

No. 1-13-1713

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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CARLOS BONILLA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT	)	
SECURITY; DIRECTOR OF THE ILLINOIS	)	
DEPARTMENT OF EMPLOYMENT SECURITY;	)	
and BOARD OF REVIEW,	)	No. 12 L 51511
	)	
Defendants-Appellants,	)	
	)	
and	)	
	)	
RECYCLING SYSTEMS, INC.	)	
c/o NSN JERRY WEINSTEIN,	)	Honorable
	)	Robert Lopez Cepero,
Defendant.	)	Judge Presiding.

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PRESIDING JUSTICE CONNORS delivered the judgment of the court.  
Justice Hoffman concurred in the judgment.  
Justice Cunningham specially concurred, with opinion.

**O R D E R**

¶ 1 *Held:* The decision of the Illinois Department of Employment Security Board of Review that plaintiff was ineligible for unemployment benefits because he failed to establish he was able to work and available for work was not clearly erroneous; circuit court judgment reversed.

¶ 2 Defendants, the Illinois Department of Employment Security (IDES), the IDES Director, and the IDES Board of Review (Board),<sup>1</sup> appeal from an order of the circuit court of Cook County reversing the Board's denial of plaintiff Carlos Bonilla's claim for unemployment benefits. Although the appellee has not filed a response brief in this court, we may proceed under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). On appeal from the circuit court's reversal, defendants contend that the Board's finding that plaintiff was ineligible for benefits because he failed to establish he was able to work and available for work was not clearly erroneous. For the reasons that follow, we reverse.

¶ 3 Plaintiff was employed in construction work by Recycling Systems, Inc., from May 2010 to June 2011, when he hurt his back. After plaintiff's employment ended, he filed a claim for unemployment benefits, which was denied because he failed to provide evidence of his work search. Plaintiff appealed, attaching a copy of his work search record. Plaintiff's paperwork indicated that during the weeks ending March 10, 2012, March 17, 2012, March 24, 2012, May 5, 2012, June 23, 2012, and June 30, 2012, he contacted numerous employers regarding construction work and was either told the employers were not hiring or that they would call him. A telephone hearing was held before an IDES referee. Several issues were to be considered at

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<sup>1</sup> An additional defendant in the proceedings below, Recycling Systems, Inc. c/o NSN Jerry Weinstein, is not a party to this appeal.

the hearing, including whether plaintiff was able to work, available for work, or was actively seeking suitable work during the period in question.

¶ 4 At the telephone hearing, plaintiff testified through an interpreter that after he injured his back, a doctor told him he could not lift more than 15 pounds. Plaintiff stated that he had been following the doctor's instructions. The referee asked plaintiff whether, when he applied for the jobs listed in his paperwork, he told the prospective employers that he had a back injury and a weight restriction. Plaintiff answered, "Uh huh. I don't tell them that I have a restriction because then I won't get a job." Plaintiff also stated that he only applied for construction work because he had "always worked in construction" all his life.

¶ 5 Following the telephone hearing, the IDES referee affirmed the denial of plaintiff's claim for unemployment benefits. The referee found that plaintiff was separated from employment after a back injury, that a doctor had put him under a 15 pound weight-lifting restriction, that he had submitted a work search that only had construction job applications, and that according to plaintiff's own testimony, he did not disclose his back injury and lifting restrictions to any potential employers because he knew that he would not be hired. The referee concluded that because plaintiff was not "able and available for work" during the period under review, he was disqualified from receiving unemployment benefits under section 500(C) of the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/500(C) (West 2012)).

¶ 6 Plaintiff appealed to the Board. The Board found that the record was adequate and that the referee's decision was supported by the record and the law. Incorporating the referee's decision as part of its own, the Board affirmed the denial of benefits. Plaintiff thereafter filed a complaint for administrative review, and the circuit court reversed the Board's decision.

¶ 7 On appeal, defendants contend that the Board's determination that plaintiff was ineligible for benefits under section 500(C) of the Act was not clearly erroneous.

¶ 8 In Illinois, a person may receive unemployment benefits provided that he meets the eligibility requirements of section 500 of the Act and is not subject to the exemptions or disqualifications set out in the statute. *Acevedo v. Department of Employment Security*, 324 Ill. App. 3d 768, 771 (2001). In the instant case, the issue before us is whether plaintiff met the eligibility requirements of section 500 of the Act. This issue presents a mixed question of law and fact, that is, one involving an examination of whether the facts satisfy the statutory standard. *Moss v. Department of Employment Security*, 357 Ill. App. 3d 980, 984 (2005). Administrative agency decisions involving mixed questions of law and fact are reviewed under a "clearly erroneous" standard of review. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 211 (2008). An agency's decision is considered to be clearly erroneous where the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001). In an appeal involving a claim for unemployment benefits, we review the findings of the Board rather than the referee or the circuit court. *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 524-25 (2008).

¶ 9 Section 500(C) of the Act provides, in relevant part, that an unemployed individual shall be eligible to receive benefits with respect to any week only if "He is able to work, and is available for work; provided that during the period in question he was actively seeking work and he has certified such." 820 ILCS 405/500(C) (West 2012). "Available for work" means that the plaintiff is ready and willing to accept suitable work. *Moss*, 357 Ill. App. 3d at 985. An

individual is "actively seeking work" when he makes an effort that is reasonably calculated to return him to the labor force. 56 Ill. Adm. Code 2865.115(a) (2012). Such an individual is not deemed to be actively seeking work if he seeks work that is "unrealistic in light of his physical or mental limitations." 56 Ill. Adm. Code 2865.115(b) (2012). The Administrative Code provides an example of an unrealistic job search:

"The individual, seven months pregnant, quit her job as an assembler because it was strenuous and required her to be constantly on her feet. She applies for work at a factory, as an assembler, under conditions essentially the same as those of her last job. She would be determined to be not actively seeking work." *Id.*

¶ 10 The example provided in the Administrative Code is instructive. As in the example, in the instant case, plaintiff's employment in the construction industry ended due to a physical limitation. He then applied for work solely in construction jobs, which would present conditions essentially the same as his last job, which he would not be able to perform due to his 15-pound lifting limit. Plaintiff admitted that he did not tell potential employers about his physical limitations because he knew he would not be hired. In these circumstances, we agree with defendants that plaintiff's job search was not reasonably calculated to return him to the labor force, as he was seeking work that was unrealistic in light of his physical limitations. Thus, plaintiff did not meet the eligibility requirements of section 500(C) of the Act.

¶ 11 The suggestion of the special concurrence that our result may be legally correct, but not just, needs to be addressed and is somewhat disingenuous. At all times in this case, the claimant

had the burden on the issue of being "able to work" and being "available for work," *Yadro v. Bowling*, 91 Ill. App. 3d 889 (1980), neither of which were met. Moreover, Illinois law recognizes that the receipt of unemployment insurance benefits is a conditional right and the burden of proving eligibility before the Board rests with the claimant. *Rosenbaum v. Johnson*, 60 Ill. App. 3d 657, 662 (1972).

¶ 12 The requirement of being able to work is usually a question of health factors that may disable a claimant. The availability for work depends on the facts and the circumstances of each case. *Yadro*, 91 Ill. App. 3d at 893. The focus of the inquiry is whether the claimant is genuinely attached to the labor market and has made a reasonable attempt to find work.

¶ 13 In this case, Bonilla has established only that he is unavailable for many jobs in the construction industry, in his disclosure that he cannot lift more than 15 pounds. Bonilla may be able to complete some construction tasks but he has made no showing of what they are.

¶ 14 True, the claimant states that he has been employed in construction his entire career, unfortunately, for him, a line of work that demands a certain level of physical health. He failed to make any showing of inquiry into employment that he is able to perform, considering his particular health situation.

¶ 15 We disagree that the claimant is subject to a cruel hoax and that the majority has reached an unjust result in the ruling in this case.

¶ 16 After reviewing the entire record, we cannot say, definitively and firmly, that the Board made a mistake. The Board's determination that plaintiff was ineligible for benefits under section 500(C) was not clearly erroneous. Accordingly, we reverse.

¶ 17 For the reasons explained above, we reverse the judgment of the circuit court of Cook County and uphold the Board's decision finding plaintiff ineligible to receive unemployment benefits.

¶ 18 Reversed.

¶ 19 JUSTICE CUNNINGHAM specially concurring:

¶ 20 While the majority terms this special concurrence disingenuous, I respectfully reject that label. I write separately for two reasons. First, to highlight the conundrum in which plaintiff finds himself through no fault of his own; and secondly, to express an understanding, if not concurrence, with the circuit court's reversal of the Board's denial of benefits to plaintiff on the basis that he was not and could not have been actively seeking work. The circuit court recognized that the Board had some flexibility in its interpretation of the propriety of plaintiff's job search. The Board chose to interpret plaintiff's search in a manner that led to its conclusion of plaintiff's ineligibility for benefits. The circuit court recognized the injustice of the Board's ruling and tried to find a way to allow plaintiff to claim the benefits to which the court believed he was entitled.

¶ 21 It is un rebutted that plaintiff had worked in the construction industry his entire life. Thus, it is reasonable to infer that construction work constituted the foundation of his employment skills. The very injury which sidelined plaintiff from the job market was obtained while doing the work he knew, *ie.*, construction work. It seems reasonable for plaintiff to seek employment in an industry with which he was familiar, so he applied for many construction jobs during the period from March 6, 2012 to June 29, 2012. He never informed prospective employers of the weight limitations placed on him by his physicians. He did not get a single job offer during that

period, so we cannot know what might have happened if he had secured an offer of employment in the construction industry. Plaintiff was clearly willing to take a chance in order to secure employment. At the hearing to determine his eligibility for benefits, the IDES referee found that since plaintiff had a 15-pound weight restriction and he did not disclose it when applying for construction jobs, he was not available for work, even if he had been offered a job. The Board agreed and plaintiff was denied benefits.

¶ 22 Further compounding the problem which plaintiff faced in overcoming the Board's decision are the examples spelled out in the section of the Illinois Administrative Code which discusses the criteria for determining eligibility. The examples highlight circumstances in which a job search is considered "unrealistic" thereby signifying that the individual is not *really* searching for a job. One of the examples fit the facts of this case such that we are bound to the conclusion which it dictates and which the Board adopted. The example is as follows:

"[An] individual, seven months pregnant, quit her job as an assembler because it was strenuous and required her to be constantly on her feet. She applies for work at a factory, as an assembler, under conditions essentially the same as those of her last job. She would be determined to be not actively seeking work." 56 Ill. Adm. Code 2865.115(b) (2012).

¶ 23 While I agree that this example is instructive and lends itself to the result reached by the Board in this case, I empathize with the plaintiff's predicament. The reasoning resulting from the example taken to its logical conclusion means that an injured construction worker with medically imposed weight limitations such as those imposed upon plaintiff can *never* seek employment in

the construction industry during the period in which he is eligible for unemployment benefits.

The Board apparently reasoned that plaintiff was not *really* available for employment in the construction industry because of the 15-pound weight restriction. The Board found it irrelevant whether he was *actually* offered a job or not.

¶ 24 The conundrum which this plaintiff faced is that he clearly did not think he was employable outside of the construction industry. He testified that construction work was what he had done his entire life. In my view, if the plaintiff had applied for jobs in other industries in which he had no experience, he would be even less likely to get any offers. Further, he would leave himself open to the argument that he *knew* that such a job search was unrealistic, therefore he was not *really* seeking employment and was not available to be employed; thereby making him ineligible for benefits.

¶ 25 This is a "Catch 22" situation which I believe requires a legislative remedy. The purpose of the Act is to provide benefits to eligible workers such as plaintiff in this case. Yet, section 2865.115(a) and (b) of the Illinois Administrative Code and, specifically, the example provided in section (b) as applied to the facts of this case, operate as a cruel trap from which plaintiff cannot extricate himself. This case clearly presents a wrong for which there is no remedy under the statutory provision invoked by the Board. This may be a legally correct result, but it is not necessarily a just result.

¶ 26 No eligible, unsuspecting claimant should be subjected to this cruel hoax, nor should a court find itself meting out what may seem like an unjust result when it follows the letter of the law.

¶ 27 As the Board recognized, the resolution of this case largely rests on the interpretation of section 2865.115 [citation omitted], which gives specific examples regarding a determination of when a claimant may be considered to be "actively seeking work." Unfortunately for the plaintiff, the language of the statute gives ambiguous and perhaps conflicting criteria to be applied in order to determine when an individual is actively seeking work. Consider the following:

"An individual is actively seeking work when he makes an effort that is reasonably calculated to return him to the labor force. Reasonableness is determined by factors including \*\*\* physical abilities, \*\*\* training and experience, employment opportunities, and the customary means of obtaining work in [that] occupation."  
56 Ill. Adm. Code 2865.115(a) (2012).

¶ 28 It can be inferred that plaintiff believed that his effort to find work in the only occupation for which he was qualified, would satisfy the requirement of "actively seeking work," thereby making him eligible for benefits if he did not find a job.

¶ 29 However, paragraph (b) of the same section of the Illinois Administrative Code which describes how to determine when an individual is actively seeking work, also describes how to determine when an individual is *not* actively seeking work. Section (b) states: "an individual is not actively seeking work if he seeks work that is unrealistic in light of his physical \*\*\* limitations." 56 Ill. Adm. Code 2865.115(b) (2012). The section then goes on to give the

example discussed above regarding the pregnant assembler. The example concludes that she would be determined to be "not actively seeking work." *Id.*

¶ 30 Clearly this example presents a problem for the plaintiff in this case and gives the Board an excuse to deny benefits. To compound the problem, plaintiff would likely fare no better if he sought work outside of the construction industry because paragraph (c) of the same section of the Illinois Administrative Code states: "an individual is not actively seeking work if he seeks work that is unrealistic in light of his training or experience." 56 Ill. Adm. Code 2865.115(c) (2012).

¶ 31 Since plaintiff's only work experience was in the construction industry, one can infer that had he applied for work in other industries, he would likely have been unsuccessful in securing employment. His failure to secure employment outside his area of experience and training would then have been interpreted by the Board to be "not actively seeking work." I see no clear path to an interpretation of section 2865.115 which would allow plaintiff to qualify for benefits under the facts of this case.

¶ 32 Consequently, plaintiff found himself in a situation in which one can reasonably conclude he would *never* qualify for benefits, because he would *never* be "actively seeking work." Surely, this interpretation trap which the Board adopted defeats the underlying purpose of the statute and could never have been the intent of the legislature.