

No. 25814 -- Alice R. Patton, et al. v. Cathy S. Gatson, Clerk of the Circuit Court of Kanawha County; the Board of Review of the West Virginia Bureau of Employment Programs; and Sexton Can Company, Inc.

**FILED**

**April 21, 2000**

DEBORAH L. McHENRY, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

**April 21, 2000**

DEBORAH L. McHENRY, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Starcher, C.J., dissenting:

I dissent because the appellants in this case got the short end of the procedural stick. The most important, probative piece of evidence that benefited the appellants did not exist until *after* the Administrative Law Judge’s fact-finding “appeal tribunal hearing.” The appellants presented this evidence to the Board of Review (“Board”), and the Board has the power and duty to examine such late-presented evidence. The regulations governing the Board require the Board to consider evidence that “was not available prior to the appeal tribunal hearing.” Even though the Board is supposed to liberally construe its own rules in a claim for unemployment benefits in favor of the claimants, in this case, the Board chose to ignore the appellants’ favorable evidence.

The appellants in this case contend that they were justified in failing to file for unemployment benefits within the required time period because an employee of the Bureau of Employment Programs told them that they were ineligible for benefits while on strike. At the hearing before the Administrative Law Judge, a supervisor from the Bureau testified that no Bureau employee would have told a worker on strike that they were ineligible for unemployment benefits. This testimony directly controverted the appellants’ testimony at the hearing.

After the hearing, several of the appellants approached the supervisor in the hallway. The appellants offered to point out the Bureau employee who prevented the appellants from filing a claim for benefits, and who told the appellants they were ineligible for benefits while on strike. The supervisor

responded that “she already knew who had told [the appellants] that [they] could not file for unemployment during a strike” -- a statement directly at odds with the supervisor’s testimony before the Administrative Law Judge.

This statement by the supervisor could not be presented to the Administrative Law Judge. The hearing was over and done, and the appellants, acting collectively without an attorney, could not have known how to hunt down the Administrative Law Judge to reopen the hearing, or to file an affidavit for the Administrative Law Judge’s consideration. Instead, the appellants mistakenly assumed that their collective testimony would be taken as true, and that they would prevail.

So after the Administrative Law Judge ruled against the appellants, they hired an attorney and pursued an appeal to the Board of Review. The appellants’ attorney prepared affidavits reflecting several of the appellants’ recollection of the Bureau supervisor’s post-hearing statement. These affidavits were filed with the Board along with the appellants’ appeal brief.

The Board of Review is statutorily empowered to consider evidence such as affidavits and make findings of fact. *W.Va. Code*, 21A-4-9 [1941] states:

The board shall have the following powers and duties, to:

- (1) Hear and determine all disputed claims presented to it in accordance with the provisions of article seven. . . .
- (4) Take oaths, examine witnesses, and issue subpoenas. . . .

Additionally, *W.Va. Code*, 21A-7-13 (4) [1939] requires the Board to establish rules that assist in:

Determining the rights of the parties; and the rules need not conform to the common-law or statutory rules of evidence and procedure and may provide for the determination of questions of fact according to the predominance of the evidence.

The rules set by the Board pursuant to this statute allow a party to present additional evidence on appeal upon a showing of “good cause.” The specific rule, 84 C.S.R. § 1.5.8, states that:

To establish good cause, a party must demonstrate that the evidence was not available prior to the appeal tribunal hearing [before an administrative law judge] or that he or she did not know, nor reasonably could have known, of the evidence in question at that time.

In carrying out its statutory responsibilities, the Board is supposed to perform its obligations liberally, to achieve the beneficent purposes of the unemployment compensation statutes. As we have repeatedly stated,

Unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof.

Syllabus Point 6, *Davis v. Hix*, 140 W.Va. 398, 84 S.E.2d 404 (1954).

In this case, the Bureau supervisor did not make her contradictory statement until *after* the hearing with the Administrative Law Judge. Hence, the appellants clearly “demonstrate[d] that the evidence was not available prior to the appeal tribunal hearing,” and thereby established good cause sufficient for the Board to consider their affidavits on appeal.

However, the final order issued by the Board of Review in this case contains absolutely no mention of the appellants’ affidavits, and no discussion of why the evidence presented in the affidavits was rejected by the Board. The appellants established good cause such that, procedurally and statutorily, the Board should have acted in some fashion on the evidence. Instead, the evidence was totally ignored.

I agree with the maxim that the findings of fact by the Bureau’s Board of Review are entitled to substantial deference unless clearly wrong. But the majority was wrong in suggesting that the

Board of Review can totally disregard a party's evidence and act as though it never existed, particularly when the party established good cause for why it should be considered. In sum, I would have reversed the Board of Review's decision denying the appellants their unemployment benefits, and remanded the case for consideration of the Bureau supervisor's post-hearing statement that "she already knew" who told the appellants they could not file for unemployment benefits.

I therefore respectfully dissent.