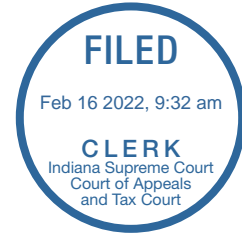


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

C.H.,
Appellant-Petitioner,

v.

Review Board of the Indiana
Department of Workforce
Development and BKD Twenty-
One Management Co., Inc.,
Appellees-Respondents.

February 16, 2022

Court of Appeals Cause No.
21A-EX-1729

Appeal from the Review Board of
the Department of Workforce
Development

The Honorable Steven F. Bier,
Chairperson

Review Board No. 21-R-3116

Riley, Judge.

STATEMENT OF THE CASE

- [1] Appellant-Petitioner, C.H. (C.H.), appeals the decision of the Review Board of the Indiana Department of Workforce Development (Review Board), which affirmed the Administrative Law Judge's (ALJ) decision to dismiss her claim.
- [2] We affirm.

ISSUE

- [3] C.H. presents a single issue on appeal, which we restate as: Whether C.H.'s due process rights were violated when she failed to attend the hearing.

FACTS AND PROCEDURAL HISTORY

- [4] On October 29, 2020, a claims investigator for the Indiana Department of Workforce Development (IDWD) determined that C.H. was not eligible for unemployment benefits because she was discharged for just cause. C.H.'s attorney, Taylor Ferguson (Attorney Ferguson) appealed the decision on October 30, 2020, stating that he had been retained by C.H. "to represent her regarding her request for an appeal concerning her unemployment benefits." (Appellant's App. Conf. Vol. II, p. 5). On May 14, 2021, IDWD sent C.H. and Attorney Ferguson a notice of telephone hearing (Notice), stating the hearing would take place on May 28 at 8:30 a.m. The Notice which was accompanied by instructions for C.H.'s participation. In particular, the instructions instructed C.H. as follows:

BEFORE THE DATE OF THE HEARING

Contact Number: Return the enclosed Acknowledgment Sheet or call the Appeals office to provide ONE contact number to reach you. If your hearing is by telephone, this is the number the judge will call for the hearing . . . It is your responsibility to ensure that the judge has your contact telephone number. . . . If you are scheduled for a telephone hearing and have not provided your telephone number, the judge may attempt to call you at the number provided on your appeal statement. However, the judge is not required to search for a valid contact number. If the judge is not able to reach you, regardless of the cause, it may be considered as a lack of response and participation in the hearing. *A decision or dismissal may be issued by the judge even if you do not participate.*

* * * *

Attorney/Representative: Parties may be represented at the hearing. Representatives must file Notice of Appearance with the judge (and copy the other party) before the date of the hearing. . . .

(Appellant’s App. Conf. Vol. II, pp. 13-14) (emphasis added). The hearing took place on the scheduled day. The ALJ first called Attorney Ferguson, but he indicated that he no longer represented C.H. and that it had been two months since he was terminated. The ALJ then asked Attorney Ferguson if he had a good phone number for C.H., and he provided C.H.’s phone number. When the ALJ called that number, it went to voice mail. Following that failed attempt, the ALJ stated,

This is Administrative Law Judge Williams. We're here on 1445228. We checked the packet list, we checked with the clerk, we checked the email. We don't have a great number for [C.H.]. We have a number for her attorney, but the attorney's now out of it. The attorney gave us a new number. . . . We're gonna try that number. It's 8:48 [a.m.] on May 28th, 2021. We're gonna try that number now. We do have a good number from the Acknowledgment Sheet for the Employer. We'll try that next.

(Transcript p. 4). Again, the ALJ attempted to reach C.H. on her cellphone, but it went to voice mail, and the ALJ was unable to leave a message. The ALJ then called C.H.'s employer and explained that he was unable to reach C.H., therefore, he would dismiss the case. Following that hearing, the ALJ issued an order of dismissal based on C.H.'s failure to appear. On June 14, 2021, C.H. faxed an appeal to the Review Board, and in addition to arguing that she was wrongfully discharged by her former employer, she clarified that her current attorney is "Amber Boyd" and that "Taylor Ferguson IS NOT" her attorney on record. (Appellant's App. Vol. II, p. 21) (emphasis in original). On July 19, 2021, the Review Board adopted the ALJ's findings and conclusions denying C.H.'s unemployment benefits and dismissing C.H.'s appeal.

[5] C.H. now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

[6] Upon review of an unemployment compensation proceeding, we determine whether the Review Board's decision is reasonable in light of its findings.

Szymanski v. Review Bd. of Ind. Dep't of Workforce Dev., 656 N.E.2d 290, 292 (Ind. Ct. App. 1995). We are bound by the Review Board's resolution of all factual issues, and accordingly we do not reweigh evidence or assess the credibility of witnesses. *Id.* We consider only the evidence and reasonable inferences which are most favorable to the Review Board's decision and will not set aside the decision if there is substantial evidence of probative value in support thereof. *Id.* By implication, this standard of review dictates that where, as here, the Review Board adopts and incorporates by reference the findings and conclusions of the ALJ and affirms the ALJ's decision without accepting additional evidence, we are bound by the ALJ's resolution of all factual issues. *See Franklin Cnty. Cmty. Sch. Corp. v. Brashear*, 660 N.E.2d 1081 (Ind. Ct. App. 1996). However, we are not bound by the Review Board's interpretation of law and determine *de novo* whether the Review Board correctly interpreted and applied the law. *Szymanski*, 656 N.E.2d at 292. Whether a party was afforded due process in an unemployment proceeding is a question of law. *Scott v. Review Bd. of Indiana Dep't of Workforce Dev.*, 725 N.E.2d 993, 996 (Ind. Ct. App. 2000).

II. *Due Process*

- [7] C.H. acknowledges having received the actual notice and instead argues she was denied due process because Attorney Ferguson failed to inform her of the hearing, and therefore, she failed to participate at her hearing. The issue of due

process in unemployment benefits cases often arises when one party alleges inadequate notice of a hearing, but the case before us is quite different.

[8] “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *NOW Courier, Inc. v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 871 N.E.2d 384, 387 (Ind. Ct. App. 2007). Accordingly, parties to a disputed claim for unemployment benefits must be afforded “a reasonable opportunity for fair hearing.” Ind. Code § 22-4-17-3(a). An ALJ may hold a hearing by telephone upon determining that to do so is proper and just and neither the claimant nor the employer objects. I.C. § 22-4-17-8.5(b)(4).

[9] At the outset, we reiterate that C.H. does not allege insufficient notice, and does not challenge the telephonic nature of the hearing. The sole due process issue is whether C.H. was denied due process by failing to participate in the hearing.

[10] With that said, we are drawn to the portion of the Notice instructions sent to C.H. that expressly indicated C.H.’s personal responsibility to ensure the ALJ had her contact information. This, along with the date and time of the hearing, constitutes sufficiently specific notice of a scheduled hearing and clear instructions on how to participate. Other sections of the instructions make clear that the stakes are high if her contact information is not received—the ALJ could hold the hearing in C.H.’s absence and enter a decision or dismissal. Further, the instructions mandate that an attorney representing a party must

enter an appearance. All those instructions describe reasonable limits of an opportunity to be heard and even directions on how to take advantage of that opportunity.

[11] A review of similar cases is helpful to explain why C.H.’s failure to adhere to the instructions from the Notice, *i.e.*, requiring her to personally have a valid phone number on record for purposes of the hearing, and the ALJ’s resulting inability to contact her does not constitute denial of due process. *In Art Hill, Inc. v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 898 N.E.2d 363, 367 (Ind. Ct. App. 2008), we first addressed the “due process implications of an ALJ conducting a hearing without the participation of a party who received notice but could not be contacted via telephone at the time of hearing.” *Id.* The party appealing the IDWD deputy’s decision unpredictably changed phone extensions after returning the participation sheet, which made the return of the sheet and designated phone number meaningless—in other words, it was the party’s own fault for missing the call. *Id.* We noted the ALJ properly provided the appealing party with notice of the hearing, instructions to provide the ALJ with a single phone number on the participation sheet, and specific directions to submit the participation sheet via postal mail, facsimile, or personal delivery. *Id.* Ultimately, we held that “a party to an unemployment hearing may voluntarily waive the opportunity for a fair hearing where the party received actual notice of the hearing and failed to appear at or participate in the hearing.” *Id.* at 368. In *Wolf Lake Pub, Inc. v. Review Bd. of Ind. Dep’t of Workforce*

Dev., 930 N.E.2d 1138, 1142 (Ind. Ct. App. 2010), we concluded that the poor cellular phone reception of a party to a telephonic hearing before an ALJ could have been anticipated and prevented, and therefore the party was not denied due process in its failure to participate in the hearing.

[12] In the instant case, C.H. received similar instructions that we mentioned in *Art Hill* and additional instructions which made clear that she was personally responsible to ensure the ALJ had her number, she could call prior to the hearing to confirm the ALJ had her correct number, and the ALJ was not required to search for a valid number. C.H. provided Attorney Ferguson’s telephone contact in the Acknowledgement Sheet. When the ALJ called Attorney Ferguson on the day of the hearing, he stated that he no longer represented C.H.

[13] C.H. contends that Attorney Ferguson had a duty under the Rules of Professional Conduct to keep her apprised of the hearing. The rule C.H. cites requires attorneys to provide “reasonable notice to the client” allowing time for “employment of other counsel. . .” Ind. Professional Conduct Rule 1.16(d). C.H. does not dispute that she fired Attorney Ferguson two months before the May 28 hearing. Moreover, it appears that C.H. had two months to employ new counsel and she admitted in her appeal to the Review Board that she had obtained new counsel. While explaining her reasons to the Review Board for not participating in the hearing before the ALJ, which led to the dismissal of her unemployment benefits appeals claim, C.H. stated that Attorney Ferguson

was no longer her attorney, but it was “Amber Boyd.” (Appellant’s App. Vol. II, p. 21). Contrary to her argument on appeal, it appears that C.H. did have ample time to seek new counsel, but new counsel failed to enter an appearance to represent her at the hearing. Moreover, it was her responsibility to ensure that there was a valid phone number on record by which she could be reached by the ALJ.

[14] On the day of the hearing, the ALJ, who was not required to search for a valid number, was gracious enough to ask Attorney Ferguson for C.H.’s phone number. The ALJ then called that number twice and was directed to voicemail. While C.H. blames her former attorney for not participating in the appeal, it was up to C.H. to ensure that she could be reached by the number she provided to the ALJ. *See Art Hill, Inc.*, 898 N.E.2d at 368. Because C.H. had an opportunity to be heard, and voluntarily failed to participate in the hearing, we hold that C.H. was not denied due process when the ALJ conducted a hearing in her absence. Under these facts and circumstances, we must affirm the decision of the Review Board dismissing her claim.

CONCLUSION

[15] Based on the foregoing, we conclude that C.H. was afforded due process and a reasonable opportunity to participate in a telephonic hearing. The Review Board’s decision adopting the ALJ’s findings and conclusions denying C.H.’s unemployment benefits is therefore affirmed.

[16] Affirmed.

[17] Robb, J. and Molter, J. concur