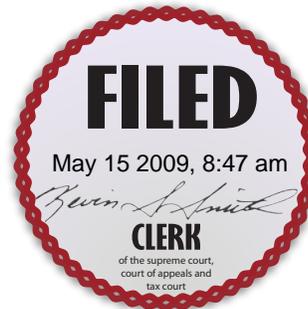


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LAURA J. BLICKEM)

Appellant-Respondent,)

vs.)

No. 93A02-0812-EX-1126)

REVIEW BOARD OF THE INDIANA)
DEPARTMENT OF WORKFORCE)
DEVELOPMENT and GASAMERICA)
SERVICES, INC.,)

Appellee-Petitioner.)

APPEAL FROM THE REVIEW BOARD OF THE
DEPARTMENT OF WORKFORCE DEVELOPMENT
Cause No. 08-R-03523

May 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Laura J. Blickem received unemployment benefits after her employment with GasAmerica Services, Inc., ended, and Gas America appealed the Department of Workforce Development's initial determination that she was eligible for benefits. The Department mailed documents relating to Blickem's upcoming telephonic hearing to her address of record, including a form for Blickem to return to provide the Administrative Law Judge with her contact telephone number for the hearing. Shortly before the hearing began, Blickem faxed her telephone number to the Department. However, the ALJ did not see the fax, ended the hearing after determining that Blickem had failed to appear, and reversed the initial Determination of Eligibility. Blickem appealed, and the Review Board affirmed the ALJ's decision without accepting additional evidence. Blickem now appeals to this Court, contending in part that the Review Board erred by refusing to consider additional evidence. Because we agree with Blickem that the Review Board should have reviewed her proffered additional evidence and remanded for a new hearing, we reverse and remand for a new hearing before an ALJ.

Facts and Procedural History

Blickem was employed as a sales associate for a Gas America store in Avon, Indiana, between December 5, 2007, and December 29, 2007. Appellant's App. p. 13. On December 29, 2007, her employment ended. *Id.* Blickem applied for and was granted unemployment benefits. Gas America appealed the initial Determination of Eligibility, and the Department scheduled a telephonic hearing before an ALJ.

The Department mailed documents relating to Blickem's upcoming hearing to her address of record. The packet of materials sent by the Department informed Blickem that the hearing would be held at 9:45 a.m. on October 28, 2008. *Id.* at 4. Forty-five minutes were set aside for the hearing. *Id.* The materials also included a form for Blickem to return to the Department to provide the ALJ with her contact telephone number for the hearing. *Id.* at 9.

Blickem faxed her telephone number to the ALJ's office on October 28, 2008, at 9:53 a.m. *Id.* at 17. The hearing did not begin until 9:56 a.m. *Id.* at 12. The ALJ did not notice Blickem's fax before the hearing and therefore observed at the beginning of the hearing, "The claimant did not provide a telephone number at which to [be] contacted" *Id.* After receiving brief testimony from a representative of Gas America, the following exchange took place on the record:

JUDGE: Well, the regulations, or procedure state that if the non-appealing party arrives before the hearing is adjourned, I have to admit them into the hearing room and let them present their case, so I'll need to check the fax machine . . .

[GAS AMERICA]: Okay.

JUDGE: . . . and see if she faxed in a number. I need to check with my secretary to see if she called a number in on the other line while we were on this line, so if you will just stay on the line, I'll be right back.

[GAS AMERICA]: Okay.

JUDGE: She has not faxed or called in a number, so I will show the record closed at 10:01 a.m. on October 28, 2008 and I will show the hearing adjourned at the same time.

Id. at 13. The ALJ thereafter reversed the initial determination that Blickem is eligible for benefits, observing again that Blickem "did not provide a telephone number at which to be contacted or appear in person" and concluding that Blickem failed to sustain her burden of proof. *Id.* at 20.

Blickem appealed the ALJ's decision to the Review Board and requested that the Review Board consider additional evidence. *Id.* at 22-26. In her written request, Blickem asked the Review Board to consider that the Department had her telephone number at the time of the hearing, that she sent a fax to the ALJ at the time of the hearing, and the evidence that she would have provided during the hearing had she been permitted to participate. *Id.* Without considering any additional evidence, the Review Board affirmed the ALJ's decision. *Id.* at 27. Blickem now appeals to this Court, Ind. Code § 22-4-17-12(a), contending in part that the Review Board erred by failing to consider additional evidence.

Discussion and Decision

Blickem raises several issues on appeal, one of which we find dispositive: whether the Review Board erred by denying her request to consider additional evidence. The admission of evidence additional to the evidence heard by the ALJ is within the Review Board's discretion. *Ritcheson-Dick v. Unemployment Ins. Review Bd.*, 881 N.E.2d 54, 56 (Ind. Ct. App. 2008). We review the Review Board's decision for an abuse of discretion, which occurs if the decision is arbitrary or capricious as revealed by the uncontradicted facts. *Fruehauf Corp. v. Review Bd. of Ind. Employment Sec. Div.*, 448 N.E.2d 1193, 1197 (Ind. Ct. App. 1983).

This issue is governed by 646 Indiana Administrative Code 3-12-8(b), which provides, in pertinent part:

Each hearing before the review board shall be confined to the evidence submitted before the administrative law judge unless it is an original hearing. *Provided, however, the review board may hear or procure additional evidence upon its own motion, or upon written application of*

either party, and for good cause shown, together with a showing of good reason why such additional evidence was not procured and introduced at the hearing before the administrative law judge.

(Emphasis added). In Blickem's request to the Review Board that it consider additional evidence, she asked that it consider her attempt to participate in her hearing before the ALJ and evidence regarding why her employment with Gas America ended. *See* Appellant's App. p. 22-26. The ALJ did not consider any of Blickem's evidence because the ALJ determined that she had failed to appear for her hearing or provide a telephone number at which she could be reached. However, Blickem *did* provide a telephone number to the Department before her hearing commenced, and her fax, time stamped three minutes before the hearing started, made apparent that she was available and wished to participate in her hearing. *Id.* at 17.¹

Indiana Code § 22-4-17-3 entitles the parties to a dispute over eligibility for unemployment insurance benefits to a "reasonable opportunity for [a] fair hearing" before an ALJ, and Indiana Code § 22-4-17-6 further provides that the "manner in which disputed claims shall be presented and the conduct of hearings . . . *shall be in accordance with rules adopted by the department* for determining the rights of the parties"

(Emphasis added). Although neither party to this case has provided us with a copy of the relevant rules of procedure adopted by the Department for ALJ hearings, the ALJ explained the applicable rule during the hearing:

JUDGE: Well, the regulations, or procedure state that if the non-appealing party arrives before the hearing is adjourned, I have to admit them into the

¹ The fax is electronically time stamped, and provided the following message to the Department: "Please call at [XXX-XXX-XXXX] ASAP SS# [XXX-XX-XXXX] Just received paper work that was needed to be sent back in by today for hearing at 9:45 per phone. Please reply ASAP[.]" Appellant's App. p. 17.

hearing room and let them present their case, so I'll need to check the fax machine. . .

[GAS AMERICA]: Okay.

JUDGE: . . .and see if she faxed in a number. I need to check with my secretary to see if she called a number in on the other line while we were on this line, so if you will just stay on the line, I'll be right back.

Appellant's App. p. 13. Blickem faxed the Department her telephone number and an expression of her desire to participate in her hearing before the hearing began. That the Department did not discover the fax until 10:37 a.m. is of no moment. Ex. p. 14. The ALJ's statement on the record that Blickem would be entitled admission to the hearing room and to present evidence if she faxed a telephone number to the Department during the hearing makes clear that had the ALJ been made aware of Blickem's fax, she would have been given the opportunity to take part in the hearing. Given the unusual circumstances that prevented Blickem from participating in her hearing and presenting any evidence on her own behalf, we conclude that Blickem has shown good cause why the Review Board should have considered her proffered additional evidence and a good reason why the additional evidence was not introduced before the ALJ. 646 Ind. Admin. Code 3-12-8(b). Thus, we conclude that the Review Board abused its discretion by failing to consider the additional evidence.

We reverse and remand this matter for a new hearing before an ALJ on the issue of Gas America's appeal of the initial Determination of Eligibility.

Reversed and remanded.

NAJAM, J., and FRIEDLANDER, J., concur.