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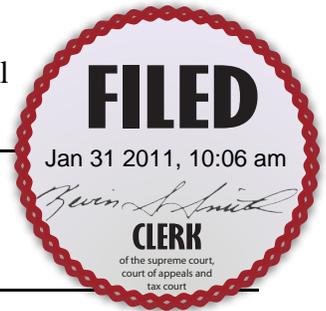
ATTORNEY FOR APPELLANT:

**JAMES D. FIEREK**  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES:

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**KATHY BRADLEY**  
Deputy Attorney General  
Indianapolis, Indiana



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**IN THE  
COURT OF APPEALS OF INDIANA**

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H & R EXCAVATING, )

Appellant, )

vs. )

No. 93A02-1007-EX-765

REVIEW BOARD OF THE INDIANA )  
DEPARTMENT OF WORKFORCE )  
DEVELOPMENT and K.S., )

Appellees. )

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APPEAL FROM THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT  
Review Board  
Case No. 10-R-02630

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**January 31, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

H&R Excavating appeals the Review Board's decision to grant unemployment benefits to its former employee, K.S. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

A claims deputy of the Indiana Department of Workforce Development (DWD) denied K.S.'s application for unemployment benefits in December 2009. K.S. appealed the decision, and a telephonic hearing was scheduled for May 3, 2010. During the hearing, the administrative law judge (ALJ) attempted to contact a representative of H&R at the telephone number provided by H&R. The ALJ left two messages on the representative's voicemail. In the first message, the ALJ said "I will attempt to call you back in a couple minutes. If you fail to answer we will have the hearing without you." (Tr. at 1.) In the second, the ALJ voicemail informed the representative, "You have failed to answer your phone after two calls. This hearing was scheduled for 9:45 a.m. The time is now 9:53 a.m. Due to your failure to answer your phone after two calls we will be having the hearing without you." (*Id.*) Following the hearing, the ALJ reversed the claims deputy's decision and granted unemployment benefits to K.S. based on the evidence K.S. presented during the hearing. The Review Board affirmed the ALJ's decision.

### **DISCUSSION AND DECISION**

H&R claims it was denied due process at the hearing because an issue discussed during the hearing was not listed as an issue on the notice received by H&R prior to the hearing.

When a party to an unemployment hearing receives actual notice of the hearing and

does not appear at or participate in the hearing, that party has waived the opportunity to obtain a fair hearing. *Art Hill, Inc. v. Review Bd. Of Ind. Dept. of Workforce Dev.*, 898 N.E.2d 363, 367 (Ind. Ct. App. 2008). The ALJ tried at least twice to call the contact number provided, but H&R could not be reached. H&R's failure to answer its telephone at the time of the hearing amounted to failure to participate in the hearing. *See id.* (company failed to participate in hearing when it did not provide correct contact telephone number to ALJ prior to hearing).

H&R nevertheless asserts we should not hold it waived its right to a fair hearing, as H&R did not voluntarily decline to participate in the hearing; rather, its representative was having cell phone problems when the ALJ attempted to contact him. The instructions provided with the notice of hearing sent to H&R indicated:

The judge will be recording the hearing, including the attempts the judge makes to contact parties. . . . If you choose to use a cell phone or cordless telephone, you must have adequate minutes, a fully charged battery, and good reception. . . . It is not possible for you to call the judge, so you must be available and you must answer the telephone when it rings. . . . Although the judge may make more than one attempt to reach you, the judge is not required to do so. If you cannot be reached at or near the time scheduled for the hearing you will be considered to have not participated and the judge may dismiss your case or decide against you.

(App. at 9.) H&R knew any telephonic difficulties could result in the judge deciding the case without H&R and against H&R, but chose to appear telephonically. As H&R accepted the attendant risks, we cannot hold H&R's failure to appear was anything other than voluntarily. *See Art Hill*, 898 N.E.2d at 367.

Because H&R voluntarily failed to appear, it cannot now be heard to complain about

any irregularities that may have occurred in its absence. *See id.* (company was not denied due process when ALJ conducted hearing without its participation because company failed to provide valid contact number for participation in telephonic hearing).

### **CONCLUSION**

H&R's voluntary failure to participate in the hearing amounted to a waiver of its right to challenge any error that may have occurred during the hearing. We accordingly affirm.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.