if the worker cannot show good cause for absences. When an employer alleges that the issue was unsatisfactory attendance, the employer must first establish such unsatisfactory attendance.

In the case at bar, the employer cited three days of unsatisfactory attendance. The Commission accepted the claimant's testimony that he had called in sick on two of those days. Claimant showed at the hearing that Mr. Webb was aware of the reason for his absence on those days. The only issue remaining was claimant's leaving early *on a day he was not scheduled to work* and on which he did not have any agreement with the employer to work a set number of hours. The Commission correctly concluded that this burden to show unsatisfactory attendance was not met in this case. The Commission's findings were supported by substantial evidence.

The third day of alleged unsatisfactory attendance involved the claimant's leaving work early on a Wednesday he was not scheduled to work. The employer argues that the Commission erred in finding that the claimant had no set schedule on Wednesdays. Again, there was substantial evidence to support this finding.

The employer's representative testified that claimant was off on Wednesdays and that the employer worked with his school schedule. [TE 21] Mr. Webb specifically testified regarding claimant's work on Wednesdays, "It was really no set schedule." [TE 40] The claimant testified that he had been coming in to work on Wednesdays for about a month, but that he never told Mr. Webb that he was going to work a full day on the Wednesday in question. [TE 36] In fact, he never testified that he always worked until 6:00 p.m., but stated that he did not work the whole shift. [TE 37]

The employer argues now that the employer had come to rely on the claimant's working on Wednesdays, citing the referee decision. This was **not** a finding of the Commission, and rightly so -- there was **no** evidence in the record to support the referee's finding that the employer had come to rely on the claimant's working to the point that it had become a set part of his schedule. The employer does not cite to any evidence in the record regarding reliance or the staffing capacity of the employer without claimant present. Mr. Webb did not testify to any reliance. He never said the employer was left shorthanded. Instead, both the employer and the claimant testified that these were extra hours the claimant was working; both testified that the claimant's schedule did not include Wednesdays; and no one testified that the claimant's leaving early that day left the employer "empty-handed." The referee's conclusions that the claimant was required to work a full Wednesday and the employer had come to rely on that *were not* supported by substantial evidence in the record, and the Commission correctly rejected those conclusions. The employer fails to show in this appeal that the Warren Circuit Court committed clear error in concluding the Commission's findings were supported by substantial evidence.

The employer cites the employee's warning and suspension for absence/tardiness the year before (June of 2008), as decisive of the inquiry as to whether claimant's actions were misconduct. But the analysis for the Commission is whether on the evidence before it the claimant had displayed "unsatisfactory attendance if the worker cannot show good cause for absences or tardies." KRS 341.370. Termination as a result of violating the employer's

attendance policy still requires an individualized inquiry into the reasons behind the absenteeism to disqualify an employee from receipt of unemployment benefits. Alliant Health Sys. v. Kentucky Unemployment Ins. Com'n, 912 S.W.2d 452 (Ky.App. 1995). The issue is whether the employee shows good cause for absences. “[W]hether an employee's termination is for lawful cause or for misconduct under the Act is a distinct question. Thus, while an employee may be discharged for cause, the Act provides mitigating circumstances which would permit statutory benefits.” Kentucky Unemployment Ins. Com'n v. Duro Bag Mfg. Co., 250 S.W.3d 351, 354 (Ky.App. 2008).

The only absences in evidence were the two days in which the claimant testified that he was sick and that he called in to work, and the day that he left early when he was not scheduled to work. The Commission concluded these did not establish unsatisfactory attendance. The employer did not provide any information about other absences except to say that claimant had been warned about absences months earlier. The Warren Circuit Court found that even if claimant had been told that his job was in jeopardy in the summer of 2008, “while this may be evidence to the contrary, it does not shift the weight of the evidence sufficiently to conclude that the Commission’s decision was not supported by substantial evidence.” (Warren Circuit Court Order Affirming p. 5) The Commission had no information to determine whether those earlier absences would have been for good cause. Additionally, those alleged absences occurred a period of eight months before. This is all evidence relevant to the Commission's assessment of the attendance of the claimant.

The employer's continues to argue on appeal that the claimant committed "insubordination" when he cursed after he was fired. The employer did not claim before the Division of Unemployment or the Commission that Runyon had been fired for insubordination. The employer statement submitted to the Division of Unemployment stated that the claimant was fired for no call/no show, and at the hearing Mr. Webb stated that the claimant was discharged for "missing work and not calling in." [TE 22] Therefore, the fact regarding the claimant cursing and allegations of insubordination have no relevance to this appeal.

The employer alleges, without citation, that Kentucky law does not permit an employee to come and go as he pleases without giving a reason for leaving work early. The employer cites no law. An employer and employee are at liberty, however, to come to an agreement that the employee can arrive and leave at unscheduled times, on a flex schedule, or to make up time such as in the case at bar where the employee was picking up extra hours. The burden is on the employer to show that the employee's attendance was unsatisfactory. The employer in this case did not establish unsatisfactory attendance so as to require disqualification from unemployment benefits.

In summary, the Commission correctly determined that the claimant did not commit misconduct under the statute in order to be disqualified from receiving benefits. The Commission determined that the employer did not establish that by leaving early on a day he was not scheduled to work the claimant's attendance was unsatisfactory in order to establish that his absences were misconduct. The Commission's findings were supported by substantial

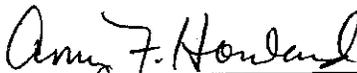
evidence in the record from both the claimant and the employer's representative. The employer has failed to show that any aspect of the Commission's Order was clearly erroneous.

CONCLUSION

For all the foregoing reasons, the Commission submits that the order of the Warren Circuit Court affirming the Commission's Order must be affirmed.

Respectfully submitted,

COMMONWEALTH OF KENTUCKY
EDUCATION CABINET

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