

1987

# Barbara A. Deluca v. Board of Review of the Industrial Commission of Utah : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BARBARA A. DeLUCA,

Claimant-Petitioner,

v.

BOARD OF REVIEW OF THE  
INDUSTRIAL COMMISSION OF UTAH,  
DEPARTMENT OF EMPLOYMENT  
SECURITY,

Respondents.

APPEAL BRIEF  
OF  
CLAIMANT-PETITIONER

Case No. 870003-CA

#6

UTAH COURT OF APPEALS  
BRIEF

BRIEF OF PETITIONER

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DOCKET NO. 870003-CA

APPEAL FROM AN ORDER OF THE  
BOARD OF REVIEW OF THE INDUSTRIAL  
COMMISSION OF THE STATE OF UTAH

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### STATEMENT OF ISSUES PRESENTED

The issue presented on appeal is whether the claimant is entitled to the benefit of §35-4-4.5, Utah Code, the application of which would result in the award of unemployment compensation in this case. Section 35-4-4.5 allows a claimant's base period to be frozen where the claimant "had a continuous period of sickness or injury for which he was compensated under the workmen's compensation or the occupational disease laws of this state or under Federal law." Claimant urges freezing. Respondent has held that she does not qualify for the benefits of this statute.

### STATEMENT OF FACTS

Claimant began working for Deseret Medical Inc. on November 21, 1983. (R., p. 50). While with the company she developed a panic and anxiety disorder which was diagnosed and treated by her medical doctor, (R., p. 78-79), and her psychotherapist. (R., p. 66-68). The psychotherapist found that the condition was aggravated by her employment. (R., p. 66-68). On March 21, 1985 the company granted her medical leave. (R., p. 50). She received disability compensation from her employer's insurer through a private

disability plan. She did not apply for worker's compensation, having received benefits under the private plan. (R., p. 53-54). In September, 1985, after a required six-month waiting period, she began receiving federal social security disability due to the illness. (R., p. 72-74).

On May 6, 1986 her doctor released her to return to work. At this time, Deseret told her that her job was no longer available and she was discharged. (R., p. 80).

Subsequent to her discharge she applied for unemployment compensation. (R., p. 102). Her application was denied on the ground that she had insufficient earnings during her base period (which was determined to be January 1, 1985 - December 31, 1985) to qualify her for unemployment compensation. Through most of this base period, she had been on medical leave and therefore had no earnings. Respondent rejected her contention that her base period should be "frozen," as allowed by §35-4-4.5, Utah Code, and an earlier base period used. This appeal followed.

#### SUMMARY OF ARGUMENT

Petitioner's argument is that Respondent has been arbitrary and capricious in using the "regular" base period in determining her eligibility for unemployment compensation. Freezing the base period, as allowed by

§35-4-4.5, Utah Code, would allow her a base period with sufficient earnings in it that she would be eligible for compensation. The Department's refusal to give her the benefit of §35-4-4.5 is based on a narrow reading of the statute which is arbitrary and capricious under longstanding caselaw holding that statutes should be read liberally to effectuate the goal of the Act.

#### ARGUMENT

- I. THE RESPONDENT HAS BEEN ARBITRARY AND CAPRICIOUS IN NOT USING THE EARLIER BASE PERIOD, AS IS ALLOWED BY §35-4-4.5, UTAH CODE.

Section 35-4-4.5, Utah Code, and the Department's regulations promulgated thereunder set forth the circumstances under which calendar quarters prior to the normal base period may be used. Section 35-4-4.5, Utah Code reads:

Notwithstanding any requirements involving base periods or other such benefit compensational factors as provided under chapter 4, Title 35, a person who has had a continuous period of sickness or injury for which he was compensated under the workmen's compensation or the occupational disease laws of this state or under federal law shall, if he is otherwise eligible, thereafter be entitled to receive such unemployment compensation benefits as he would have been entitled to receive under the law and regulations based on his potential eligibility at the time of his last employment; provided, however, that his benefit rights shall not be preserved under this provision unless he files a claim for benefits with respect to a week not later than the fourth calendar week of his unemployment occurring after the end of



such continuous period of sickness or injury; and he files such claim with respect to a week within the 36-month period immediately following the commencement of such period of sickness or injury (emphasis added).

Pursuant to this statute, the Department has adopted regulations to determine eligibility for using wages from calendar quarters that began prior to the normal base period. There are four elements of eligibility, all of which must exist:

1. The claimant must have been off work due to a job related illness or injury,
2. The claimant must have been entitled to compensation for the illness or injury under a qualifying workmen's compensation or occupational disease program of the state of Utah or a Federal program,
3. The initial claim for benefits must have been filed within four calendar weeks of unemployment occurring after he was released:
  - (a) by his medical consultant to return to full-time work,
  - (b) following a continuous period of sickness or injury, and
4. The claim must have been filed within 36 months of the week the covered injury or illness occurred.

A 71-07-1:4.5 Department of Employment Security - - Rules and Regulations.

The claimant in this case meets all four criteria:

1. Claimant's psychotherapist testified that her illness was precipitated by, and related to her employment.

(R., p. 66-68).

2. Claimant received federal social security disability during her leave (R., p. 72-74). This satisfies the second requirement that she must have been entitled to compensation for the illness or injury under either a state workmen's compensation or occupational disease program or under a federal program.

It is this element that Respondent has found lacking. A reading of the Administrative Law Judge's opinion makes clear that he read the statute as requiring that a claimant must be entitled to compensation under state or federal workmen's compensation or occupational disease laws to satisfy element number two.

The statute's wording places the preposition "under" before the description of the state programs which qualify, and then also places it before the words "federal law." This makes it clear that when the claimant is entitled to compensation for the illness under those specific state programs or is entitled to compensation under federal law, the claimant has satisfied element number two. The federal compensation need not have been under a workmen's compensation program or occupational disease program.

The first requirement that the illness be job-related would ensure that only job-related social security compensation would bring the claimant within the

purview of this section. Had it been the legislature's intent to make the qualifying programs under this section federal or state workmen's compensation or occupational disease programs, then it would have put "state or federal" before "workmen's compensation." The wording it adopted however, with "under" before the state categories and then again before "federal law," leaving "federal law" unqualified, demonstrates that it did not intend to limit federal programs to workmen's compensation or occupational disease.

3. Claimant here made timely application for unemployment benefits to satisfy the third and fourth elements. (R., p. 102).

4. The Claim was filed within 36 months of the week the covered injury or illness occurred. The illness occurred on March 21, 1985 and claimant filed her claim in May, 1986.

Because the claimant meets all four criteria, her base period should have been frozen, thereby making her monetarily eligible.

II. THE EMPLOYER'S ELIMINATION OF CLAIMANT'S JOB  
MAKES HER ELIGIBLE FOR UNEMPLOYMENT  
COMPENSATION.

The record demonstrates that claimant was discharged upon her release to return to work after 14 months medical leave. At that time she was informed that

her job had been eliminated. (R., p. 80). Pursuant to Section 35-4-5, job elimination does not make her ineligible for unemployment compensation, and therefore she is entitled to benefits.

III. THE EMPLOYMENT SECURITY ACT IS TO BE  
CONSTRUED LIBERALLY IN FAVOR OF AFFORDING  
BENEFITS.

The Respondent has adopted a narrow, restrictive interpretation of this statute which is out of harmony with the intention of the Act and the law that the Act is to be liberally interpreted in favor of affording benefits. This has consistently been the law since the earliest interpretations of the Act. North Beck Mining Co. v. Industrial Commission., 58 U. 486, 200 P. 111 (1921); Salt Lake City v. Industrial Commission., 104 U. 436, 140 P.2d 644 (1943), ("This act [35-1-1, et seq.] must be liberally construed to effectuate its beneficent and humane objects.") Singer Sewing Machine Co. v. Industrial Commission, 104 U. 175, 134 P.2d 479 (1941); Neilsen v. Department of Employment Security, 692 P.2d 774 (Utah, 1984).

CONCLUSION

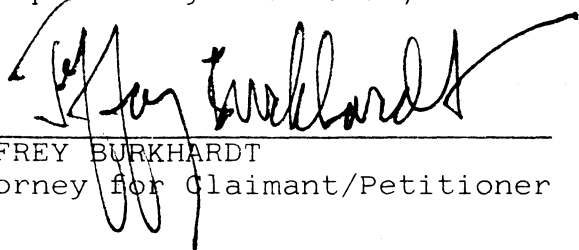
Section 35-4-4.5, Utah Code, is a safeguard passed

by the legislature to protect persons in petitioner's position. Petitioner, having been on medical leave for one year immediately prior to her discharge, would be ineligible for unemployment compensation upon her discharge due to failure to have sufficient earnings in the base period. Section 35-4-4.5 remedies that situation by reverting the base period to the time when petitioner was working. Petitioner should have the benefit of that statute because she received work-related social security during that time.

Because her job was eliminated, she is entitled to benefits. Respondent has denied benefits, employing a narrow interpretation of the statute that defies the law favoring liberal granting of benefits. Respondent's decision should be reversed and claimant awarded benefits.

DATED this 4th day of May, 1987.

Respectfully submitted,

  
\_\_\_\_\_  
JEFFREY BURKHARDT  
Attorney for Claimant/Petitioner

ADDENDUM

STATUTES

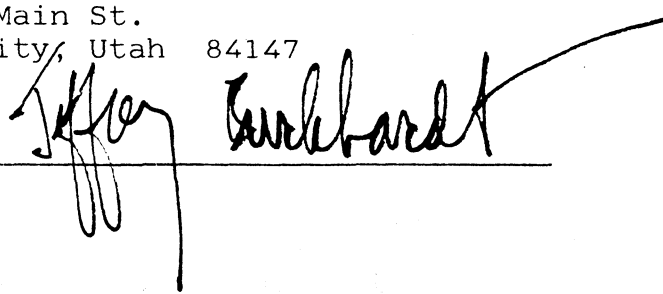
Notwithstanding any requirements involving base periods or other such benefit compensational factors as provided under chapter 4, Title 35, a person who has had a continuous period of sickness or injury for which he was compensated under the workmen's compensation or the occupational disease laws of this state or under federal law shall, if he is otherwise eligible, thereafter be entitled to receive such unemployment compensation benefits as he would have been entitled to receive under the law and regulations based on his potential eligibility at the time of his last employment; provided, however, that his benefit rights shall not be preserved under this provision unless he files a claim for benefits with respect to a week not later than the fourth calendar week of his unemployment occurring after the end of such continuous period of sickness or injury; and he files such claim with respect to a week within the 36-month period immediately following the commencement of such period of sickness or injury.

§35-4-4.5, Utah Code Anno. (1953) as amended.

CERTIFICATE OF MAILING

MAILED, postage prepaid, this 4<sup>th</sup> day of May, 87,  
four true and correct copies of the foregoing Appeal Brief  
of Claimant-Petitioner, to:

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