IN THE COURT OF APPEALS OF IOWA

No. 1-359 / 91-37

FILED
JAN 29 1992
CLERK SUPREME COURT

385

JOHN LEWIS,

Appellant,

vs.

CONSTRUCTION SERVICES, LTD., and **EMPLOYMENT APPEAL BOARD,**

Appellees.

Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

Petitioner appeals an order of the district court affirming the decision of the Employment Appeal Board finding that petitioner was not eligible for unemployment benefits because he voluntarily quit his employment. **AFFIRMED.**

Robert C. Oberbillig and Devon Hintz-Miller of Legal Aid Society of Polk County, Human Services Campus, Des Moines, for appellant.

William C. Whitten and Joe E. Smith of Employment Appeal Board, Des Moines, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

DONIELSON, P.J.

The petitioner, John Lewis, was an employee of Construction Services, Ltd. from April 1989 until November 4, 1989. Lewis was employed as a truck driver and general laborer. Construction Services is owned by Chris Green and Edward L. Bundy, Sr. Lewis's last day of work was October 27, 1989.

Lewis claimed he was told on October 27, 1989, that he was laid off because the employer did not have any work available for him. Lewis testified he attempted to contact Green several times regarding the availability of work.

Green, however, testified that he called Lewis and informed him that work would be available on November 4, 1989, and that another employee would pick him up. Green maintained that the other employee attempted to pick up Lewis, but that Lewis was not available. Green argued he had work available throughout the time period in question, but that Lewis simply failed to return to work.

Lewis ultimately filed his claim for unemployment benefits on December 3, 1989. Construction Services protested the payment of benefits. On December 26, 1989, an initial determination was made that Lewis was qualified to receive benefits because he was laid off by Construction Services.

Construction Services appealed the initial determination. Lewis represented himself at the hearing. Construction Services was represented by Green. The other

owner of Construction Services, Bundy, was not present at the hearing. Following the hearing, the administrative law judge (ALJ) found that the employer had work available and that Lewis abandoned his job by failing to report to work. The ALJ held that Lewis had voluntarily quit his employment. The ALJ determined Lewis had received $774 in benefits to which he was not entitled.

Lewis subsequently filed an appeal with the Employment Appeal Board. On March 26, 1990, Lewis filed a letter and accompanying affidavit of Bundy. According to the affidavit, Lewis did not quit his employment, but was laid off due to a seasonal work slowdown. The board, however, refused to consider the affidavit, stating that such information should have been presented at the initial hearing, and affirmed the decision of the ALJ. Lewis filed for a rehearing, which was denied.

Lewis filed a petition for judicial review in district court. The district court entered an order affirming the agency denial of benefits and its refusal to consider new evidence. Lewis has appealed.

I. Our scope of review in cases involving unemployment benefits is at law, not de novo. Hollensbe v. Iowa Department of Job Service, 418 N.W.2d 77, 78 (Iowa App. 1987). The district court acts in the role of an appellate court in judicial review proceedings to correct errors at law. Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 605 (Iowa App. 1990). Similarly,

our review of the district court decision is to correct errors at law. Id.

II. Lewis contends that the decision of the board is not supported by substantial evidence. He claims Green is not credible because he did not present any corroborating evidence there was work available during the time in question.

We review to determine whether the agency decision is supported by substantial evidence when viewing the record as a whole. Lithcote Co. v. Ballenger, 471 N.W.2d 64, 66 (Iowa App. 1991). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach the given conclusion. Id. The fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. Id.

We hold there was substantial evidence to support the board's decision. The testimony of Green supports the decision of the board. The question here is not so much whether there was substantial evidence, but the credibility of the evidence presented. The weight of testimony is for the agency as fact finder to determine. Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

III. Lewis also contends the board should have considered the affidavit of Bundy or granted a rehearing. He believes the evidence is material. Lewis states he did

not present the evidence at the hearing because he was not aware of Bundy's opinion until after the ALJ's decision.

Although this case involves the question of presentation of additional evidence to the agency after the administrative hearing has been held, we look to Iowa Code section 17A.19(7) for guidance. That section gives a district court authority to remand a case to the agency for the taking of additional evidence not included in the agency record. See Hollensbe v. Iowa Department of Job Service, 418 N.W.2d 77, 80 (Iowa App. 1987).

The district court's authority here is discretionary. Heidemann v. Sweitzer, 375 N.W.2d 665, 670 (Iowa 1985). An application pursuant to section 17A.19(7) must show (1) materiality and (2) good reasons for failure to present the evidence earlier. Cedar Valley Leasing, Inc. v. Iowa Department of Revenue, 274 N.W.2d 357, 363 (Iowa 1979).

We find that the proper standard of review here is that required by section 17A.19(7). Thus, the question is whether the agency acted within its discretion. We hold the board did not abuse its discretion in refusing to consider the affidavit of Bundy. Lewis did not show a good reason for failing to present the evidence earlier. The agency had the power to subpoena Bundy, see Iowa Code section 96.11(9), but Lewis did not take advantage of this power.

We affirm the decisions of the district court and the Employment Appeal Board.

AFFIRMED.