

RENDERED: APRIL 26, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001156-MR

MICHAEL NICHOLS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 16-CI-002236

KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION; AND
NORTON HEALTHCARE, INC.

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: MAZE AND NICKELL, JUDGES; HENRY, SPECIAL JUDGE.¹

MAZE, JUDGE: Michael Nichols appeals an order of the Jefferson Circuit Court which affirmed a ruling by the Kentucky Unemployment Insurance Commission

¹ Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution. Special Judge Henry dissented from this opinion prior to the expiration of his appointment on April 24, 2019.

(“the Commission”) denying his application for benefits following the termination of his employment with Norton Healthcare, Inc. (“Norton”). Upon review, we conclude that KRS² 341.470(3), the statutory provision allowing corporate or partnership employers to appear *pro se* through non-lawyer representatives in unemployment proceedings, violates the separation-of-powers provisions of the Kentucky Constitution. Since Norton was represented by a non-attorney in the administrative proceedings before the Commission, we must vacate the circuit court’s order with directions to remand this matter to the Commission for a new administrative hearing.

The relevant facts of this matter are as follows. Nichols worked for Norton as a clinical engineering specialist from April 14, 2013, until November 9, 2015. On the latter date, Norton’s Systems Director of Clinical Engineering, Scott Skinner, fired Nichols, citing alleged failures to comply with instructions, falsification of records, and misfeasance of company resources. Fifteen minutes later, Nichols submitted an online application for unemployment benefits, seeking to secure unemployment benefits as expeditiously as possible. In his application, Nicholas selected “lack of work” as a basis for his separation from employment from Norton.

² Kentucky Revised Statutes.

Norton contested Nichols's application, stating that it had discharged Nichols for misconduct. Following an initial investigation, the Commission's Unemployment Division determined that Norton had fired Nichols for misconduct and that he had made intentional misrepresentations in his application, which justified both his disqualification from eligibility to receive benefits and the extension of this period of ineligibility. Nichols then appealed this decision to a referee.

The referee conducted evidentiary hearings on February 8 and 29, 2016. Nichols was represented by counsel, while Skinner, a non-lawyer, appeared for Norton. Skinner also testified in the hearings, offering several crucial facts. The referee conducted most of the questioning during Nichols' testimony at the February 29th hearing. However, the referee also afforded Skinner an opportunity to conduct a brief cross-examination, asking several questions of Nichols.

The referee affirmed the Unemployment Division, entering a written ruling to that effect on March 18, 2016. The Commission, after conducting a *de novo* review of the record, affirmed. The Commission concluded that Nichols had been terminated for misconduct; specifically, abandoning his work duties, dishonesty, and inappropriate stewardship of company resources.

Nichols filed a petition for judicial review in Jefferson Circuit Court, alleging three errors by the Commission. He first argued that the Commission's

factual finding lacked the support of substantial evidence. Second, he contended that the Commission impermissibly shifted the burden to him to prove the lack of misconduct. Finally, he asserted that the proceedings before the referee and the Commission were unconstitutional *per se* due to Skinner's appearance as a non-attorney representative on behalf of Norton. The circuit court affirmed the Commission in all respects. This appeal followed.

As an initial matter, we agree with Nichols that Skinner was not authorized to represent Norton during the proceedings before the referee and the Commission.³ KRS 341.470(3)(a) authorizes "[a]ny employer" to represent himself or to be represented by counsel in a proceeding before a referee or the Commission. And subsection (b) authorizes a managerial representative to represent a corporate or partnership employer in a proceeding before the referee or the Commission.

However, in *Turner v. Kentucky Bar Association*, 980 S.W.2d 560 (Ky. 1998), our Supreme Court held that a similar statute authorizing non-attorneys

³ As part of his statutory appeal, Nichols also filed a declaratory judgment action challenging the constitutionality of KRS 341.470(3). Although Nichols did not raise this issue before the Commission, it is well-established that exhaustion of administrative remedies is not necessary when attacking the constitutionality of a statute or a regulation as void on its face. This is because an administrative agency cannot decide constitutional issues. *St. Luke Hosps., Inc. v. Commonwealth, Cabinet for Health & Family Servs.*, 254 S.W.3d 830, 833 (Ky. App. 2008). Furthermore, we note that Nicholas properly served the Attorney General in the proceedings before the circuit court. KRS 418.075. Therefore, the constitutional issue is properly presented in this appeal.

to represent and advise workers' compensation claimants encroached on the exclusive power of the judiciary to establish rules relating to the practice of law. *Id.* at 562-63. *See also* KY. CONST. § 116. "Legal representation by a lay person before an adjudicatory tribunal, however informal, . . . as such representation involves advocacy that would constitute the practice of law." *Turner*, 980 S.W.2d at 564. Furthermore, the Court expressly declined to extend comity to the statute at issue in *Turner*. *Id.* at 563.

We emphasize that individual employers, such as a sole proprietorship, have the right to represent themselves in any administrative or legal proceeding. We also recognize that KRS 341.470(3) has a laudable goal of trying to simplify proceedings before the Commission. However, it is well-established that representation of a corporate or non-natural entity by a non-attorney implicates the unauthorized practice of law. *See* SCR⁴ 3.020. *See also* *Statewide Environmental Services, Inc. v. Fifth Third Bank*, 352 S.W.3d 927, 929 n.4 (Ky. App. 2011). Based on *Turner*, we are compelled to conclude that this restriction also applies to proceedings before administrative agencies. Therefore, to the extent that KRS 341.470(3) provides otherwise, the statute violates the separation-of-powers provisions of the Kentucky Constitution.

⁴ Kentucky Rules of the Supreme Court.

Consequently, we must vacate the circuit court's holding affirming the Commission's ruling. We must further emphasize that conclusion regarding the constitutionality of KRS 341.470(3) should only apply prospectively. But since the issue is squarely presented in this case, it must also apply to the parties in the current matter.⁵ In light of this holding, we need not address Nichols's remaining arguments regarding the sufficiency of the evidence or the Commission's allocation of the burden of proof. Rather, this matter must be remanded for a new administrative hearing before the Commission or a referee at which Norton is entitled to be represented by an attorney.

Accordingly, we reverse the order of the Jefferson Circuit Court and remand with directions to remand this matter to the Commission for a new hearing in accord with this opinion.

NICKELL, JUDGE, CONCURS.

⁵ The dissent cites to *Yount v. Calvert*, 826 S.W.2d 833 (Ky. App. 1991), as adopting the three-pronged test of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) to be applied in cases dealing with retroactivity of a constitutional determination. However, *Yount* and *Chevron Oil* considered only the appropriate remedy when a tax statute is found unconstitutional. Furthermore, the United States Supreme Court has since clarified that a ruling relating to the constitutionality of a tax statute must apply retroactively to the parties before the Court. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 98, 113 S. Ct. 2510, 2518, 125 L. Ed. 2d 74 (1993). Given the distinct issues presented here, we conclude that the *Chevron Oil* analysis is not applicable to this case.

HENRY, SPECIAL JUDGE, CONCURS IN PART AND DISSENTS

IN PART.

HENRY, SPECIAL JUDGE, CONCURRING IN PART AND

DISSENTING IN PART: I concur in the majority's conclusion that KRS 341.470(3) violates the separation-of-powers provision of the Kentucky Constitution insofar as it authorizes non-lawyers to represent a corporate or partnership employer in a proceeding before a referee or the Commission. I am convinced that the holding in *Turner v. Kentucky Bar Association, supra*, compels the conclusion that "the legislature has no power to make rules relating to the practice of law or create exceptions to the settled rules of this Court." 980 S.W.2d. at 563. Thus, to the extent that KRS 341.470(3) does just that, it must be construed to be unconstitutional.

Where I part company with the majority, however, is in the impact that a declaration of unconstitutionality has upon the litigation in this case. As the Supreme Court of Kentucky emphasized in *Frazee v. Citizens Fid. Bank & Trust Co.*, 393 S.W.2d 778, 782 (Ky. 1964):

The basic consideration in suits involving unauthorized practice of law is the public interest. Public interest dictates that the judiciary protect the public from the incompetent, the untrained, and the unscrupulous in the practice of law. Only persons who meet the educational and character requirements of this Court and who, by virtue of admission to the Bar, are officers of the

Court and subject to discipline thereby, may practice law.
The sole exception is the person acting in his own behalf.

I find no benefit to the public interest in overturning an otherwise sound decision rendered prior to the date the statute was determined to be unconstitutional. At the time the non-lawyer corporate representative appeared in the proceedings before the KUIC, there was specific statutory authority for such representation and the non-lawyer was also exempted from the statutory proscription against the unlawful practice of law set out in KRS 524.130(1):

Except as provided in KRS 341.470 and subsection (2) of this section, a person is guilty of unlawful practice of law when, without a license issued by the Supreme Court, he engages in the practice of law, as defined by rule of the Supreme Court.

(Emphasis added.)

In my view, the analysis regarding the outcome of the litigation in this case should be similar to that expressed in *Estate of Moloney v. Becker*, 398 S.W.3d 459 (Ky. App. 2013):

Here, since the jury found John's actions to have violated the standard of care, whether he engaged in the unauthorized practice of law is immaterial. . . . Whether John violated his common law standard of care or the statutorily-imposed standard of care found in KRS 524.130 is immaterial since "the violation 'must be a substantial factor in causing the result.'" *Isaacs v. Smith*, 5 S.W.3d 500, 502 (Ky. 1999) (quoting *Britton v. Wooten*, 817 S.W.2d 443, 447 (Ky. 1991)). The issue in the underlying case is whether substantial evidence supported the jury's finding that John's negligence was

not a substantial factor in causing an injury to the Estate. Thus, the Estate's argument that John's actions violated KRS 524.130 is not germane to the issue.

Id at 462. As was the case in *Becker*, whether the non-lawyer corporate representative was engaging in the unauthorized practice of law in the proceedings before the referee and the Commission is immaterial to the result reached in those proceedings. It is not germane to any issue concerning the propriety of the Commission's decision. Requiring the successful party in that litigation to retry the action simply because they were represented by an employee who was later determined to be unqualified does nothing to advance the public interest and is a waste of judicial and private resources.

Finally, in my view, the majority has imposed a retroactive application of the finding of unconstitutionality without engaging in the requisite analysis. This Court in *Yount v. Calvert*, 826 S.W.2d 833 (Ky. App. 1991), set out the test to be applied in determining whether to impose retroactive application of a statute declared to be unconstitutional:

In *Chevron Oil [Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)], the United States Supreme Court presented a three-pronged test to be applied in deciding cases dealing with the nonretroactivity question. The test provides:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of

first impression whose resolution was not clearly foreshadowed . . . (citations omitted).

Second, it has been stressed that “we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.” . . . Finally, we have weighed the inequity imposed by retroactive application, for “[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the ‘injustice or hardship’ by a holding of nonretroactivity.”

Id. at 836. In my opinion, retroactive application of the unconstitutionality of KRS 341.470(3) fails prongs two and three of the *Chevron* test. Considering prong two, retroactive application does not further the public interest in avoiding the unauthorized practice of law because at the time of the proceedings before the Commission the corporation was acting under valid statutory authority in permitting a non-lawyer employee to represent it. As to prong three, in my view it is inequitable to both parties, the Commission, and the court system to require relitigation of a claim for the sole reason that the successful party had been represented by a non-lawyer, a permitted action at the time of the representation.

Respectfully, I would affirm the decision of the circuit court upholding the Commission’s decision.

BRIEF FOR APPELLANT:

Robyn Smith
Louisville, Kentucky

BRIEF FOR APPELLEE
KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION:

Clay J. Lamb
Frankfort, Kentucky

BRIEF FOR APPELLEE NORTON
HEALTHCARE, INC.:

Donna King Perry
Louisville, Kentucky