

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

PATRICIA J. BOUCHARD,

Appellant,

Case No. 2012-4168-AE

vs.

LAVDAS ENTERPRISES, INC. and  
MICHIGAN DEPARTMENT OF LICENSING  
AND REGULATORY AFFAIRS,  
UNEMPLOYMENT INSURANCE AGENCY,

Appellees.

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OPINION AND ORDER

Appellant Patricia J. Bouchard<sup>1</sup> appeals the decision of the Michigan Compensation Appellate Commission (“Board of Review”) affirming Administrative Law Judge J.R. Wheatley’s May 30, 2012 decision dismissing Appellant’s appeal for failure to prosecute pursuant to MCL 421.33. Appellee Agency has filed a response requesting the Court affirm the Board of Review’s decision.

*Factual and Procedural History*

Appellee Agency issued a redetermination in which it found Appellant ineligible to receive unemployment benefits and ordered Appellant to pay restitution. The basis for its decision was that it found that Appellant had collected benefits while at the same time receiving unreported wages from Appellee Company. Further, Appellee Agency assessed fraud penalties based on its finding that Appellant fraudulently failed to report the wages.

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<sup>1</sup> For simplicity the Court will refer to Appellant Patricia J. Bouchard as “Appellant”, Appellee Lavdas Enterprises, Inc. as “Appellee Company”, Appellee Michigan Department of Licensing and Regulatory Affairs, Unemployment Insurance Agency as “Appellee Agency”, and Appellee Company and Appellee Agency collectively as “Appellees.”

Appellant then appealed the redetermination to Administrative Law Judge (“ALJ”) Wheatley. On May 29, 2012, a hearing was held in connection with Appellant’s appeal. Appellant did not appear at the hearing; rather, Appellant’s counsel appeared at the hearing to represent Appellant. ALJ Wheatley held that Appellant was required to appear at the hearing and that her failure to do so constituted a failure to prosecute her appeal pursuant to MCL 421.33. As a result, ALJ Wheatley dismissed Appellant’s appeal. Appellant then filed an appeal to the Board of Review, which on August 10, 2012 affirmed ALJ Wheatley’s decision. On September 10, 2012, Appellant filed her Claim of Appeal with this Court.

#### Standard of Review

The Court’s examination of the Board of Review’s decision is governed by MCL 421.38. The Court will reverse a decision of the Board of Review where it is either contrary to law or not supported by competent, material, and substantial evidence on the whole record made before the referee and the board of review. MCL 421.38(1); *Vanderlaan v Tri-County Community Hosp*, 209 Mich App 328, 331; 530 NW2d 186 (1995). Substantial evidence regarding unemployment benefits is that evidence which reasonable minds would accept as adequate to support a decision, meaning more than a mere scintilla but less than a preponderance of evidence. *Korzowski v Pollack Industries*, 213 Mich App 223, 228; 539 NW2d 741 (1995). The public policy of the Michigan Employment Security Act (MESA) requires liberal construction of unemployment benefits coverage and strict construction to effect disqualification. MCL 421.1 *et seq*; *Empire Iron Min Partnership v Orehanen*, 455 Mich 410, 416; 565 NW2d 844 (1997).

#### Analysis

The Court has reviewed the record, the decision of the ALJ, and the decision of the Board of Review. The key determination to be made is whether Appellant failed to prosecute her

appeal by being represented by her counsel at the hearing rather than appearing at the hearing personally. In his decision, ALJ Wheatley concluded that Appellant was required to personally appear at the hearing in order to prosecute her appeal. The Court is convinced that ALJ Wheatley's decision, as well as the Board of Review's affirmation of the ALJ decision, are contrary to law and must be reversed and remanded for further proceedings.

MCL 421.33 does not define what constitutes a failure to prosecute an appeal. Specifically, MCL 421.33 does not state whether an appealing party must personally appear at the hearing. However, it is well established that "an appearance by an attorney for a party is deemed an appearance by the party. Unless a particular rule indicates otherwise, an act required to be performed by a party may be performed by the attorney representing the party." MCR 2.117(B)(1). Further, MCL 421.31 of the Michigan Employment Security Act provides: "any individual claiming benefits in any proceeding before the commission or a court may be represented by counsel or other duly authorized agent." Based upon the above-referenced authority, the Court is satisfied that Appellant's failure to personally appear at the hearing did not constitute a failure to prosecute her appeal.

The parties in this matter spent a substantial portion of their briefs disputing who held what burden(s) of proof. The Court is convinced that such determinations are irrelevant for the purpose of the instant appeal. ALJ Wheatley and the Board of Review both declined to address the merits of Appellant's appeal. Rather, they decided the merits did not need to be addressed based on Appellant's failure to appear at the hearing. However, for the reasons discussed above the Court is satisfied that Appellant, through her attorney, was present at the hearing for the purpose of prosecuting her appeal. While it is unclear from the record whether Appellant's counsel was permitted to argue Appellant's position at the hearing, it is clear that the merits were

not entertained. Consequently, the Court finds that the decisions of the ALJ and Board of Review must be reversed and that this matter should be remanded for a re-hearing before an administrative law judge.

Conclusion

Based upon the reasons set forth above, the September 10, 2012 decision of the State of Michigan Employment Security Board of Review is REVERSED. Appellant's claim of appeal is GRANTED. This matter is REMANDED for further proceedings consistent with this Opinion and Order regarding Appellant's appeal. This Opinion and Order resolves the last claim and closes the case. This Court does not retain jurisdiction. See MCR 2.602(A)(3).

IT IS SO ORDERED.

**MARK S. SWITALSKI**

CIRCUIT JUDGE

Mark S. Switalski, Circuit Judge

Dated: June 14, 2013

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