IN THE COURT OF APPEALS OF IOWA

No. 1-302 / 00-1580
Filed July 31, 2001

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CLERK SUPREME COURT

ALAN J. WILSON, Claimant,
Petitioner-Appellant,

vs.

SWINE GRAPHICS ENTERPRISES, L.C., EMPLOYER, and IOWA EMPLOYMENT APPEAL BOARD,
Respondents-Appellees.

Appeal from the Iowa District Court for Appanoose County, Dan F. Morrison, Judge.

The petitioner appeals from the district court's ruling on judicial review affirming the respondent board's denial of his claim for unemployment benefits.

AFFIRMED AS MODIFIED.

Michael T. Jalovec and James A. Sinclair of Sinclair & Associates, P.C., West Des Moines, for appellant.

Richard R. Ramsey, Des Moines, for appellee board.

Sharon Malheiro of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellee employer.

Considered by Streit, P.J., and Mahan and Zimmer, JJ.

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MAHAN, J.

The petitioner, Alan Wilson, appeals from the district court's ruling on judicial review affirming the respondent board's denial of his claim for unemployment benefits. The petitioner contends: (1) the respondent employer's initial appeal of his claim for unemployment benefits was untimely; (2) the board improperly determined the petitioner was disqualified from receiving unemployment benefits under Iowa Code section 96.5(1)(d) on the basis of a voluntary quit without being capable of returning to work after his injury; (3) the petitioner established he was able to return to work under Iowa Code section 96.4(3); (4) the board violated his due process rights by allegedly giving him inadequate notice of the "ability to work" issue; and (5) the district court erred in assessing costs against the petitioner. Finally, petitioner argues if this court concludes he is entitled to unemployment benefits, the board's overpayment decision should be reversed. We affirm as modified.

Background Facts and Proceedings. Alan Wilson (Wilson) began working as a part-time-hourly employee for Swine Graphics Enterprises (Swine Graphics) on October 16, 1996. He later became a full-time-salaried employee. On November 10, 1997, Wilson sustained a work-related injury to his neck, shoulders, and back. His doctor released him to return to work with a sixty pound lifting restriction on April 16, 1998.

Wilson was injured in a non-work-related auto accident on August 29, 1998. He worked a few days, then advised Swine Graphics a doctor was treating him and he could not work due to his injuries. Swine Graphics allowed Wilson to

use seventeen days of vacation and sick leave to cover his absence. Thereafter, Swine Graphics gave Wilson the option of going on family medical leave. Wilson signed paperwork for, and Swine Graphics approved of, family leave from September 28, 1998 through December 21, 1998. Wilson had not been released to return to work shortly before his family leave was to expire in December 1998. Swine Graphics informed Wilson he could extend his leave until he was ready to return to work. Wilson agreed to the extended leave.

In February 1999, Wilson's doctor released him to work with the following restrictions: no absolute lifting (rare lifting greater than fifty pounds), no occasional lifting more than thirty pounds, no repetitive lifting greater than twenty pounds, no prolonged or repeated extension of the arms or use of arms above the head, no use of the head in a bent posture or posture other than straight forward for long periods of time. His doctor also limited Wilson as to driving and standing.

Wilson discussed returning to work with a manager at Swine Graphics. The manager indicated he could not use Wilson unless he was one hundred percent. Wilson filed for unemployment benefits on February 7, 1999. Swine Graphics did not receive notice of the claim for unemployment benefits. It first learned of Wilson's claim upon receipt of a statement of charges dated May 7, 1999. Swine Graphics responded with an appeal letter dated May 25, 1999. It protested on the basis Wilson was on an extended leave of absence and still considered an employee.

On June 18, 1999, the Iowa Workforce Development denied unemployment benefits to Wilson, finding he was on a voluntary leave of absence. An Administrative Law Judge (ALJ) affirmed the claims deputy's decision and denied Wilson's claim on August 4, 1999. On October 26, 1999, the Iowa Employment Appeal Board (EAB) affirmed the ALJ's ruling, but modified the ALJ's decision. The district court affirmed the EAB's decision on September 8, 2000. Wilson appeals.

Standard of Review. The Iowa Administrative Procedure Act, Iowa Code Chapter 17A, governs our review of unemployment benefits cases. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 664 (Iowa 2000). Our review of an agency decision is on error. *Eaton v. Iowa Employment Appeal Bd.*, 602 N.W.2d 553, 554 (Iowa 1999). The agency's decision is binding if substantial evidence supports the decision and it is not based upon an incorrect conclusion of law. *Id.* Substantial evidence means evidence that a reasonable person would accept as adequate to reach the same finding. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). Therefore, the ultimate question is not whether the evidence would support a different finding but whether it supports the finding actually made. *Id.*

When an appellant raises constitutional issues we make an independent evaluation based on the totality of the circumstances. *Silva v. Employment Appeal Bd.*, 547 N.W.2d 232, 234 (Iowa Ct. App. 1996). This is the equivalent of de novo review. *Id.* Therefore, we review Wilson's due process claim de novo.

Timeliness of Employer's Appeal. Wilson contends Swine Graphics did not protest payment of unemployment benefits to him within ten days, as required by Iowa Code section 96.6(2). Therefore, Wilson argues, Swine Graphics' appeal should not have been allowed.

Iowa Code section 96.6(2) allows interested parties ten days from the date of mailing notice of the filing of a claim to protest payment of unemployment benefits to the claimant. Iowa Code § 96.6(2) (1999). *See also* Iowa Admin. Code r. 871-26.4(2). Notice of Wilson's intent to claim unemployment benefits should have been mailed to Swine Graphics on February 12, 1999. However, Swine Graphics did not learn of the claim until it received a statement of charges dated May 7, 1999. Swine Graphics filed its appeal on May 25, 1999, within the thirty-day time period to appeal a statement of charges. *See* Iowa Code § 96.7(4) (employer allowed thirty days from the date on which an initial determination is mailed to appeal an initial determination of the employer's liability); Iowa Admin. Code r. 871--26.5(1) and (2). *See also* Iowa Admin. Code r. 871--26.4(3) ("Notwithstanding [the ten-day requirement of Iowa Admin. Code r. 871--26.4(2)], a contributory employer, which has not previously received notice of the filing of a valid claim for benefits, may appeal an individual's eligibility to receive benefits within 30 days from the mailing date of the quarterly statement of benefit charges.").

The submission of any appeal shall be considered timely if the delay was due to department error or delay of the United States postal service. *See* Iowa Admin. Code r. 871--24.35(2). The ALJ concluded the employer's failure to

receive notice of the claim was "most probably due to the failure of the U.S. Postal Service to properly deliver or the Department to forward." Once Swine Graphics learned of the claim via the statement of charges, it timely appealed within the required thirty-day period. Substantial evidence supports the agency's decision. We affirm on this issue.

Application of Iowa Code Section 96.5(1)(d). The ALJ concluded Wilson was still on a leave of absence when he applied for unemployment benefits. Therefore, the ALJ determined Wilson was disqualified pursuant to rule 871--24.22(2)(j) (employee ineligible for benefits during leave of absence negotiated with consent of both parties). The EAB modified the ALJ's decision, however, applying Iowa Code section 96.5(1)(d) and rule 871--24.26(6)(a).

Iowa Code section 96.5(1)(d) (1999) provides as follows:

> An individual shall be disqualified for benefits:
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> (1) *Voluntary quitting.* If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified in the department finds that:
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> ....
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> (d) The individual left employment because of . . . injury . . . upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the . . . injury. . . , when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Unemployment benefits will be afforded under the exception found in section 96.5(1)(d) where a claimant is fully recovered and the claimant's former

position was not held open upon his or her return. *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa Ct. App. 1985). The Iowa Administrative Code defines "recovery" as "the ability of the claimant to perform all of the duties of the previous employment." Iowa Admin. Code r. 871--24.26(6)(a).

The EAB found and concluded:

> [Wilson] remained on leave of absence only until he returned to work and offered his services at the end of January 1999. Prior to the automobile accident, the claimant had a lifting restriction of not to exceed 60 pounds and his job responsibilities required that he be able to lift 50 pounds. After the automobile accident, and when the claimant returned and offered his services, the claimant had additional restrictions including a lifting restriction of not to exceed 40 pounds. Claimant failed to establish that he was recovered from the automobile accident to the extent that he was prior to the accident or that he was able to perform the same duties for the employer that he was performing prior to the automobile accident.
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> ....
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> [Wilson] assented to being placed on leave of absence only until he was released to return to work by his doctors.
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> After being released with restrictions by his doctors, the claimant offered to return to work. However, the claimant failed to establish that he had recovered to the extent that he was prior to the automobile accident or that he could perform the same or similar duties that he had performed for the employer prior to the automobile accident. The claimant is barred from receiving unemployment benefits until he has complied with the provisions of Iowa Code Section 96.5.1(d) and 871 IAC 24.26(6)a.

We conclude the EAB did not err in applying section 96.5(1)(d). Substantial evidence supports the EAB's decision, and we affirm on this issue.[1]

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[1] We note our approval of the EAB's decision, rather than that of the district court. While we agree with the district court's result, the EAB's decision clearly sets forth the facts and the law on this issue.

Application of Iowa Code Section 96.4(3). Wilson argues he proved he was able and available to work pursuant to Iowa Code section 96.4(3).[2] We conclude Wilson failed to preserve the issue for our review.

A party is precluded from raising issues in the district court that were not raised and litigated before the agency. *Interstate Power Co. v. Iowa State Commerce Comm'n*, 463 N.W.2d 699, 701 (Iowa 1990). To preserve error for appeal, a party must raise the issue before the agency. *Id.* Wilson's availability for work was not an issue before the ALJ, the EAB, or the district court. Therefore, we need not consider whether Wilson was "able and available" for work. Similarly, we need not consider Wilson's contention his due process rights were violated due to inadequate notice of the "able and available to work" issue. No due process violation occurred because the issue was never raised or addressed by the agency or the district court.

Overpayment. Subsequent to the decision denying Wilson unemployment benefits, the claims deputy determined Wilson had been overpaid unemployment benefits. The ALJ, EAB, and district court affirmed the decision. Because we affirm the EAB's denial of unemployment benefits, we need not address the overpayment issue Wilson raises.

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[2] The section provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that: . . . (3) the individual is able to work, is available for work, and is earnestly and actively seeking work. . . . .

Iowa Code § 96.4(3) (1999).

Assessment of Costs. The district court assessed costs to Wilson. Wilson contends Iowa Code section 96.15(2) prohibits the court from assessing costs to him. We agree.

Iowa Code section 96.15(2) provides as follows:

> *Prohibition against fees.* An individual claiming benefits shall not be charged fees of any kind in any proceeding under this chapter by the department or its representatives or by a court or an officer of the courts. . . . .

The prohibition in section 96.15(2) against charging a claimant "fees of any kind" encompasses court costs. *Geiken v. Lutheran Home for the Aged Ass'n.*, 468 N.W.2d 223, 227 (Iowa 1991). The district court erred in assessing Wilson with court costs. We modify the district court judgment by removing the requirement Wilson pay court costs.

AFFIRMED AS MODIFIED.