



In the Missouri Court of Appeals
WESTERN DISTRICT

HOMER HERGINS, JR.,)
Appellant,)
) WD73190
v.)
) OPINION FILED:
DIVISION OF EMPLOYMENT)
SECURITY,) March 6, 2012
Respondent.)

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION
Division Three: Karen King Mitchell, P.J., James M. Smart, Jr., and Gary D. Witt, JJ.

Homer Hergins, Jr., appeals the decision of the Labor and Industrial Relations Commission (“Commission”) affirming the determination that he was ineligible for Emergency Unemployment Compensation benefits in Missouri during the same period of time that he was eligible to claim regular unemployment benefits from the State of Kansas. We vacate and remand.

Background

In July 2008, Homer Hergins, Jr., after having lost his job, began receiving unemployment benefits through the Missouri Division of Employment Security (“Division”). The record does not provide specific information as to his employment

history or the location of his employment. The record shows that after exhausting his regular unemployment compensation in Missouri on April 18, 2009, Hergins filed for extended benefits in Missouri under the Federal Emergency Unemployment Compensation Act of 2008. On April 19, 2009, Hergins was granted Emergency Unemployment Compensation (“EUC”) in the amount of \$325.00 per week. Hergins claimed EUC benefits for each week during the period of time between April 19, 2009 and July 18, 2009. Hergins also received \$25.00 per week in Federal Additional Compensation (“FAC”)¹ benefits beginning on April 19, 2009 through July 18, 2009. During the process of filing his initial claim for regular unemployment benefits in Missouri and also during the filing of his claim for EUC benefits, Hergins was in contact with Division representatives. At that time, Hergins was advised to continue filing weekly claims in Missouri for EUC benefits. After exhausting his extended benefits, Hergins filed a claim for regular unemployment compensation in the State of Kansas, effective July 19, 2009.

Subsequently, the Division was contacted by the Kansas Department of Labor and informed that Hergins would have been eligible to receive regular unemployment benefits in Kansas during the same period of time (beginning April 19, 2009) that he was receiving EUC benefits in Missouri. A deputy with the Division determined that Hergins was not eligible to claim and receive EUC benefits in Missouri when, during the same time, he was eligible to claim and receive regular unemployment benefits in Kansas. The Division therefore determined that Hergins had been overpaid EUC benefits in the

¹These benefits are paid pursuant to the American Recovery and Reinvestment Act of 2009 (*see* 26 U.S.C. § 3304).

amount of \$4,485.00 during the period of ineligibility. The Division issued its determination regarding the overpayment of benefits on June 10, 2010.

Hergins appealed the Division's determination to the Appeals Tribunal. On August 16, 2010, the Appeals Tribunal conducted a hearing. Hergins appeared in person and testified, and one witness for the Division, Linda Hafley, testified by telephone. After the hearing, the Tribunal issued its decision, affirming the Division's determination, and entered the following findings of fact and conclusions of law, in pertinent part:

FINDINGS OF FACT:

The claimant filed an initial claim with the Missouri Division of Employment Security pursuant to the Emergency Unemployment Compensation Act, effective April 19, 2009. The claimant claimed benefits for each week during the period between April 19, 2009 and July 18, 2009, and was paid benefits and Federal Additional Compensation (stimulus payment).

The Missouri Division of Employment Security determined that the claimant was entitled to benefits in the State of Kansas, as of April 19, 2009. The claimant has, in fact, established a claim in Kansas effective July 19, 2009, and has claimed and received benefits pursuant to that claim, although he has not received Kansas benefits prior to July 19, 2009. The claimant acted forthrightly in his dealings with the Division. It is not known why the Division did not determine that the claimant had an effective Kansas claim prior to his claiming and receiving Emergency Unemployment Compensation in Missouri.

LAW:

The Missouri Employment Security Law, Chapter 288, RSMo. 2000, as amended, which also applies to claims for Emergency Unemployment Compensation (EUC), provides in part as follows:

* * * *

288.040.5. *A clamant shall be ineligible for waiting week credit or benefits for any week for which or a part of which he or she has received or is seeking unemployment benefits pursuant to an unemployment insurance law of another state or the United States[.] [Emphasis added.]*

288.062.3. An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the deputy finds that with respect to such week:

- (1) He is an “exhaustee” as defined in subdivision (8) . . . [.]
- (2) He has satisfied the requirements of this law for the receipt of regular benefits, including not being subject to a disqualification for the receipt of benefits; except that, in the case of a claim for benefits filed in another state, which is acting as an agent state under the Interstate Benefits Payment Plan as provided by regulation, which claim is based on benefit credits accumulated in this state, eligibility for extended benefits shall be limited to the first two compensable weeks unless there is an extended benefit period in effect in both this state and the agent state in which the claim was filed[.]

The Federal Emergency Unemployment Compensation Act of 2008 provides, in part:

Section 4001:

b) PROVISIONS OF AGREEMENT. Any agreement under subsection (a) shall provide that the State agency of the State will make payments of emergency unemployment compensation to individuals who:

1) have exhausted all rights to regular compensation under the State law or under Federal law with respect to a benefit year (excluding any benefit year that ended before May 1, 2007);

2) *have no rights to regular compensation or [extended compensation under such law or²] any other State unemployment compensation law* or to compensation under any other Federal law . . . [.] [Emphasis added.]

c) EXHAUSTION OF BENEFITS. For purposes of subsection (b) (1); an individual shall be deemed to have exhausted such individual’s rights to regular compensation under a State law when:

1) no payments of regular compensation can be made under such law because such individual has received all regular compensation available to such individual based on employment or wages during such individual’s base period; or

² The bracketed material was statutory language that was inadvertently omitted in this quotation by the Division. Pub. L. 110-252, 122 Stat. 2323, section 4001(b)(2), 26 U.S.C. § 3304 note.

2) such individual's rights to such compensation have been terminated by reason of the expiration of the benefit year with respect to which such rights existed.

CONCLUSIONS OF LAW:

The issue is whether the claimant is eligible beginning April 19, 2009, to a claim in Missouri for Emergency Unemployment Compensation (EUC). The claimant received unemployment compensation pursuant to the Emergency Unemployment Compensation Act and Federal Additional Compensation (FAC), for the period between April 19, 2009 and July 18, 2009. The claimant was eligible for benefits during that period on a Kansas claim. *The claimant is not eligible to file claims in Missouri, when he is eligible in Kansas for the same period, pursuant to Section 288.040.5, RSMo., and the Federal Emergency Unemployment Compensation Act.* Therefore, the claimant is ineligible from June 7, 2009 through September 29, 2009, because the claimant is eligible for benefits from another State. The claimant has acted forthrightly in his dealings with the Division. However, the Appeals Tribunal lacks the authority to contravene the law. The Appeals Tribunal must conclude that the claimant is ineligible for the period at issue. [Emphasis added.]

DECISION:

The deputy's determination is affirmed. *The claimant is ineligible for EUC benefits from Missouri for the period from April 19, 2009 through July 18, 2009, because the claimant was eligible for benefits in another State during that period.* [Emphasis added.]

Hergins appealed this decision to the Commission, and the Commission affirmed and adopted the Appeals Tribunal's decision. Hergins now appeals to this court.

Standard of Review

Appellate review of a decision made by the Labor and Industrial Relations Commission is governed by section 288.210, RSMo.³ *Dixon v. Stoam Indus., Inc.*, 216 S.W.3d 688, 692 (Mo. App. 2007). An appellate court may modify, reverse, remand for

³All statutory references are to the Revised Statutes of Missouri, 2000 RSMo, as updated through the cumulative supplement 2010, unless otherwise indicated.

rehearing, or set aside the Commission’s decision only if it finds that: 1) the Commission acted without or in excess of its powers; 2) the decision was procured by fraud; 3) the decision is not supported by the facts; or 4) the decision is not supported by sufficient competent evidence in the record. § 288.210; *Ayers v. Sylvia Thompson Residence Ctr.*, 211 S.W.3d 195, 197-98 (Mo. App. 2007).

Analysis

In his Point Relied On, Hergins does not dispute the Commission’s findings, nor does he argue that the Commission erred as a matter of law. Rather, Hergins’ sole argument is that he should not be required to reimburse the Division for the amount of overpaid benefits because he “complied with all the requirements to receive the unemployment compensation” and did not act in bad faith or willfully withhold information from the Division. Thus, he believes there must be some relief for him under the law. He notes that the Division gave him instructions as to how to proceed, and he was entirely in good faith in his dealings.

In support of his legal contention, Hergins cites section 288.380.10.⁴ Section 288.380.10 is not applicable here. The Division did not allege that Hergins acted in bad faith, willfully withheld information, or falsified any facts. Nor did the Appeals Tribunal make any such finding. To the contrary, the Tribunal found that Hergins “acted

⁴ Section 288.380.10 states, in pertinent part: “An individual who willfully fails to disclose amounts earned during any week with respect to which benefits are claimed by him or her, willfully fails to disclose or has falsified as to any fact which would have disqualified him or her or rendered him or her ineligible for benefits during such week, or willfully fails to disclose a material fact or makes a false statement or representation . . . shall forfeit all of his or her benefit rights, and all of his or her wage credits accrued prior to the date of such failure to disclose or falsification shall be canceled, and any benefits which might otherwise have become payable to him or her subsequent to such date based upon such wage credits shall be forfeited[.]”

forthrightly in his dealings with the Division.” In any event, the Commission determined as an interpretation of applicable state law that Hergins was ineligible to claim extended benefits in Missouri during the same period of time that he was eligible to claim regular unemployment compensation in Kansas.

As Hergins correctly asserts, the record reflects that he acted forthrightly and was not at fault here. There was no explanation offered at the hearing as to why Hergins was not timely notified that he could pursue a claim for regular compensation in Kansas as to the period in question. Linda Hafley, a senior claims supervisor with the Division, stated that she did not know why Hergins was told to file a claim for EUC benefits in Missouri, rather than claiming regular unemployment benefits in Kansas.

The Division determined that it did not have statutory authority under the Missouri statutes to do anything other than to seek repayment. The Commission affirmed. Therefore, even though Hergins argues that the Division’s communications misled him as to his entitlement to claim emergency benefits in Missouri during the same period of time that he was eligible to claim regular unemployment benefits in Kansas, the Division believed that its ruling was required under Missouri law. The Commission focused on section 288.381.1, which specifically provides:

The provisions of subsection 6 of section 288.070 notwithstanding, benefits paid to a claimant pursuant to subsection 5 of section 288.070 to which the *claimant was not entitled* based on a subsequent determination, redetermination or decision, which has become final, *shall be collectible by the division* as provided in subsections 12 and 13 of section 288.380.⁵

⁵ Subsection 5 of 288.070 deals with the deputy's determination as to an applicant's claim for benefits. Subsection 6 deals with a determination or redetermination and provides that if, during an appeal with respect to certain weeks of unemployment, there are weeks as to which there is no dispute, those undisputed benefits shall be promptly paid without waiting for the appeal to conclude.

(Emphasis added.)

This court has previously held that claimants who are overpaid unemployment benefits while disqualified are obligated to repay those benefits. *See, e.g., Harris v. Div. of Emp't Sec.*, 292 S.W.3d 416, 419 (Mo. App. 2009); *Campbell v. Labor & Indus. Rel. Comm'n*, 907 S.W.2d 246, 250 (Mo. App. 1995). All of these cases, however, have involved benefits paid under state law, including "regular benefits" (benefits payable under state law other than "extended benefits") and "extended benefits" (benefits payable to an individual under section 288.062 for weeks of unemployment in his or her eligibility period). *See* § 288.062.1(5) and (6).

In *Harris*, this court affirmed the Commission's decision that the claimant was required to reimburse the Division for the overpayment of benefits during the period of time that the claimant was disqualified. 292 S.W.3d at 419. Similarly, in *Campbell*, this court determined that a claimant who was overpaid benefits while disqualified was obligated to repay those benefits. 907 S.W.2d at 251. In *Campbell*, this court noted:

The policy behind [section 288.381.1] is to ensure that the unemployment compensation fund is not depleted except for valid benefit payments, thus preserving the limited resources of the fund[.] The general purpose of the statutory provision requiring reimbursement is to preserve and secure the financial stability of the unemployment compensation fund. This policy would be undermined if those who are not entitled to funds are nevertheless entitled to keep benefits previously received.

Id. at 250 (internal citations omitted).

It is true that the states routinely administer through state agencies the funding for unemployment compensation benefits that come from federal dollars. But we note that in

the 2008 legislation providing for federal emergency unemployment funding (the Emergency Unemployment Compensation Act of 2008, also called the "EUC"), 26 U.S.C. § 3304 Note, Congress included provisions governing collection of overpayments. What the Division and the Commission did not take into account in this case was that this case involved a claim of repayment of EUC benefits. Under the EUC, sections 4005(b) and (c), there are specific provisions related to repayment that would logically be understood to pre-empt the general Missouri repayment statute enacted before the EUC was enacted.

The repayment of federal EUC funds overpaid, governed by section 4005(b) and (c), is provided as follows:

(b) Repayment.—In the case of individuals who have received amounts of *emergency unemployment compensation* under this title to which they were not entitled, the State shall require such individuals to repay the amounts of such emergency unemployment compensation to the State agency, *except that that State agency may waive such repayment if it determines that—*

- (1) *the payment of such emergency unemployment compensation was without fault on the part of any such individual; and*
- (2) *such repayment would be contrary to equity and good conscience.*

(Emphasis added.)

The federal statute allows the state agency to waive collection of repayment when it determines that the recipient was without fault, and when it would be appropriate to do so according to considerations of equity and good conscience. The federal statutory provisions would prevail over any conflicting state statute. The general Missouri statute has been interpreted as providing for no consideration of equity and good conscience.

See, e.g., Harris, 292 S.W.3d at 419; *Campbell*, 907 S.W.2d at 250. The federal and state provisions are to that extent in conflict, and the federal provisions cannot be subsumed or merged into the state statute. The federal statute necessarily contemplates the exercise of discretion in the individual case, because the discretion is to be exercised by the state agency. The statute cannot be interpreted to authorize the Missouri General Assembly to categorically reject and nullify the equitable considerations that otherwise would be applicable to the individual case. This is evident from the fact that the discretion is given to the state agency to exercise individual case discretion, not to the legislative branch to exercise blanket discretion. Congress did not contemplate that the pre-existing regular statutory provision would prevail, or that the state legislature could restrict the agency's ability to follow the federal directive without being non-compliant with federal law.⁶

Hergins does not cite or argue the language of the federal statutes; he merely asserts that it is “not fair” to require him to repay the amount of overpaid benefits because he did nothing wrong; he relied on the Division; and, he says, the Division should have timely notified him of any pitfalls regarding his eligibility for benefits. While his assertion that the result in the Division was not “fair” does not specifically invoke the statutory concepts of “equity and good conscience,” or any other specific substantive

⁶ We disagree with what seems to be the only reported decision on point, the summary conclusion of the Iowa Supreme Court in *Bailey v. Employment Appeal Board*, 518 N.W.2d 369 (Iowa 1994) (involving an earlier version of the federal law containing the same language in question here). We reject the holding of that case that the general Iowa statute requiring collection of repayment (without exception) constituted compliance with the federal statute (Pub. L. 102-164 (1991), now found at 26 U.S.C. § 3304, and amended by the EUC in 2008) because it demonstrated a legislative choice to reject considerations of equity and good conscience. The flaw in this reasoning is evident if one considers that the state legislature could not nullify the effect of the federal legislation by going to the other extreme -- enacting legislation specifying that *no attempt will be made, under any circumstances*, to collect any federal EUC overpayments. Such would *not* be in compliance with section 4005(b) and (c); neither can a categorical repayment imperative ignoring the federally specified criteria be considered in compliance.

principle of law, there are reasons, under Rule 84.13,⁷ to treat his contention as an invocation of rights under the federal statute.

At the hearing on this repayment claim, the evidence showed that Hergins had received benefits from Kansas, but not for the period during which he received the EUC benefits.⁸ Accordingly, there is no indication in our record of "double dipping" with regard to the period of time in question. The Division already determined that Hergins was without fault.

The Division and the Commission misapplied the law by failing to apply federal law to the Division's claim seeking repayment of federal EUC benefits. In an effort to clarify the law as we understand it, and in order to allow the Division the opportunity to exercise the discretion that it has been allowed under federal law, we will exercise *our* discretion under Rule 84.13 to vacate the decision in this case and remand to the Commission. The Commission shall then remand to the Division for further proceedings in which the Division shall apply the federal provisions governing repayment. The Division may waive such repayment if it determines that there was no fault on the part of the individual and if compelling such repayment would be contrary to equity and good conscience.⁹

⁷ All Rule citations are to the Missouri Court Rules 2011, unless otherwise stated.

⁸ It is conceivable that his claim for benefits in Kansas in 2009 was denied because he had received EUC benefits through Missouri, or perhaps due to lack of timeliness in applying in Kansas. Our record does not clarify.

⁹ If Hergins in fact received compensation from the State of Kansas for his unemployment during that time (between April 19 and July 19, 2009) or remains eligible to yet receive compensation for the period in question, the Division may decide that repayment would *not* be contrary to equity and good conscience. On the other hand, if for some reason Hergins was precluded without his fault from receiving such compensation, the Division may decide that repayment *would* be contrary to equity and good conscience. The decision belongs to the Division and is within the Division's exercise of discretion upon consideration of all relevant factors. This court does not purport to decide such issues within the reasonable discretion of the Division.

Ruling

We, therefore, vacate the Commission's decision and remand to the Commission to remand to the Division with instructions to apply the federal statutory provisions governing claims for repayment.

James M. Smart, Jr., Judge

All concur.