

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

TONIA CONN :
Plaintiff-Appellant : **CASE NO. 2014 CVF 000564**
vs. : **Judge McBride**
RAND LOVELAND, LLC, et al. : **DECISION/ENTRY**
Defendants-Appellees :

Tonia Conn, appellant appearing *pro se*, 4474 Carriage Ct., Batavia, Ohio 45103.

Jackson Lewis P.C., Sarah E. Keates, and Anitra Walden-Jacobs, counsel for appellee Rand Loveland, LLC, 201 East 5th Street, 26th Floor, Cincinnati, Ohio 45202.

Office of the Ohio Attorney General, Robin A. Jarvis, Assistant Attorney General, Health & Human Services Section, counsel for appellee Ohio Department of Job and Family Services, 1600 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202.

This cause is before the court for consideration of an appeal filed by the appellant Tonia Conn, as well as a motion to strike filed by appellant Rand Loveland, LLC.

The court entered a briefing schedule for the appeal on June 10, 2014. Oral argument was not requested by any party pursuant to that briefing schedule and, as such, the matter was deemed under advisement upon the filing of the final brief addressing the appeal.

On September 8, 2014, the court entered a briefing schedule on the motion to strike. No briefs were filed pursuant to that order and no oral argument was requested. As a result, that motion was deemed under advisement upon the expiration of the final deadline to file a written brief on the motion.

Upon consideration of the appeal and the motion, the record of the proceeding, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The appellant Tonia Conn's employment as a food service director with appellee Rand Loveland, LLC ended on October 8, 2013.¹ On October 10, 2013, the appellant applied for unemployment compensation benefits.² That application was disallowed by the Ohio Department of Jobs and Family Services (ODJRS) on October 29, 2013 based on the finding that Conn was dismissed with just cause.³

Conn appealed that determination on November 10, 2013.⁴ The initial denial of benefits was affirmed by the Director's Redetermination on December 4, 2013.⁵ The section titled "Appeal Rights" in the Redetermination decision notice indicated that "[t]o be timely, your appeal must be received/postmarked no later than 12/26/2013 (21 calendar days after the Date Issued)."⁶

¹ Certified Transcript, filed May 30, 2014, Fact Finding Questions for Discharge and Request to Employer for Separation Information.

² Id., Application Summary.

³ Id., Determination of Unemployment Compensation Benefits.

⁴ Id., Letter of Appeal via Facsimile.

⁵ Id., Director's Redetermination.

⁶ Id., Director's Redetermination.

The appellant filed an appeal via facsimile on January 7, 2014.⁷ A telephone hearing on the issue of the timeliness of the appeal was held on January 23, 2014 before a Hearing Officer.⁸ At that hearing, Tonia Conn testified that she received a copy of the Director's Redetermination and that she was aware that December 26, 2013 was the end of the appeal period.⁹ She further testified that she filed the appeal on December 26th via facsimile but that she did not have any evidence of sending that fax, such as a fax confirmation sheet, with her and that she did not have the number to which she sent the fax.¹⁰ She testified that she spoke to someone later at the Ohio Department of Job and Family Services and that she was told that the fax sometimes did not work and that she should resubmit her application, which she did.¹¹

The Hearing Officer issued a decision on January 23, 2014 in which that officer made the following findings of fact:

“On December 04, 2013, the Director sent a copy of the Redetermination to the last known address of the appellant. The appellant received a copy of the Redetermination prior to December 26, 2013, the last day of the appeal period.

On January 07, 2014, the appellant filed an appeal by fax.

The appellant contends that an earlier appeal was filed within the appeal period. The Department has no record of having received that earlier appeal and the appellant has not provided independent verification to establish that an appeal was filed within the appeal period.”¹²

⁷ Id., Appeal Letter for LHC.

⁸ Id., Transcript of Testimony, January 23, 2014.

⁹ Id., Transcript of Testimony, January 23, 2014 at pg. 6.

¹⁰ Id. at pgs. 6-7.

¹¹ Id. at pg. 7.

¹² Id., Decision, January 23, 2014 at pg. 3.

The hearing officer determined that the appeal was not timely filed and consequently dismissed the appeal.¹³ On February 13, 2014, the appellant requested a review of that decision.¹⁴ With that request for review, the appellant submitted a list of facsimile results which shows only that a document was sent via fax on December 26, 2013, but it does not indicate the number to which that fax was sent.¹⁵ The decision on the request for review affirming the decision of the hearing officer was issued on April 3, 2014.¹⁶ Tonia Conn then filed her appeal in this court.¹⁷

On August 22, 2014, the appellant filed a reply brief and attached several documents to that brief, including an “Addendum to Dietary Manager’s Responsibilities” and “Log of Events with Renee Sharp.” Appellee Rand Loveland, LLC subsequently filed a motion to strike those two documents from the record.

LEGAL ANALYSIS

R.C. 4141.282(H) provides parameters for a common pleas court’s review of a decision of the unemployment commission and states as follows:

“The court shall hear the appeal on the certified record provided by the commission. If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.”

¹³ Id. at pg. 4.

¹⁴ Id., Request for Review.

¹⁵ Id.

¹⁶ Id., Decision on Request for Review.

¹⁷ Notice of Appeal, filed April 25, 2014.

“ * * * [A] reviewing court may not make factual findings or determine a witness's credibility and must affirm the commission's finding if some competent, credible evidence in the record supports it.”¹⁸ “In other words, a reviewing court may not reverse the commission's decision simply because ‘reasonable minds might reach different conclusions.’ ”¹⁹

Regarding the motion to strike, as set forth above, R.C. 4141.282(H) requires this court to hear the appeal on the certified record provided by the commission. A court cannot accept new evidence at this stage of the proceedings and cannot rely upon any evidence that is not part of the certified record.²⁰ The court would note that one of the documents, the “Addendum to Dietary Manager’s Responsibilities,” does appear in the certified record. Regardless, the court can only examine the certified record and cannot accept new evidence. As such, the motion to strike shall be granted.

As to the appeal, the question is whether the finding below that the appeal was not timely filed was unlawful, unreasonable, or against the manifest weight of the evidence. R.C. 4141.281(A) provides that “[a]ny party notified of a determination of benefit rights or a claim for benefits determination may appeal within twenty-one calendar days after the written determination was sent to the party or within an extended period as provided under division (D)(9) of this section.” R.C. 4141.281(D)(9) provides as follows:

“The time for filing an appeal or a request for review under this section or a court appeal under section 4141.282 of the Revised Code shall be extended in the manner described in

¹⁸ *Williams v. Ohio Dept. of Job and Family Servs.*, 129 Ohio St.3d 332, 2011-Ohio-2897, 951 N.E.2d 1031, ¶ 20, citing *Irvine v. Unemp. Comp. Bd. of Review*, 19 Ohio St.3d 15, 18, 482 N.E.2d 587 (1985).

¹⁹ *Id.*, quoting *Irvine* at 18.

²⁰ See, *Underhill v. Unemp. Comp. Rev. Comm.*, 10th Dist. Franklin No. 10AP-617, 2011-Ohio-1598, ¶ 10, citing *Barnett v. Ohio Adult Parole Auth.*, 81 Ohio St.3d 385, 387, 692 N.E.2d 135 (1998).

the following four sentences. When the last day of an appeal period is a Saturday, Sunday, or legal holiday, the appeal period is extended to the next work day after the Saturday, Sunday, or legal holiday. When an interested party provides certified medical evidence stating that the interested party's physical condition or mental capacity prevented the interested party from filing an appeal or request for review under this section within the appropriate twenty-one-day period, the appeal period is extended to twenty-one days after the end of the physical or mental condition, and the appeal or request for review is considered timely filed if filed within that extended period. When an interested party provides evidence, which evidence may consist of testimony from the interested party, that is sufficient to establish that the party did not actually receive the determination or decision within the applicable appeal period under this section, and the director or the commission finds that the interested party did not actually receive the determination or decision within the applicable appeal period, then the appeal period is extended to twenty-one days after the interested party actually receives the determination or decision. When an interested party provides evidence, which evidence may consist of testimony from the interested party, that is sufficient to establish that the party did not actually receive a decision within the thirty-day appeal period provided in section 4141.282 of the Revised Code, and a court of common pleas finds that the interested party did not actually receive the decision within that thirty-day appeal period, then the appeal period is extended to thirty days after the interested party actually receives the decision.”

There is no extension set forth in R.C. 4141.281(D)(9) that is applicable to the case at bar. The appellant was informed by the decision mailed to her that her last day to file an appeal was December 26, 2013 and she testified that she was aware of that fact.

Ohio Administrative Code 4141-19-01(C) provides that “[w]here the department has not received, has disregarded as unintelligible or incomplete, or is unable to locate an appeal, said appeal will be considered to have been received timely if the sender

provides independent verification to demonstrate that the appeal was mailed, submitted electronically or filed in person within the statutorily prescribed time frame.”

In the case at bar, the hearing officer found that Tonia Conn had failed to present any independent verification to demonstrate that the appeal was faxed within the twenty-one days. The transcript of the hearing supports this finding, as the appellant stated that she did not have any such independent verification with her. The hearing officer chose not to find the appellant’s testimony that she faxed the appeal on December 26, 2013 to be credible and this court cannot revisit findings as to credibility on appeal.

A list of fax results was submitted with the appellant’s request for review on February 13, 2014 and a decision was issued affirming the decision of the hearing officer. As this court noted above, this document showed only that a fax was sent on December 26, 2013, but it does not indicate the number to which that fax was sent. It was not unlawful, unreasonable, or against the manifest weight of the evidence for the Review Commission to affirm the decision of the hearing officer, as this document does not provide independent verification to demonstrate that the appeal was timely filed.

There is competent, credible evidence in the record which demonstrates that the appeal in the present case was not timely filed. Therefore, the decision to deny and dismiss the appeal was not unlawful, unreasonable, or against the manifest weight of the evidence. As a result, the decision of the Unemployment Compensation Review Commission affirming the decision of the hearing officer denying and dismissing Tonia Conn’s appeal shall be affirmed.

CONCLUSION

The decision of the Unemployment Compensation Review Commission affirming the decision of the hearing officer denying and dismissing Tonia Conn's appeal is hereby affirmed.

The motion to strike filed by appellee Rand Loveland, LLC is well-taken and is hereby granted.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent on this _____ day of December 2014 via e-mail to Robin A. Jarvis, Assistant Attorney General, attorney for Director, Ohio Department of Job and Family Services, at rjarvis@ag.state.oh.us, and to Anita Walden-Jacobs at anita.waldenjacobs@jacksonlewis.com, and to Sarah E. Keates at Sarah.Keates@jacksonlewis.com, attorneys for the defendant Rand Loveland LLC, and that a copy of the within Decision/Entry was also mailed by regular U.S. Mail to Tonia Conn, the plaintiff appearing pro se, at 4474 Carriage Court, Batavia, Ohio 45103.

Administrative Assistant to Judge McBride