

BRIEF AND ORAL ARGUMENT FOR APPELLEE KENTUCKY STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO: Everett C. Hoffman, Louisville, Kentucky.

JUDGES: BEFORE: KELLER AND NICKELL, JUDGES; LAMBERT, n1 SENIOR JUDGE. All concur.

1

Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

OPINION BY: KELLER

OPINION

OPINION AFFIRMING IN PART, VACATING IN PART, AND REMANDING

KELLER, JUDGE: TECO Mechanical Contractor, Inc. (TECO), appeals from the Franklin Circuit Court's summary judgment upholding the constitutionality of portions of Kentucky Revised Statutes (KRS) Chapter 337 (the Act) and assessing back wages and civil penalties against TECO. On appeal, [*2] TECO argues that portions of the Act are unconstitutional because there is no provision for a due process hearing regarding the classification of workers by the Environmental and Public Protection Cabinet (the Cabinet). Additionally, TECO argues the Act does not provide adequate guidance regarding the classification of workers. Furthermore, TECO argues that, if the Act is constitutional, the circuit court, in finding for the Cabinet, used the incorrect standard of proof; adopted the Cabinet's classification method, which is contrary to law; and based its judgment on inadmissible evidence. For the following reasons, we affirm in part, vacate in part, and remand.

FACTS

The facts are not in dispute. TECO provided mechanical contractor services to various general contractors on a number of public works projects. TECO bid and contracts were awarded based on payment of the prevailing wage as set forth in the applicable Notification of Public Works Projects documents (the Notifications). Following receipt of a complaint, the Cabinet audited TECO's wage records from those projects and, on November 21, 2002, notified TECO that it had underpaid several of its employees by a total of \$ 150,781.82. [*3] TECO protested, and the Cabinet conducted additional investigations, which lead to a reduction in the back wages owed to \$ 63,494.21.

Following failed attempts to negotiate a resolution, the Cabinet notified TECO that it had until March 4, 2005, to pay a compromised amount of \$ 51,620.65 in back wages and a civil penalty of \$ 4,000.00. Furthermore, the Cabinet advised TECO that, if it did not pay by that date, the Cabinet would seek payment of the back wages from the appropriate general contractors. On March 14, 2005, the Cabinet notified the general contractors of the deficiencies and indicated that it would seek payment from them. The general contractors contacted TECO seeking an explanation and advised TECO that, if they had to pay, TECO would not be asked to bid on any additional prevailing wage work.

On March 30, 2005, TECO filed a complaint and petition for declaration of rights in Franklin Circuit Court, to which the Cabinet filed an answer. In its complaint, TECO asked the court to declare various portions of the Act unconstitutional and to enjoin the Cabinet from collecting back wages and imposing civil penalties. TECO also filed a motion for a temporary restraining order asking [*4] the court to restrain the Cabinet from attempting to collect the alleged back wages and civil penalty. The court granted TECO's motion.

The Cabinet then filed a motion to amend its answer to TECO's complaint and to assert a cross-claim against TECO seeking back wages and a civil penalty. The Cabinet also sought leave to join and file cross-claims against TECO's general contractors, which the court granted. The newly joined parties then filed answers and cross-claims. During the course of litigation, the Kentucky State Building and Construction Trades Council, AFL-CIO; Associated Builders and Contractors of Kentuckiana, Inc.; Associated General Contractors of Kentucky, Inc.; and Mechanical Contractors Association of Kentucky, Inc. (MCAK) intervened.

TECO filed a motion for summary judgment, making the same constitutional arguments it makes herein. The circuit court denied TECO's motion, finding that KRS 337.525 provides "[a]ny person or party claiming to be aggrieved by any final determination of prevailing wages by the prevailing wage review board may appeal to the Franklin Circuit Court." Citing Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, 195, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001), [*5] the court determined that this right of appeal to the Franklin Circuit Court provided TECO with adequate due process.

The court then determined that, because of the "variety of skills and the nature of the labor covered by the prevailing wage laws, it is impractical if not impossible for the Cabinet to statutorily define each discrete category of work activity and assign a specific prevailing wage to it." The court also noted that, if there was a dispute regarding classification of a particular job, TECO could avail itself of an appeal to the circuit court. Therefore, the court concluded that the Act did not impermissibly delegate power to the Cabinet.

The court then conducted a bench trial. In this proceeding, two representatives of the Cabinet, Jeff Wiley (Wiley) and Joseph Lagrotto (Lagrotto), testified regarding their investigation of TECO employee complaints. Initially, Wiley and Lagrotto reviewed wage records from TECO. Those records showed that a number of TECO's employees were paid a fixed number of hours per day at the rate for skilled work and a fixed number of hours per day at the rate for general labor. According to Lagrotto, this type of payment raised "red flags." Therefore, [*6] he and Wiley interviewed several former TECO employees. Based on the wage records and those interviews, Wiley and Lagrotto determined that several TECO employees had been paid at the general laborer rate when they were actually performing skilled work.

Lagrotto also testified that he based his conclusions, in part, on the "work incident to a trade" method of job classification. Using that method, work that might otherwise be characterized as general labor, *i.e.*, unloading trucks and carrying materials to the job site, should not be characterized as general labor when incident to performing skilled work. Thus, if a sheet metal worker helps unload fabricated sheet metal ducts from a truck, carries those ducts to the work site, and then installs those ducts, the unloading of the truck and carrying of the ducts are incident to the job of sheet metal worker - installation of the ducts - and should be paid at the rate for a sheet metal worker. However, if a sheet metal worker were to do nothing but unload trucks and carry materials to the job site, that work would be general labor and the employee should be paid at the general laborer rate.

Both Wiley and Lagrotto testified that, at the time, [*7] there were no specific job descriptions for skilled trade jobs in the Act, in any regulations, or in the Notifications. However, there was some description of general laborer in the Notifications. n2

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We note this "description" is a mix of various job titles and job duties. It is not like the job descriptions in the *Dictionary of Occupational Titles* or the descriptions currently available on the Cabinet's web site.

----- End Footnotes-----

In addition to Wiley and Lagrotto, the Cabinet presented testimony from former TECO employees Bill House (House), Ricky Brinegar, Mitchell Bard, Everett Lewis Miller, Tracy Whittaker, Tim Thompson, and William Michael Toy II. The trial court accurately summarized the testimony of these witnesses in detail. We do not believe that such a detailed summary is necessary to resolution of the issues on appeal. However, we note that, generally, these witnesses testified that they were often paid at the general laborer rate when performing skilled work. Although they admitted that, throughout the day, they might perform tasks that in isolation might be considered general labor, they considered those tasks to be incident to the skilled work. Those witnesses who testified about the completion [*8] of time cards stated that they were told to list a certain number of hours as skilled work and a certain number of hours as general labor, regardless of the actual time spent performing each type of work.

TECO presented testimony from former TECO employees Ronnie Brown (Brown), Tim Hellard (Hellard), and Alvin Shepherd (Shepherd); contractor Kenneth Griggs (Griggs); TECO employees Frank Hadley (Hadley), and Kenney Creighton (Creighton); and TECO president, Bill R. Thompson (Thompson). Again, we note that the trial court did a thorough and excellent job of summarizing the testimony of these witnesses. We will not recite their testimony in detail; however, we note that Brown, who operates a sheet metal company, testified that he pays his unlicensed sheet metal workers on prevailing wage jobs at the skilled rate for skilled work and at the general laborer rate for general labor.

Hellard, who worked as a foreman for TECO, testified that while with TECO, he completed time cards for those employees he supervised on prevailing wage jobs. According to Hellard, unlicensed sheet metal workers were initially paid at the skilled rate for two of every eight hours worked and at the general laborer [*9] rate for the remaining six hours. As an unlicensed sheet metal worker gained experience, he was paid at the skilled rate for four of every eight hours worked and at the general laborer rate for the remaining four hours. This division of rate applied regardless of the actual work performed by an unlicensed sheet metal worker.

Shepherd, who worked for TECO for 26 years before starting his own plumbing and HVAC company, testified regarding what he considers skilled work and what he considers general labor. As to time cards, Shepherd believes that he may have completed them for the employees he supervised.

Griggs, who operates a general contracting company, does not have licensed employees. However, he does pay his employees on prevailing wage jobs different rates depending on the jobs performed. According to Griggs, an employee could be paid at as many as three different rates during the course of a day, depending on the type of work he performs.

Hadley, a twenty-nine year TECO employee, is a licensed sheet metal mechanic. At the relevant times herein, Hadley worked as a sheet metal foreman. He testified that he would not complete time cards for employees but would review and sign them. [*10] Hadley only reviewed the time cards to determine if the total number of hours worked was accurate, not to determine if the division of hours between skilled work and general labor was accurate.

Creighton, a forty-three year employee of TECO, testified that, as foreman, he did not complete time cards for employees. He reviewed time cards, but only for total hours worked, not for division of time between skilled and general labor. According to Creighton, TECO does have employees who are strictly laborers. Those laborers might assist a sheet metal worker by holding a duct, but would not assist in cutting duct work.

Thompson testified that approximately half of TECO's jobs are prevailing wage projects. Approximately 30% of TECO's costs are related to payroll and estimators rely on previous jobs performed by TECO as well as the wage specifications in the Notifications in order to prepare a bid. Thompson noted that TECO also uses job definitions recognized under federal law in making its bids. TECO does not offer a recognized apprenticeship program; however, it does offer training and encourages unskilled employees to obtain the skills necessary to qualify for various licenses. In order to [*11] encourage unskilled workers to develop the necessary skills, TECO pays them a certain number of hours at the skilled rate, with the rest paid at the general laborer rate. As an employee's skills improve, the number of skilled rate hours increases. Although these divisions are reflected on employee time cards, Thompson testified that he has never told any employee how to apportion time on a time card. Finally, Thompson testified that TECO had undergone a number of investigations by the Cabinet in the 1980's and 1990's and the Cabinet only questioned how TECO classified or paid its employees on one occasion. On that occasion, TECO agreed to pay the claimed past due wages rather than contesting them.

Following trial, the court issued its judgment, awarding \$ 64,163.47 in back wages to the twelve employees the Cabinet identified in its documents as having been underpaid. The court also assessed a civil penalty of \$ 750.00 for each violation of the Act related to the twelve employees, for a total penalty of \$ 9,000.00.

Because the standard of review used by the court is one of the keys to our opinion, we set forth,

in toto, the court's finding regarding that standard below.

The prevailing [*12] wage statutes provide no specific directions for the Executive Director to use as guidance in resolving a classification dispute. In the absence of such standards or statutory provisions, the decision of the Executive Director must be considered valid unless determined to be arbitrary. American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450 (Ky. 1964).

The Constitution prohibits the exercise of arbitrary power by an administrative agency. In determining whether an agency's action was arbitrary, the reviewing court should look at three primary factors. The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. American Beauty Homes Corporation, supra. [sic] Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. American Beauty Homes Corporation, supra. [sic] If any of these three [*13] tests are failed, the reviewing court may find that the agency's action was arbitrary.

Com. Transp. Cabinet Dept. of Vehicle Regulation v. Cornell, 796 S.W.2d 591, 594 (Ky. App. 1990).

In this case, the Commissioner/Executive Director was acting within his statutory authority. The Commissioner/Executive Director has the authority to investigate potential prevailing wage violations. KRS 337.530(2) and (4). TECO was provided due process through a protracted negotiation process that included employees coming to Frankfort to give testimony and there is substantial evidence in the court hearing record to support the decision of the agency that TECO violated the prevailing wage law, that employees are owed the wages set forth in Exhibits 1 through 46 (summarized at Exhibit 1 to the Cabinet's post-hearing memorandum) and that a substantial penalty should be assessed against TECO. The Court finds that the action of the agency is not arbitrary. Although the contours of the prevailing wage statute in the context of this case are subject to legitimate debate, the statute provides adequate safeguards to ensure against arbitrary application. Butler v. United Cerebral Palsy of Northern Kentucky, Inc., 352 S.W.2d 203 (Ky. 1961). [*14] Accordingly, this Court must uphold the actions of the Department of Labor.

There are no statutory or regulatory provisions allowing prevailing wage contests to be decided through the state's administrative procedure statute, KRS Chapter 13B. The Labor Department has provided TECO with notice of its allegations of violations of the prevailing wage statute, and further provided TECO an opportunity to be heard through the presentation of evidence to the Department. Accordingly, TECO exhausted its administrative remedies and adjudication of this dispute by this Court is appropriate. (Quotation marks and paragraph numbers deleted from the original).

We will set forth additional facts as necessary in analyzing the issues raised on appeal.

STANDARD OF REVIEW

The issues raised by TECO must be analyzed using differing standards of review; therefore, we will set forth the appropriate standards as necessary in analyzing each issue.

ANALYSIS

1. Constitutionality of the Act

We first address the constitutional issues raised by TECO: (1) that the Act does not provide due process and (2) that the Act unconstitutionally delegates judicial authority to the Cabinet. "Our courts are sensitive to the presumption [*15] of constitutionality, *i.e.*, the rule that an act should be held valid unless it clearly offends the limitations and prohibitions of the Constitution. The one who questions the validity of an act bears the burden to sustain such contention." Stephens v.

State Farm Mut. Auto. Ins. Co., 394 S.W.2d 624, 626, 42 01 Ky. L. Summary 30 (Ky. 1995).

With the preceding standard in mind, we first address TECO's due process argument. TECO argues that the Act does not provide for an administrative hearing when a dispute arises regarding the classification of employees, thus depriving it of due process. The trial court, in denying TECO's motion for summary judgment on this issue, found that KRS 337.525 provides that "[a]ny person or party claiming to be aggrieved by any final determination of prevailing wages by the prevailing wage review board may appeal to the Franklin Circuit Court. . . ." The court then noted that an administrative hearing prior to appeal might be a more efficient way to handle such disputes; however, the court found that "the current statutory scheme . . . fully protected TECO's due process rights by affording it the right to appeal any decision of the Cabinet regarding the prevailing wage it was obligated [*16] to pay."

Sections 505 through 550 of the Act address wages and hours on prevailing wage projects. Prevailing wage is defined as

[t]he basic hourly rate paid or being paid subsequent to the executive director's most recent wage determination to the majority of laborers, workmen, and mechanics employed in each classification of construction upon reasonably comparable construction in the locality where the work is to be performed; such rate shall be determined by the executive director in accordance with paragraphs (a), (b), and (c) of subsection (3) of KRS 337.520; in the event that there is not a majority paid at the same rate, then the basic hourly rate of pay shall be the average basic hourly rate which shall be determined by adding the basic hourly rates paid to all workers in the classification and dividing by the total number of such workers[.]KRS 337.505(1).

In determining what rates of wages prevail, the executive director must consider:

(a) Wage rates paid on previous public works constructed in the localities. In considering the rates, the executive director shall ascertain, insofar as practicable, the names and addresses of the contractors, including subcontractors, the locations, [*17] approximate costs, dates of construction and types of projects, the number of workers employed on each project, and the respective wage rates paid each worker who was engaged in the construction of these projects.

(b) Wage rates previously paid on reasonably comparable private construction projects constructed in the localities. In considering the rates the executive director shall ascertain, insofar as practicable, the names and addresses of the contractors, including subcontractors, the locations, approximate costs, dates of construction and types of projects, the number of workers employed on each project, and the respective wage rates paid each worker who was engaged in the construction of these projects.

(c) Collective bargaining agreements or understandings between bona fide organizations of labor and their employers located in the Commonwealth of Kentucky which agreements apply or pertain to the localities in which the public works are to be constructed.KRS 337.520(3).

Prior to making an initial determination or revision regarding prevailing wage rates in a locality, the executive director must conduct a public hearing unless the United States Department of Labor has issued a prevailing [*18] wage under the Davis-Bacon Act or other applicable federal legislation. KRS 337.522(1). Any person may request and shall be granted an additional hearing before a three-person prevailing wage review board. KRS 337.522(2). Pursuant to KRS 337.525, "[a]ny person or party claiming to be aggrieved by any final determination of prevailing wages by the prevailing wage review board may appeal to the Franklin Circuit Court." However, the Franklin Circuit Court is limited to reviewing the record before the prevailing wage review board and may not substitute its judgment for that of the board.

Once a prevailing wage is established, any contractor or subcontractor shall "pay not less than the rate of wages so established." KRS 337.530(1). Furthermore, all contractors and subcontractors are required to

keep full and accurate payroll records covering all disbursements of wages to their employees to whom they are required to pay not less than the prevailing rate of wages. Such records shall

indicate the hours worked each day by each employee in each classification of work and the amount paid each employee for his work in each classification. KRS 337.530(2). Pursuant to KRS 337.550, any laborer, workman, [*19] or mechanic employed on a prevailing wage project may file a complaint with the Cabinet and the Cabinet is required to assist any such employee in obtaining any wages owed. Furthermore, the Act requires the Cabinet to investigate violations and enforce its provisions, which the Cabinet may do through legal action. KRS 337.550(2). Finally, the Cabinet may seek civil penalties against anyone violating the Act by issuing a citation. If that citation is not paid within fifteen days, the Cabinet shall initiate a civil action to collect the penalty. KRS 336.985.

Based on the above, the Act provides a person several opportunities to be heard with regard to prevailing wage issues. The first opportunity is at the public hearing when a prevailing wage is set or revised. A person dissatisfied with the result of that hearing may then request a hearing before the prevailing wage review board and, if dissatisfied with the review board's determination, may appeal to Franklin Circuit Court. KRS 337.522 and KRS 337.525. It appears from the trial court's ruling on TECO's motion for summary judgment that the court relied on this review process in finding that TECO received due process. However, we agree [*20] with TECO that the trial court's reliance was misplaced. The review process set forth in KRS 337.520 through 522 is related to the setting or revision of the prevailing wage rate. It is not related to classification of employees or to enforcement of the provisions of the Act.

That is not to say that the Act lacks any provision for due process. As noted above, to enforce the Act, the Cabinet or an aggrieved employee may file a legal action. Furthermore, in order to enforce any citation seeking a civil penalty, the Cabinet must file a civil action. Therefore, although the trial court cited to the wrong review process, it reached the correct conclusion that the Act does provide a process for aggrieved parties to be heard. However, that does not end the analysis because this Court must determine whether those processes are constitutionally sufficient.

We agree with the trial court, the Cabinet, and MCAK that Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, 121 S.Ct. 1446, 149 L.Ed.2d 391 (2001), is persuasive. In Lujan, G & G Fire Sprinklers, Inc. (G & G), served as a subcontractor on several public works projects. The California Division of Labor Standards Enforcement (the Division) [*21] determined that G & G had failed to pay prevailing wages and failed to keep adequate records. The Division, pursuant to California law, advised the awarding bodies of the public works projects to withhold payment equal to the back wages and penalties from the general contractors who then withheld payment from G & G. G & G filed a declaratory judgment action claiming that issuance of the withholding notices, without a prior hearing, violated its right to due process. The United States Supreme Court held that G & G had access to the California courts because the California statutes expressly provided G & G with the ability to file a breach-of-contract suit to recover any amounts wrongfully withheld. 532 U.S. at 196, 121 S.Ct. at 1451, 149 L.Ed.2d 391. That access, which made "ordinary judicial process available to [G & G] for resolving its contractual dispute" amounted to due process. 532 U.S. at 197, 121 S.Ct. at 1451, 149 L.Ed.2d 391.

The case herein differs from Lujan because the Act does not specifically provide TECO with the right to bring a breach-of-contract suit. However, the underlying principle in Lujan, that access to ordinary judicial process is due process, applies herein. [*22] In order to enforce the provisions of the Act, the Cabinet must bring a legal action. Because there is no provision in the Act for an administrative hearing regarding the propriety of a violation, fine, or assessment of back wages, any enforcement action by the Cabinet in the circuit court must allow for an adversarial trial on the merits. The Court must permit the Cabinet and the aggrieved party to fully present evidence regarding the propriety of the Cabinet's actions. Upon conclusion of any such trial, the Court must weigh the evidence and make findings of fact and reach conclusions of law based on a *de novo* review of that evidence. Furthermore, because there is no provision for an administrative hearing, the circuit court shall not afford deference to any "findings" by the Cabinet.

Additionally, although the Act does not specifically provide for the filing of a direct action in circuit court by an aggrieved party, we hold that such a right is inherent in the Act. Because a "party to be affected by an administrative order is entitled to procedural due process[.]" American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning

Commission, 379 S.W.2d 450, 456 (Ky. 1964), [*23] absent the provision for an administrative hearing, a party affected by an administrative order must be entitled to seek relief in circuit court. As noted above, any proceeding in circuit court would be an original action, not an appeal from an administrative adjudication. Upon the foregoing, we uphold the constitutionality of the Act despite its failure to provide an administrative hearing.

Therefore, we hold that, from a due process standpoint, the Act is constitutional.

The second constitutional challenge by TECO, that the Act improperly delegates judicial power to the Cabinet, also fails. TECO argues that the Cabinet exercises judicial power when it issues citations for civil penalties. Although TECO recognizes that the legislature may delegate such powers to an agency, it argues that there must be adequate safeguards to prevent an abuse of discretion by the agency. According to TECO, the fact that there are no job descriptions in the Act, the regulations, or the Notifications gives the Cabinet unfettered discretion in determining how to classify jobs, amounting to an improper delegation of judicial power.

TECO's argument is not persuasive for several reasons. First, TECO did not [*24] even attempt to classify the jobs performed by its employees. It paid them by 'a formula that it devised, rather than by the work performed or pursuant to any other classification method. Therefore, TECO cannot now be heard to complain regarding the Cabinet's classification system.

Second, the Cabinet is not performing a judicial function when it issues a citation or seeks back wages for an employee. It is performing an administrative function. Any judicial function takes place in a court after the Cabinet files a legal action to enforce the citation or collect the back wages. At that point, an aggrieved party may put on evidence contesting the Cabinet's classification, much as TECO did before the Franklin Circuit Court.

Third, as noted by MCAK, there are constraints on the Cabinet's classifications. Determining prevailing wage consists of two factors; the first is classifying jobs. The second is setting the rate of pay for each classification. In determining the prevailing wage, the Cabinet is required to consider the wages paid "to the majority of laborers, workmen, and mechanics employed in each classification of construction upon reasonably comparable construction in the locality [*25] where the work is to be performed[.]" KRS 337.505(1). Furthermore, the Cabinet must obtain information regarding the number of workers employed in other projects and their rates of pay as well as collective bargaining agreements in the locality. KRS 337.520(3). These constraints, particularly those provided by the collective bargaining agreements, do not leave the Cabinet with unfettered discretion regarding classification.

Fourth, the primary case relied on by TECO, Butler v. United Cerebral Palsy of Northern Ky., Inc., 352 S.W.2d 203 (Ky. 1961), deals with the delegation of legislative authority to an agency, not the delegation of judicial authority. Therefore, it has no application to TECO's argument regarding the delegation of judicial authority. The other case on which TECO relies, Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852 (Ky. 1981), does deal with the delegation of judicial authority. However, as we previously stated, the Cabinet was not exercising judicial authority when it issued its citation and sought to collect back wages. Furthermore, even if the Cabinet were exercising judicial authority, the Act provides for judicial review of the Cabinet's actions, [*26] which is a sufficient safeguard against abuse of discretion.

2. Trial Court Standard of Review

TECO argues that the trial court used the incorrect standard of review in finding for the Cabinet on its counterclaims. We agree. Although it is not as clear as TECO argues, it appears from the trial court's judgment that it reviewed this matter for an abuse of discretion by the Cabinet. If the Act provided for and/or if TECO had received a hearing at the administrative level, then the trial court's use of the abuse of discretion standard of review would have been appropriate. See Johnson v. Galen Health Care, Inc., 39 S.W.3d 828, 833 (Ky. App. 2001); Kentucky Unemployment Insurance Commission v. King, 657 S.W.2d 250, 251 (Ky. App. 1983); and Kentucky Racing Commission v. Fuller, 481 S.W.2d 298, 309 (Ky. 1972). However, as noted

above, that is not the case herein. While the Cabinet did conduct a thorough investigation, which included interviewing a number of TECO employees, there is no indication that TECO received a full hearing at the Cabinet level. The first full hearing TECO received was before the trial court. As such, the trial court should have reviewed this matter *de novo*, as it would [*27] any other civil matter before it. Thus the trial court was required to judge the credibility of witnesses and to independently weigh the evidence. See Quadri Business Systems v. Kentucky Cattlemen's Association, Inc., 242 S.W.3d 359, 365 (Ky. App. 2007); Singer v. Singer, 440 S.W.2d 783, 785 (Ky. 1969); and Adkins v. Meade, 246 S.W.2d 980 (Ky. 1952). Because we cannot confidently discern whether the trial court reviewed this matter *de novo*, we must remand to the trial court for findings under the appropriate standard of review. Note, we are not directing the trial court what conclusion it should reach. We are simply instructing the trial court to re-weigh the evidence using the appropriate standard. After doing so, the trial court may or may not reach the same conclusion regarding the Cabinet's counterclaims.

3. Method of Classifying Work Activity

Lagrotto testified that, in investigating TECO, he used the "work incident to the trade" method to classify whether an employee performed skilled work or general labor. TECO argues that this method of classification is not the standard practice in the trade. In support of that argument, TECO points to House's testimony that, in his current [*28] job, plumber's helpers are paid a fixed amount of time as helpers and a fixed amount of time as plumbers. As those employees increase their skills, the number of hours paid at the plumber rate increases.

TECO also points to Brown's testimony that his company does not pay employees using the work incident to a trade method. However, unlike TECO, Brown's company pays employees according to the work performed, not by a fixed formula, *i.e.*, if a worker is unloading a truck, he is paid at the general laborer rate, and if he is installing sheet metal, he is paid at the skilled rate.

Finally, TECO points to testimony from Griggs as supporting its contention that the work incident to a trade method is not normally used. Griggs testified that his employees are paid wages according to the work performed. He did not testify that those wages were calculated according to a set formula.

The preceding testimony lends some credence to TECO's argument that work incident to a trade is not the commonly used method to classify employees. However, it also lends credence to the Cabinet's argument that TECO's use of a predetermining formula to set pay is not commonly used to classify employees.

The trial court [*29] appears to have used an abuse of discretion standard of review and deferred to the Cabinet with regard to the appropriate method to be used to determine classification of employees. However, because the trial court was not acting as a reviewing body, that standard of review was not appropriate. Therefore, on remand, the trial court must review *de novo* whether the Cabinet's use of the work incident to a trade method to classify employees is reasonable.

Finally, on this issue, we note TECO's argument that the work incident to a trade method runs afoul of statutes requiring certain tradesmen to be licensed. We agree with the Cabinet that this argument is without merit. The Act ties wage rates to the type of work performed, not to the type of worker performing the work. As noted by the Cabinet, the legislature, when defining prevailing wage, could have tied payment of various wage rates to licensing; however, it chose not to do so. Therefore, whether an employee is licensed or not is essentially meaningless under the Act.

4. Sufficiency of the Evidence

Finally, TECO argues that the Cabinet did not present sufficient evidence to support the trial court's judgment on the Cabinet's cross-claims. [*30] We agree, in part.

Substantial evidence consists of "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Smyzer v. B.F. Goodrich

Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). It is that "evidence which would permit a fact-finder to reasonably find as it did." Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

During trial, the Cabinet introduced into evidence forty-six payroll audit sheets. Those audit sheets were prepared by Wiley and Lagrotto as part of their investigation of TECO and contain information garnered from TECO's records and interviews with employees. At trial, TECO objected to the introduction of the audit sheets related to any employees who were not listed as witnesses because the audit sheets contained information from employee interviews, and thereby contained hearsay. The trial court overruled TECO's objection, stating that the audit sheets were admissible business records. Furthermore, the court noted that TECO would be able to cross-examine Lagrotto, Wiley, and the employees.

Kentucky Rule of Evidence (KRE) 802 provides that hearsay evidence is not admissible unless one of a number of exceptions [*31] applies. KRE 803(6) provides an exception for business records made at or near the time of the events they record that are kept in the course of regularly conducted business. KRE 803(8) provides that public records and reports setting forth an agency's "regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law" are admissible. However, "[i]nvestigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party" are not exceptions to the hearsay rule. KRE 803(8)(B).

The Cabinet makes several arguments in support of the trial court's admission of and reliance on all of the audit sheets. First, the Cabinet argues that the audit sheets are not "investigative reports" because they were not created with the intent to use them as evidence in any case to which the Cabinet might be a party. That argument is not persuasive for two reasons. First, the Rule states that use of the report, not the intent behind creation of the report, is the controlling [*32] factor. Second, the audit reports were created to support any citations or claims against TECO based on incorrect payment of wages. In order to collect these wages or enforce the citations, the Cabinet was required by the Act to bring a legal action, or a "case." Therefore, it appears that the audit reports were generated with, at a minimum, the intent to make a case against TECO, thus contradicting the Cabinet's argument.

The Cabinet next argues that the audit forms do not contain any "quotes, statements, or opinions of third parties." Nonetheless, that does not mean that the forms do not contain, and were not based on, information obtained from the employees. Neither Wiley nor Lagrotto could have determined whether the wages paid by TECO were correctly apportioned between skilled work and general labor without obtaining information from the employees. By its nature, that information represented opinions of the employees regarding what type of work they performed. For that reason, we agree with TECO that the audit forms amounted to inadmissible hearsay as to the employees who did not testify. On remand, such inadmissible hearsay shall not be considered. Any hearsay problems with the [*33] audit forms related to the employees who did testify were cured by the testimony of those employees, Wiley, and Lagrotto in court.

Based on the above, on remand, the trial court shall not consider any audit sheets for the employees who did not testify and adjust any judgment accordingly.

CONCLUSION

For the foregoing reasons, we affirm the trial court's finding that the Act is constitutional. However, we vacate and remand the trial court's finding for the Cabinet on its cross-claims. On remand, the trial court shall evaluate the evidence presented *de novo* without deferring to the Cabinet as to its findings or its method of classification. Furthermore, the court shall not consider audit sheets related to the employees who did not testify.

ALL CONCUR.

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