

138280

A. D. No. TRA95-00016-138280W

S. S. No. [REDACTED]

B. O. No. 63

Employer No. 1148790

STATE OF MICHIGAN
CIRCUIT COURT FOR THE THIRTY-FIFTH JUDICIAL CIRCUIT
SHIAWASSEE COUNTY

DARLTON BROWN,
Appellant,

Court No. 97-1250-AV

v

HON. GERALD D. LOSTRACCO

JOHNSON CONTROLS BATTERY
and STATE OF MICHIGAN
UNEMPLOYMENT AGENCY,
DEPARTMENT OF CONSUMER &
INDUSTRY SERVICES,
(formerly MESC)
Appellees.

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Consumer & Industry Services

M.E.S. BOARD OF REVIEW
JUL 21 1998
FILED:
R. DOUGLAS DALIGGA
DIRECTOR

O P I N I O N

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SHIAWASSEE

DARLTON BROWN,
Appellant,

VS

FILE NO. 97-1252-AE

JOHNSON CONTROLS BATTERY and
STATE OF MICHIGAN UNEMPLOYMENT
AGENCY, DEPARTMENT OF CONSUMER
AND INDUSTRY SERVICES,
Appellees.

By 

By _____

OPINION

On May 20, 1998, this Court was scheduled to hear oral arguments on this appeal from a Board of Review hearing denying Appellant Trade Readjustment Assistance benefits; however, the parties have stipulated that this Court should rely on the briefs submitted and issue a written opinion.

Appellant was fired from his job at Johnson Controls on August 2, 1994. He subsequently filed a grievance and, on two dates, December 7, 1994 and December 13, 1994, a grievance settlement was made. The grievance settlement provided that Appellant's discharge was without cause and that it would be cleared from his record. Furthermore, it provided that Appellant

would return to work in mid-December. Appellant was unable to actually return to work because Johnson Controls closed its plant on December 16, 1994. After the plant was closed, Appellant applied for Trade Readjustment Assistance benefits and, at a Referee hearing held on November 1, 1995, Referee Coon of the State Unemployment Agency, Michigan Department of Consumer and Industry Services (formerly known as Michigan Employment Security Commission and hereinafter referred to as MESCC) denied him those requested benefits.

Appellant then requested a review of Referee Coon's decision. The MESCC Board of Review upheld Referee Coon's decision in an order dated September 29, 1997. Appellant asked for a rehearing and the panel, in a split decision, denied the application for rehearing. It is that denial by the Board of Review that is now being appealed to this Court.

According to MSA 17.540(1), this Court may only reverse the MESCC Board of Review's decision if it determines that the decision is contrary to law or it is not supported by competent, material and substantial evidence on the whole record.

The reason cited by the Referee in determining that Appellant did not qualify for Trade Readjustment Assistance benefits was that, had Appellant not grieved his dismissal, his date of separation would have remained August 2, 1994. It was at that time he had been

discharged for alleged inappropriate conduct, which the employer subsequently failed to establish at a hearing before another Referee of the MESAC.

Pursuant to the Trade Act of 1974 and specifically, 19 USC §2319(2), an "adversely affected worker" is defined as:

"...an individual who, because of lack of work in adversely affected employment -

(A) has been totally or partially separated from such employment.

Referee Coon concluded that Appellant was not separated for reasons of lack of work. The Referee reasoned that since Appellant never resumed work after the grievance settlement and it did not actually permit an active return to work, the settlement never altered his original date of separation and, therefore, Appellant was not entitled to Trade Readjustment Assistance benefits.

Appellant has argued that, although he did not actually return to work per the grievance settlement, it was only because the plant closed before he was able to do so. Since the employer agreed to reinstatement and removed the discharge from his record as a modification of a prior discipline, Appellant argues that his prior separation should be treated as though it never occurred. Therefore, his last day worked would be considered that if he had been working when the plant closed. Appellant argues that it was only but for the

lack of work caused by the plant closing that he was unable to return to work. This occurrence caused his final separation.

The MESC reasons that the Referee and Board of Review's decision are correct because claimant's only separation from work occurred in August 1994 and it was for reasons other than a lack of work. Since Appellant never returned to work after his discharge on August 2, 1994, MESC argues that the record supports the finding that his separation was for reasons other than a lack of work.

According to the grievance settlement and the record taken as a whole, Appellant would have been reinstated effective mid-December, 1994. It was only because the plant was closing that he was unable to resume his work. This Court agrees with the dissenting Board of Review panel member that, "...the fact that the employer agreed to reinstate him and remove the discharge from his record indicates a concession by the employer that the discharge was not for just cause under the collective bargaining agreement. If the claimant did not merit discharge, the claimant should be treated as if the discharge did not occur and his separation should be considered to have occurred on the date that would have been his last day of work if he had been working when the plant closed."

The Referee and Board of Review's decision is not supported by competent, material and substantial evidence on the whole record. The record reflects the fact that the employer removed the discharge

for just cause from Appellant's employment record and he would have resumed work but for the plant closing. Since the employer closed the plant, there was a lack of work and Appellant was separated due to that fact.

In conclusion, this Court finds that Appellant's separation was due to a lack of work and the decision of the Board of Review is not supported by competent, material and substantial evidence on the whole record. This case is remanded to the State of Michigan Unemployment Agency, Michigan Department of Consumer & Industry Services to determine if Appellant meets the other eligibility requirements for Trade Readjustment Assistance benefits.

An **ORDER** in conformity may, herewith, be presented for signature.

Dated: 5/21/98
Corunna, Michigan
Judge

Gerald D. Lostracco
Gerald D. Lostracco, Circuit