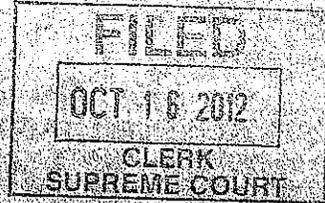


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2011-SC-000784-DG



COURT OF APPEALS CASE NO. 2011-CA-000326

WARREN CIRCUIT COURT, CIVIL ACTION NO. 2009-CI-01701
HON. STEVE A. WILSON, JUDGE

WESTERN KENTUCKY COCA-COLA
BOTTLING COMPANY, INC.

APPELLANT

v

TREVOR RUNYON and
KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION

APPELLEES

BRIEF ON BEHALF OF APPELLANT, WESTERN KENTUCKY
COCA-COLA BOTTLING COMPANY, INC.

This will certify that ten copies of this brief were on this 8th day of October, 2012, forwarded by U.S. Mail to: Susan Stokley Clary, Clerk, Kentucky Supreme Court, 700 Capitol Avenue, Room 209, Frankfort, KY 40601, and that a true and correct copy of same was placed in the U.S. Mail to: Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Steve A. Wilson, Judge, Warren Circuit Court, Warren County Justice Center, 1001 Center Street, Suite 404, Bowling Green, KY 42101; Trevor Runyon, 523 A Lost Circle, Bowling Green, KY 42101; Trevor Runyon, 698 Greenbriar Road, Alvaton, KY 42122; Trevor Runyon, 828 N. Caswell Avenue, Southport, NC 28461, and Amy E. Howard, Staff Attorney, Office of Legal and Legislative Services, 500 Mero Street, Capital Plaza Tower, Room 307, Frankfort, KY 40601. This will certify that the Record on Appeal has been returned to the Clerk of the Warren Circuit Court prior to the filing of this brief.

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A handwritten signature in black ink, appearing to read "Matthew P. Cook".

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INTRODUCTION

This is an unemployment benefits appeal initiated and pursued by the employer, Western Kentucky Coca-Cola Bottling Company, Inc., under KRS 341.450. The administrative hearing officer/referee that conducted the evidentiary hearing found for the employer, concluding that the affected employee, Trevor Runyon, had been terminated for misconduct which disqualified him from receiving unemployment benefits. The Unemployment Commission then reversed the referee's decision.

The Warren Circuit Court granted the employer's motion for default judgment against the former employee but failed to give it effect; the circuit court also affirmed the Unemployment Commission's ruling that that the employee's conduct did not constitute misconduct. The Court of Appeals affirmed the Commission. (See Court of Appeals' opinion, attached as Exhibit A). This Court subsequently granted the employer's motion for discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant, Western Kentucky Coca-Cola Bottling Company, Inc., respectfully requests oral argument. Oral argument would be beneficial and allow the parties to further express their positions on the issues presented in the appeal.

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STATEMENT OF THE CASE

Appellee, Trevor Runyon, was employed by Western Kentucky Coca-Cola Bottling Company, Inc. (hereafter "WKCC") at its soft drink distributorship in Warren County as a night loader and he served in that capacity from June of 2006 until his termination for misconduct on March 26, 2009. Mr. Runyon was terminated by WKCC because he walked off of the job without permission, without giving notice and without giving any reason for doing so. Following his termination for misconduct, Mr. Runyon filed a claim for unemployment benefits.

Mr. Runyon's initial claim for unemployment benefits was granted based upon the paperwork he submitted in support of the claim. (Record on Appeal ("ROA") p. 44). Thereafter, WKCC appealed the initial decision and an evidentiary hearing was held before an administrative hearing officer/referee on June 2, 2009. A transcript of the evidentiary hearing held before the referee is included in the Record on Appeal. Citations to the evidentiary hearing transcript in this brief will be noted as follows: (Transcript, p. ____).

The testimony and evidence at the evidentiary hearing established the following facts. As a night loader for WKCC, Mr. Runyon worked from 12:00 p.m. until the soft drink trucks were loaded in the evening, sometimes as late as 10:00 p.m. (Transcript, p. 33). Mr. Runyon attended school while employed at WKCC and he was originally scheduled to work every day of the week except for Wednesdays and Saturdays. Importantly, for over one month prior to his termination, Mr. Runyon changed his schedule and worked at WKCC on Wednesdays. Specifically, Mr. Runyon testified on this point as follows:

A. . . . **I had been coming in every Wednesday for quite a while.**

Q. How long do you think you'd been coming in and working on Wednesdays?

A. At least the entire month probably if not more.

(Transcript, pp. 36-37) (Emphasis added). After this scheduling change, Mr. Runyon worked on Wednesdays from the beginning of the shift at 12:00 p.m. until approximately 6:00 p.m. (Transcript, p. 40).

WKCC has a policy that requires employees to call into their supervisors and to report absences prior to the start of the scheduled shift. WKCC uses a progressive discipline system that includes verbal and written warnings, suspension, and finally, termination. It is not disputed that Mr. Runyon had received prior warnings and a three-day suspension for tardiness and no calls/no shows prior to the incident leading to his termination. (Transcript, pp. 26, 38). Specifically, Mr. Runyon had been warned several times about his tardiness and not calling in and not coming into work and he was suspended for three days on June 11, 2008 for this behavior. (Transcript, p. 26). The suspension was issued by Cecil Webb, WKCC's night supervisor and Mr. Runyon's immediate supervisor. The testimony at the evidentiary hearing was that WKCC allows employees to leave work early only when: (1) a reason for early departure is given by the employee; (2) it is an emergency; and (3) it is approved by a supervisor. (Transcript, p. 27).

On Sunday and Monday, March 22 and 23, 2009, Mr. Runyon did not report to work at WKCC because he said he was sick. On Sunday, March 22, 2009, Mr. Runyon testified that he called in and spoke with Justin Mercer, the weekend supervisor, at approximately 7:00 a.m. and told him that he would not be at work that day because of sickness. (Transcript, p. 34). On Monday, March 23, 2009, Mr. Runyon claims that he called in and spoke with his supervisor, Cecil Webb, at around 12:00 p.m. and told him that he would not be at work again due to illness.

(Transcript, pp. 34-35). In contrast, Mr. Webb testified that no such calls were made by Mr. Runyon prior to these two absences. (Transcript, p. 23).

On Tuesday, March 24, 2009, Mr. Runyon returned to work at WKCC. Mr. Runyon admits that he had no discussion with his immediate supervisor, Cecil Webb, on that day about his absences on the previous two days. (Transcript, p. 36). Mr. Webb testified that Mr. Runyon told him on Tuesday that he would work all day on Wednesday, March 25, 2009, to make up for his prior absences. (Transcript, pp. 22-23, 24-25). The reader should also remember that Mr. Runyon, by his own admission, had been working for over a month on Wednesdays from approximately 12:00 p.m. until 6:00 p.m. WKCC had come to rely on Mr. Runyon to work on Wednesdays until at least 6:00 p.m.

On Wednesday, March 25, 2009, Mr. Runyon came into work at approximately 12:00 p.m. and stayed for only several hours before leaving (several hours before 6:00 p.m.). (Transcript, p. 37). When Mr. Runyon went to clock out, his supervisor, Cecil Webb, asked him if something was wrong. Mr. Runyon reported that it was not. (Transcript, p. 37). It is undisputed that Mr. Webb then told Mr. Runyon that he could not just come and go from work as he pleased. (Transcript, p. 37). Despite that warning, Mr. Runyon clocked out and left work. (Transcript, p. 25). It is agreed that Mr. Runyon did not give Mr. Webb any specific reason for his leaving early that day, nor did he request permission to do so. At the evidentiary hearing, Mr. Runyon stated that he was leaving to take care of some school matters, but he admitted that he did not advise Mr. Webb that this was the reason he was leaving work early at the time. (Transcript, p. 37).

On Thursday, March 26, 2009, Mr. Runyon arrived at work at WKCC and was immediately told by his supervisor, Cecil Webb, that he was being discharged for not coming in, always being late and leaving without giving a reason. (Transcript, p. 34). It is agreed that Mr. Runyon told Mr. Webb: "Fuck it. I don't care." (Transcript, p. 34). After making this statement, Mr. Runyon left the premises of WKCC. (Transcript, p. 34).

Following his termination, Mr. Runyon filed an unemployment claim. When this is done, the claimant and the employer are allowed to file written paperwork with the Division of Unemployment Insurance. There is no evidentiary hearing at this stage and there is no testimony rendered prior to the initial determination. The initial determination was made on April 17, 2009, and a copy of it is attached hereto as Exhibit B. The initial determination was to allow unemployment benefits to Mr. Runyon because "the discharge was for reasons other than misconduct connected with the work." (ROA, p. 44).

WKCC then appealed the initial determination and an evidentiary hearing was conducted by Hearing Officer/Referee Margaret Ivie on June 2, 2009. As indicated above, a copy of the transcript from this evidentiary hearing is included in the Record on Appeal. At the evidentiary hearing, testimony was received from Mr. Runyon and from Cecil Webb, the night supervisor at WKCC and Mr. Runyon's immediate supervisor.

At the evidentiary hearing, **Cecil Webb** testified and gave the following testimony:

- After missing work on Sunday and Monday, March 22 and 23, 2009, Mr. Runyon returned to work on Tuesday, March 24, and told Mr. Webb, his supervisor, that he would work all day on Wednesday, March 25, 2009. (Transcript, pp. 22-23 and 24-25).
- Mr. Runyon did not call in on Sunday or Monday to report that he would be absent from work on those two days as required by company policy. (Transcript, p. 23).

- Mr. Runyon had been previously warned and suspended for three days in June of 2008 for tardiness and not showing up for work. (Transcript, p. 24).
- On Wednesday, March 25, 2009, Mr. Runyon left work early after only working approximately two hours. Mr. Webb asked him if something was wrong and Mr. Runyon said no. Mr. Webb told Mr. Runyon he could not come and go as he pleased. Mr. Runyon did not give any reason for leaving early, nor did he ask permission to do so. He simply clocked out and left. (Transcript, p. 25).
- Mr. Webb terminated Mr. Runyon the next day, Thursday, March 26, 2009. Mr. Webb testified that he discharged Mr. Runyon for not showing up earlier in the week without giving notice and for leaving early without giving a reason or seeking permission. (Transcript, pp. 28-29).
- Mr. Runyon's response to the termination was to tell Mr. Webb: "Fuck it. I don't care." (Transcript, p. 34).
- For over a month prior to his termination, Mr. Runyon worked for WKCC on Wednesdays until 6:00 p.m. (Transcript, p. 40).

Trevor Runyon also testified at the evidentiary hearing. His testimony revealed:

- Mr. Runyon returned to work on Tuesday, March 24, 2009 after missing two days for illness. He denied that he stated that he would work all day on Wednesday, March 25, 2009. He did admit that he had been working every Wednesday for over a month prior to this incident. (Transcript, pp. 36-27).
- Mr. Runyon admits he left work at WKCC after several hours on Wednesday, March 25, 2009 (several hours prior to 6:00 p.m.). He admits that he did not give Mr. Webb or anyone else at WKCC a specific reason for his leaving, nor did he ask permission. He agrees that Mr. Webb asked him if something was wrong and he said no. He admits that Mr. Webb told him he could not come and go as he pleased from work. (Transcript, p. 37).
- Mr. Runyon admits that he had been previously warned and suspended for a three-day period in the summer of 2008 for attendance issues. He

admits that he was told that any further incidents would cause his discharge. (Transcript, p. 38).¹

On June 4, 2009, Referee Ivie entered her written decision in favor of WKCC and reversed the initial determination. (ROA, pp. 29-31). A copy of this written decision is attached hereto as Exhibit C. Referee Ivie concluded that Mr. Runyon had been terminated for misconduct because he and WKCC had come to an agreement and understanding that he would work on Wednesdays until 6:00 p.m. and that the employer could properly rely on him to do so. The decision expressly states as follows:

DECISION: The determination is set aside. The claimant was discharged for misconduct connected with the work and is disqualified from receiving benefits from March 22, 2009, until the worker has worked in each of ten (10) weeks, whether or not consecutive, and has earned ten (10) times the weekly benefit rate in covered employment. Benefits paid constitute an overpayment of \$2,106.00, which is to be returned to the Division. The employer's reserve account is relieved of charges.

REASONS: KRS 341.370(1)(b) and 341.530(3), respectively, disqualify a worker from the date of disqualification and until the worker has worked in each of ten (10) weeks, whether or not consecutive, and has earned ten (10) times the weekly benefit amount and relieved the employer of reserve account charges if the employer discharges the worker for misconduct or dishonesty connected with the work.

An employer alleging misconduct to defeat recovery of a claim has the burden of proof by a preponderance of evidence. Brown Hotel Co. v. Edwards, Ky., 365 S.W.2d 299, 301 (1962). The parties agree that the employer discharged the claimant, so the employer bears the burden of proof in this case.

KRS 341.370(6) states "discharge for misconduct" includes, but is not limited to, a separation initiated by an employer for falsification of an employment application to obtain employment through subterfuge; knowing violation of a reasonable and uniformly enforced rule of an employer; **unsatisfactory attendance if the worker cannot show good cause for absences or tardiness;**

¹ Mr. Runyon's specific testimony in this regard was as follows: "**Q. And were you told that anything, any incidents after that [the three-day suspension] would result in your discharge? A. Yes.**" (Transcript, p. 38) (Emphasis added).

damaging the employer's property through gross negligence; refusing to obey reasonable instructions; reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during working hours; conduct endangering safety of self or co-workers; and incarceration in jail following conviction of a misdemeanor or felony by a court of competent jurisdiction which results in missing at least five (5) days work.

...

The only substantiated evidence during the hearing, other than the claimant's tardiness, was the incident that occurred on March 25, 2009, when the claimant left work early. The claimant defended his actions during the hearing by stating that he was not "technically" scheduled to work that day, and that he did not have to stay and work if he did not want to. However, it was the testimony of both parties that the claimant had been working on Wednesdays until 6 pm for a month. While the claimant may not have been "technically" scheduled, the employer and the claimant had reached a mutual agreement that the claimant would work until 6 pm on Wednesdays, which the employer had come to rely upon.

On March 25, 2009, the claimant chose to leave after working only two (2) hours of his shift, and refused to give his supervisor a reason for leaving early. The employer acts reasonably when inquiring into the cause of an employee's sudden need to leave work early and when requiring an employee to have a good cause for leaving early and not giving the employer any advance notice. By choosing to leave work without his supervisor's permission and without giving a reason, the claimant's actions constituted insubordination. Insubordination is an act of misconduct. Insubordination consists of the unjustified refusal to comply with a reasonable request or order of a superior. Based upon the claimant's actions on March 25, 2009, the claimant was discharged the following day for misconduct connected with the work and is disqualified from receiving benefits based upon this separation.

Pursuant to KRS 341.530, the employer's reserve account is relieved of charges, because the claimant's discharge was the result of misconduct connected with the work.

(Referee Decision, June 4, 2009, pp. 2-3) (ROA, pp. 30-31) (Emphasis added).

Mr. Runyon then filed an appeal of the referee decision to the Kentucky Unemployment Insurance Commission. Without hearing any additional testimony or reviewing any additional

evidence, the Commission determined to reverse the referee decision. The Commission's opinion, dated September 23, 2009, is included in the record (ROA, pp. 24-28) and is also attached hereto as Exhibit D. The Commission's opinion inaccurately characterized testimony received at the referee hearing. Specifically, at page three of the Commission's opinion, when discussing Mr. Runyon's suspension for tardiness/attendance issues in June of 2008, the Commission erroneously states that Mr. Runyon was not advised that his job was in jeopardy due to his alleged absenteeism. **This is directly contrary to the testimony of Mr. Runyon himself. (See Transcript, p. 38) (Q. "And where you told that anything, any incidence after that would result in your discharge? A. Yes.")**. Thus, Mr. Runyon testified that he was on notice that if there were any further incidents concerning his work attendance, he would be terminated. This is what occurred--Mr. Runyon was discharged for misconduct after this warning for another work attendance issue. This is work-related misconduct which disqualifies the employee from receiving unemployment benefits.

The Commission erroneously determined that Mr. Runyon had no set schedule on Wednesdays and without same, it could not be determined he actually left work early on March 25, 2009. The Commission erroneously determined that because he was not technically scheduled to work on this date, Mr. Runyon did not need to provide any reason for his leaving to his employer. The Commission ignored the fact that Mr. Runyon left his employer empty-handed without notice and that he employer had come to rely on the new schedule where Mr. Runyon worked on Wednesdays until 6:00 p.m. and Mr. Runyon's statement to Mr. Webb the day before that he would work al day on Wednesday, March 25th.

Following the Commission's decision, WKCC filed an appeal to the Warren Circuit Court pursuant to KRS 341.450.² (ROA, pp. 1-14). In compliance with KRS 341.450, WKCC named both Mr. Runyon and the Kentucky Unemployment Insurance Commission as defendants in its appeal. See KRS 341.450(1) ("within twenty (20) days after the decision of the commission, any party aggrieved thereby may ... secure judicial review thereof by filing a complaint against the commission ... Any other party to the proceeding before the commission shall be made a defendant in such action."). The Commission was made a defendant and was served with process on October 7, 2009. (ROA, p. 17). Mr. Runyon was made a defendant and served with process on December 23, 2009. (ROA, p. 58). A copy of the proof of service on Mr. Runyon is attached hereto as Exhibit E.

Mr. Runyon did not ever file an answer to the petition for judicial review in the Warren Circuit Court nor did he file a brief with that court pursuant to the scheduling order which was entered. Mr. Runyon was provided with copies of all filings made by WKCC and with a copy of the Warren Circuit Court's briefing order.

When Mr. Runyon did not file any responsive pleadings, or indeed, any pleadings in the Warren Circuit Court, WKCC moved for a default judgment against him. (ROA, pp. 120, 125-126). The motion for default judgment included an affidavit from the undersigned counsel for WKCC that there was no information available to suggest that Mr. Runyon was a minor; was of unsound mind; or was a member of the military which would prevent him from defending himself in the case. (ROA, p. 125). Mr. Runyon did not respond to this motion. On January 18,

² As required by KRS 341.450(1), the petition for judicial review was verified by the undersigned counsel for WKCC. The statute allows the verification to be made "by the plaintiff or his attorney."

2011, Warren Circuit Court Judge Steve A. Wilson entered an order granting WKCC's motion for default judgment against Mr. Runyon. (ROA, pp. 147-148). A copy of this order is attached hereto as Exhibit F. The order states that it is final and appealable and neither Mr. Runyon nor the Commission moved to have the default judgment set aside nor did they file any appeal challenging the default judgment.

On the same day, January 18, 2011, Judge Wilson of the Warren Circuit Court also entered an order affirming the decision of the Commission in favor of Mr. Runyon. (ROA, pp. 149-153). A copy of this order is attached hereto as Exhibit G. This was done despite the fact that the Court had entered the contemporaneous default judgment against Mr. Runyon. In the order affirming the Commission's ruling, Judge Wilson concluded that the Commission's finding that Mr. Runyon was not discharged for misconduct was supported by substantial evidence. In so ruling, the Court stated as follows: "Whether this court finds that Runyon was required to work on Wednesday or not is not conclusive on this issue. The only finding that matters is whether the Commission's finding that he was not required to work on Wednesday was supported by substantial evidence and this court finds that it was." (Warren Circuit Court order, January 18, 2011, pp. 4-5) (ROA, pp. 152-153). Judge Wilson did acknowledge that the Commission had misstated the record and its factual findings when it stated that Mr. Runyon had not been advised that his job was in jeopardy when he was suspended in June of 2008. Despite this acknowledgment, the Court concluded that this was not enough to state that the Commission's decision was not supported by substantial evidence. (ROA, p. 153).

Thereafter, WKCC appealed the Warren Circuit Court's order affirming the decision of the Commission to the Court of Appeals.³ (ROA, pp. 155-157). After briefing by WKCC and the Commission (and no participation by Mr. Runyon), a panel of the Court of Appeals entered an opinion affirming the Warren Circuit Court on December 9, 2011 (attached hereto as Exhibit A). In its opinion, the Court of Appeals gave erroneous weight and consideration to the fact that the Warren Circuit Court's order affirming the Commission was placed into the record immediately after the Warren Circuit Court's order of default judgment in favor of WKCC. The Court ignored the fact that these two orders were entered simultaneously on the same day and instead, construed the order affirming the Commission, solely because it was placed in the record immediately after the default judgment, as an indication that the circuit court abandoned the default judgment ruling. This decision was made by the Court of Appeals even though there was no statement made by the Warren Circuit Court that that was in fact the case or the intent of its ruling. Thus, the Court of Appeal erroneously strained to construe the record in a manner which would allow it to affirm the Commission.

In addition, the Court of Appeals also erroneously determined that the ruling of the Warren Circuit Court to affirm the Commission was supported under the abuse of discretion standard of review. The Court of Appeals gave no deference to the factual findings and legal conclusions of Referee Ivie who heard the live testimony and conducted the evidentiary hearing. The Court of Appeals erroneously chose to ignore the fact that Mr. Runyon himself testified that he had been told that if he had any other attendance issues at work he would be terminated (following his suspension for absentee issues at a prior time).

³ Neither Mr. Runyon nor the Commission filed a cross-appeal challenging the default judgment entered by the Warren Circuit Court against Mr. Runyon.

WKCC filed a motion for discretionary review and this Court granted that motion in an order entered on September 12, 2012. As was the case below, neither Mr. Runyon nor the Commission has challenged the default judgment entered against Mr. Runyon by filing a cross-motion for discretionary review.

For all of the reasons which are set forth herein, it is submitted that the decision of the Court of Appeals should be reversed and that the referee decision in favor of WKCC should be reinstated.

ARGUMENT

PRESERVATION OF ISSUES FOR APPELLATE REVIEW

CR 76.12(4)(c)(v) requires the Appellant at the beginning of the Argument section of its brief, to make a statement with reference to the record showing whether the issues raised in the appeal were properly preserved for review and, if so, in what manner. WKCC preserved the issues raised in this appeal through the following steps: (1) the filing of its papers, evidence and testimony in the administrative case and administrative appeal (ROA, pp. 45-50); (2) the filing of its verified petition for judicial review in the Warren Circuit Court (ROA, pp. 1-14); (3) its motion for default judgment against Mr. Runyon filed in and granted by the Warren Circuit Court (ROA, pp. 120, 125-126 and 147-148); (4) its briefs filed in the Warren Circuit Court (ROA, pp. 59-102 and 118-129); (5) its notice of appeal to the Court of Appeals (ROA, pp. 155-157); (6) its prehearing statement filed with the Court of Appeals setting forth the issues on appeal; (7) its briefs filed with the Court of Appeals; and (8) its motion for discretionary review filed with and granted by this Court.

STANDARD OF REVIEW

“When a defendant against whom a default judgment is entered fails to move the circuit court to set it aside, but instead appeals the default judgment directly, review is limited to determining whether the pleadings were sufficient to uphold the judgment and whether the appellant was actually in default.” Statewide Environmental Services, Inc. v. Fifth Third Bank, 352 S.W.3d 927, 930 (Ky. App. 2011) (citing Jeffrey v. Jeffrey, 153 S.W.3d 849, 851 (Ky. App. 2004)). Here, neither Mr. Runyon nor the Commission moved the Warren Circuit Court to set aside the default judgment or appealed or cross-appealed the entry of the default judgment

entered below. Thus, it should be held that the default judgment is now the law of the case and not subject to any further review. See United States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994) (“Under the doctrine of the law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation.”); Klemencic v. Ohio State University, 263 F.3d 504, 511 (6th Cir. 2001) (Clay, J., concurring) (“The law of the case...prevents a litigant from resurrecting an issue that has already been decided by a lower court and that has gone unchallenged on appeal”).

Next, “[t]he judicial standard of review of an unemployment benefit decision is whether the Commission’s findings of fact were supported by substantial evidence and whether the agency correctly applied the law to the facts.” Kentucky Unemployment Insurance Commission v. Duro Bag Manufacturing Co., 250 S.W.3d 351, 353 (Ky. App. 2008) (citing Burch v. Taylor Drugstore, Inc., 965 S.W.2d 830, 834-835 (Ky. App. 1998)). Unemployment compensation benefits may be denied, when subject to KRS 341.370(1)(b), the employee “has been discharged for misconduct...connected with is most recent work...”. Further, KRS 341.370(6) defines “‘discharge for misconduct’ as used in this section shall include but not be limited to, ...knowing violation of a reasonable and uniformly enforced rule of an employer; unsatisfactory attendance if the worker cannot show good cause for absences or tardiness...refusing to obey reasonable instructions...”.

An appellate court is correct to reverse the Unemployment Insurance Commission with the Commission’s factual findings are not supported by substantial evidence to support its ultimate conclusion. See Nichols v. Kentucky Unemployment Insurance Commission, 677 S.W.2d 317 (Ky. App. 1984). In addition, an appellate court is correct to reverse the

Commission when it makes an erroneous legal conclusion. See J.T. Nelson Co., Inc. v. Comstock, 636 S.W.2d 896 (Ky. App. 1982).

**THE UNCHALLENGED DEFAULT JUDGMENT AGAINST MR. RUNYON
PROHIBITS ANY RULING IN HIS FAVOR.**

The issue of default judgments in unemployment appeals appears to be one of first impression in Kentucky. It is undisputed that neither Mr. Runyon nor the Commission asked the Warren Circuit Court to set aside the default judgment nor did either of these parties ask the Court of Appeals or this Court to set aside the default judgment. Therefore, it is WKCC's position that the default judgment it obtained is final and the law of the case. WKCC does not agree with the Court of Appeals that the specific placement of the two Warren Circuit Court orders in the record on the same day shows any intention of that court to abandon the default judgment ruling. There is no indication in the Warren Circuit Court's order affirming the Commission that it intended to abandon its contemporaneous default judgment ruling.

Obviously, one of the two orders entered by the Warren Circuit Court on January 18, 2011 had to come first in the record and the other one had to come second. The Court of Appeals premised its decision to ignore the default judgment simply on the fact that the default judgment order came first in the record and the order affirming the Commission came second—even though they were entered at the same time on the same day. Taking this reasoning to its logical conclusion, if the default judgment order had been placed after the order confirming the Commission, then the Court of Appeals would have had no choice but to find for Mr. Runyon. To base a ruling on where the clerk placed the orders in the record is unsustainable.

KRS 341.450 required WKCC to name both Mr. Runyon and the Unemployment Insurance Commission as defendants in its action filed in the Warren Circuit Court. Accordingly, Mr. Runyon was served with WKCC's verified petition for judicial review and with an accompanying summons on December 23, 2009. The civil summons served on Mr. Runyon specifically states as follows: "You are hereby notified a **legal action has been filed against you** in this Court demanding relief as shown on the document delivered to you with this Summons. **Unless a written defense is made by you or by an attorney on your behalf** within **20 days** following the day this paper is delivered to you, judgment by default may be taken against you for the relief demanded in the attached Complaint." (ROA, p. 58) (emphasis original). It should also be noted that it has been held that the civil rules, which would presumably include the civil rules pertaining to default judgments, apply in unemployment appeals filed under KRS 341.450 in circuit courts. Brown Hotel Co. v. Edwards, 365 S.W.2d 299, 300 (Ky. App. 1962).

Thus, Mr. Runyon was required to respond to the complaint filed against him in the Warren Circuit Court and his failure to do so subjected him to a default judgment. WKCC submits that Mr. Runyon, as a necessary and indispensable party, is the party against whom a judgment for affirmative relief was sought in the complaint filed in the Warren Circuit Court. Specifically, WKCC sought a finding that he was terminated for misconduct and for a return of the unemployment benefits paid to him from its reserve account. (See ROA, pp. 1-14). WKCC appealed the separate order of the Warren Circuit Court which affirmed the Commission's ruling in favor of Mr. Runyon and thereby challenged the failure of the lower Court to give effect to the default judgment it entered simultaneously. WKCC further submits that the order affirming the

Commission's ruling cannot stand given the unchallenged and final default judgment entered by the Warren Circuit Court. See Kurt A. Philipps, Jr., David v. Kramer and David W. Burleigh, 7 Kentucky Practice: Rules of Civil Procedure Annotated, §55.01 (6th Ed. 2010) ("If a court determines that the defendant is in default, the factual allegations in the complaint are taken as true and the defendant may no longer contest the allegations"). Since Mr. Runyon, not the Commission, is the real party in interest Defendant, the default judgment against him should have the effect of ending the case in favor of WKCC.

It is anticipated that the Commission will contend that giving true effect to the default judgment against Mr. Runyon would be unduly harsh and that the doctrine of substantial compliance or something akin thereto should allow Mr. Runyon to escape the consequences of his failure to participate in this civil action— i.e., that he only had to be served under the statute and that it, the Commission, could make the substantive arguments for him in the case. Such a magnanimous argument by the Commission would be inconsistent with the position it has previously taken in unemployment benefits appeals. For example, in Kentucky Unemployment Insurance Commission v. Carter, 689 S.W.2d 360 (Ky. 1985), the Commission advocated for strict statutory compliance in an unemployment appeal and against the invocation of the doctrine of substantial compliance. In that case, the unemployment claimant failed to name and join the employer as a party to the unemployment appeal in circuit court and the complaint was dismissed. The Supreme Court upheld the dismissal and stated as follows:

On appeal, KUIC [the Commission] contends that the judicial review section of the unemployment statute mandates that the employer be joined as a party and that the doctrine of substantial compliance in this case is not the law of the Commonwealth. We agree.

...

It is also a fact that the employer was not joined as a *party* to the suit filed by Carter in the circuit court. It was not named in the caption of the complaint, no summons was issued or served pursuant to CR 4.04, and no relief was sought against the employer in the prayer for relief. In other words, Carter did not join the employer, in spite of a crystal clear directive in the statute that “Any other party to the proceeding before the commission shall be made a defendant in such action.” KRS 341.450.

...

We believe that the statute in question, and others which establish judicial review of decisions of administrative bodies and which require certain parties to be joined, in effect transform such parties into indispensable ones. CR 19.01. In the present case, the statute gives the very cogent reason for its requirement, viz., that the employer’s reserve account will be affected by the outcome of this litigation.

...

Because the judicial review statute, KRS 341.450, was not followed and because, as a result, an indispensable party to the appeal was not made a party defendant, the judgment of the trial court is affirmed.

Id. at 361-363 (emphasis original).

Mr. Runyon was an indispensable party to this appeal and he was thusly joined as a defendant pursuant to the statute, KRS 341.450. His failure to participate in this case in the circuit court and beyond had real and meaningful consequences. The Warren Circuit Court was correct to grant WKCC a default judgment when Mr. Runyon failed to answer the complaint. The Commission cannot and does not represent the affected employee in unemployment appeals. It cannot answer for the employee in appeals to either the circuit court or beyond. See Stearns Coal & Lumber Co. v. Unemployment Compensation Commission of Kentucky, 285 Ky. 249, 147 S.W.2d 382, 383 (1941) (“The right to act for and on behalf of others was not conferred by the act permitting appeals to the courts from decisions of the Commission and prescribing the

procedure to be followed.”). The default judgment was granted and then not challenged by any party. It is final and unchallenged and should be given effect.

When there is a default judgment entered against the affected employee, as there is here, the Court should rule that the failure to participate in the case is fatal to the employee’s claim for unemployment benefits. There is a reason that the unemployment benefits statute requires the joinder of the affected employee – it is because the employee is the indispensable party for whom or against whom a judgment will rest. Thus, the failure of that employee to participate in the case after being served with the complaint and a summons has real consequences that must be recognized by a reviewing Court. As such, the failure of Mr. Runyon to file responsive pleadings and otherwise participate in the circuit court appeal (and subsequent appeals) should result in a reversal of the decision of the Court of Appeals and a reinstatement of the unemployment referee’s decision in favor of WKCC (all of which was requested in the unanswered complaint).

THE COMMISSION'S FACTUAL FINDINGS AND LEGAL CONCLUSIONS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Even if the Court does not rule for WKCC based on the default judgment issue discussed above, it is submitted that WKCC should still prevail in this appeal given the erroneous factual findings and conclusions made by the Commission. The Commission's factual findings misstate the record and therefore, are not supported by substantial evidence.

Specifically, the Commission misstated the record on page three of its opinion when it stated that: "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." (Commission Decision, p. 3) (ROA, p. 26) (emphasis added). This statement by the Commission was made despite the fact, during the evidentiary hearing held before the referee, Mr. Runyon specifically testified to the contrary that he had been given a three-day suspension in June 2008 for attendance issues and **admitted that he was told at that time that any further attendance incidents would lead to his discharge.** (Transcript, p. 38).

The Commission seeks to avoid the consequences of its misstatement by pointing out that Mr. Runyon's supervisor did not recall the termination warning even though Mr. Runyon himself admits it did occur. However, the Commission did not premise its finding that Mr. Runyon had not been warned that his job was in jeopardy and subject to termination on any such testimony by his supervisor. Indeed, there is every reason to believe that the Commission either ignored Mr. Runyon's own admission in his testimony about the warning or failed to look for it in reviewing the evidentiary record. Either way, the Commission's factual findings are incorrect and the Court owes them no deference.

This case can and should be decided on the testimony of Mr. Runyon himself. He admitted at the evidentiary hearing before the referee that he had a problem with work absenteeism/tardiness and that he had been previously suspended for this problem and warned that any further incidents would lead to his discharge. He admits that he had been working regularly prior to his termination on Wednesdays and that in so doing, he regularly worked on that day from noon until at least 6:00 p.m. This is a pattern that WKCC came to rely on in conducting its business affairs. Thus, when Mr. Runyon unilaterally chose to leave work after only two hours on Wednesday, March 25, 2009, his employer had no notice and was left empty-handed.

Mr. Runyon admitted that he gave no specific reason for leaving work early on this date nor did he seek permission from his supervisor to do so. Mr. Runyon admits in this testimony that his supervisor told him as he was leaving that he could not come and go as he pleased from work. And despite knowing that any further incident would lead to his termination, Mr. Runyon still chose to leave work. The next day, it is undisputed that Mr. Runyon cursed at his supervisor at WKCC. These acts constitute insubordination would should not be deemed anything but misconduct connected with the work. In ruling otherwise, the Commission (and the reviewing Courts that deferred to it) made a clear error of law.

Referee Ivie correctly decided this case in favor of WKCC after she heard the live testimony from the witnesses at the evidentiary hearing. This is in direct contrast with the Commission which did not bother to take the time to conduct an evidentiary hearing of its own. **The referee correctly noted that: "the employer and claimant had reached a mutual agreement that the claimant would work until 6 pm on Wednesdays, which the employer**

had come to rely upon. (Referee Decision, p. 2) (ROA, p. 30) (Emphasis added). The referee also correctly noted that: **“the employer acts reasonably when inquiring into the cause of an employee’s sudden need to leave work early and when requiring an employee to have a good cause for leaving work early and not giving an employer any advance notice. By choosing to leave work without his supervisor’s permission and without giving a reason, the claimant’s acts constituted insubordination.”** (Referee Decision, p. 3) (ROA, p. 31) (Emphasis added).

Mr. Runyon clearly displayed no regard for his employer’s interests by walking off the job site without notice or permission. Kentucky law does not allow an employee to come and go from work as he pleases without giving any reason for leaving work early. KRS 341.370(6) includes unsatisfactory work attendance as part of the definition of misconduct that disqualifies an employee from receiving unemployment benefits. Kentucky law further defines Mr. Runyon’s behavior in walking off the job as misconduct. See Burch v. Taylor Drugstore, Inc., 965 S.W.2d 830, 835 (Ky. App. 1998) (“The test for determining misconduct is whether the employee’s actions evidence a ‘willful and wanton disregard of the employer’s interest.’”) (citing Shamrock Coal Co. v. Taylor, 697 S.W.2d 952, 954-955 (Ky. App. 1995)). An employee who is terminated for misconduct is not entitled to recover unemployment benefits. KRS 341.370(1)(b).

There can be little doubt that Mr. Runyon displayed no regard for his employer’s interest by walking off the job without notice or permission. This is what Referee Ivie correctly held below. Because the Commission’s factual findings and legal conclusions concerning this insubordinate behavior are not supported by substantial evidence, its decision should be given no

deference and should be reversed. This is also true of the subsequent reviewing courts who affirmed the Commission's erroneous decision.

CONCLUSION

Based on all of the foregoing, WKCC urges the Court to reverse the prior decisions of the Court of Appeals, the Warren Circuit Court and the Unemployment Insurance Commission and to further, reinstate the decision of the unemployment referee which found for it on the issue of termination for misconduct. The entry of a consistent opinion is respectfully prayed.

This 8th day of October, 2012.

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