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Margaret S. Mineer v. Board of Review of Industrial Commission of Utah et al : Brief of Defendants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARGARET S. MINEER,

Plaintiff and Appellant,

vs.

Case No. 14696

BOARD OF REVIEW OF THE
INDUSTRIAL COMMISSION OF UTAH,

Defendant and Respondent.

ROBERT W. ROSKELLEY,

Plaintiff and Appellant,

vs.

Case No. 14728

DEPARTMENT OF EMPLOYMENT SECURITY,

Defendant and Respondent.

Brief of Defendants

STATEMENT OF NATURE OF CASE

This is a consolidated action involving two separate Plaintiffs and common questions of law before the Supreme Court of Utah pursuant to UCA 35-4-10(i), 1953, as amended, for the purpose of Judicial Review of and determination of the lawfulness of decisions of the Board of Review of the Industrial Commission of Utah, affirming the decisions of the Appeals Referees denying benefits to both Plaintiffs and assessing an overpayment against Plaintiffs on the grounds that each Plaintiff knowingly withheld material facts of his/her work and earnings to receive benefits to which he/she was not entitled. The questions are whether the findings of fact are supported by the evidence, construction of Section 35-4-5(e) of the Utah Employment Security Act, and whether said section as applied violates the due process and equal protection clauses of the Constitutions of Utah and the United States.

DISPOSITION BY BOARD OF REVIEW
THE INDUSTRIAL COMMISSION OF UTAH

Plaintiff Mineer was disqualified from receiving unemployment compensation benefits for 52 weeks and an overpayment assessed against Plaintiff in the amount of \$1,640.00 in a decision by a Hearing Representative of the Department of Employment Security dated February 19, 1976. The decision was affirmed by a Department Appeals Referee in a decision dated April 16, 1976, and the decision of the Appeals Referee was affirmed by the Board of Review in a decision dated June 30, 1976, in Case No. 76-A-800, 76-BR-85.

Plaintiff Roskelley was disqualified from receiving unemployment compensation benefits for 52 weeks and an overpayment assessed against said Plaintiff in the amount of \$74.00 in a decision by a Hearing Representative of the Department of Employment Security dated January 26, 1976, as amended February 9, 1976. The decision was affirmed by a Department Appeals Referee in a decision dated May 4, 1976, and the decision of the Appeals Referee was affirmed by the Board of Review in a decision dated July 28, 1976, in Case No. 76-A-1051, 76-BR-92.

RELIEF SOUGHT ON APPEAL

Defendants Department of Employment Security and Board of Review of the Industrial Commission of Utah seek affirmation of the decisions denying benefits to Plaintiffs and assessing overpayments on the grounds that the findings of fact in each case are supported by the evidence and are conclusive; that the findings of fact and decisions comply with Defendant's regulations; and that Section 35-4-5(e) of the Utah Employment Security Act as applied does not violate the due process and/or equal protection clauses of the Constitutions of Utah and the United States.

STATEMENT OF FACTS

(A) PLAINTIFF MINEER

Plaintiff Margaret S. Mineer initiated an interstate claim for unemployment benefits on September 5, 1974, in Pasco, Washington. Her claim was approved with an effective date of

weeks. Plaintiff subsequently filed a new claim for a new benefit year effective November 2, 1975. It was approved and her benefit on this claim was determined to be \$38.00 per week, not to exceed 14 weeks. (R0036)

On October 15, 1974, the Plaintiff filed an interstate claim for unemployment benefits for the calendar weeks ended October 5, 1974, and October 12, 1974, certifying thereon that she did not work and had no earnings and also that she was not in training or attending school during said weeks. (R0029)

Plaintiff in fact did work and had earnings during the week ending October 5, 1974, and knowingly failed to report said material facts regarding her work and earnings to obtain benefits to which she was not entitled. (R0019, R0020)

Pursuant to Section 35-4-5(e) of the Utah Employment Security Act, Plaintiff was disqualified from receiving unemployment benefits for the 52-week period commencing with the calendar week ended October 5, 1974, and an overpayment was assessed against her in the amount of \$1,640.00 for benefits paid to Plaintiff during the disqualification period. (R0010)

(B) PLAINTIFF ROSKELLEY

Plaintiff Robert W. Roskelley initiated a claim for unemployment benefits on January 5, 1975. His claim was approved and his benefit was determined to be \$93.00 per week, with an effective date of January 5, 1975. Plaintiff subsequently filed a new claim for a new benefit year effective January 4, 1976, with an established weekly benefit amount on this claim of \$66.00. (R0009)

On or about April 20, 1975, the said Plaintiff filed a weekly claim for benefits for the week ending April 19, 1975, certifying thereon that he worked no hours and had no earnings during said week. (R0030) Plaintiff in fact did work three days and had earnings of \$126.11 during said week in question and knowingly failed to report said material facts to obtain benefits to which he was not entitled. (R0012, R0029, R0032)

On or about the 27th day of April 1975, the Plaintiff filed a weekly claim for benefits for the week ending April 26, 1975, certifying thereon that he worked twenty-two hours for

ABC Construction and earned \$132.41 during said week ending April 26, 1975, and that he started work on April 22, 1975. (R0031) Plaintiff in fact started work for said employer on April 14, 1975, (R0013) and earned \$255.04 the week ending April 26, 1975. (R0032)

Pursuant to Section 35-4-5(e) of the Utah Employment Security Act, Plaintiff was disqualified from receiving unemployment benefits for the 52-week period commencing with the calendar week ending April 19, 1975, and an overpayment was assessed against him in the amount of \$1,674.00 for benefits paid to Plaintiff Roskelley during the disqualification period. (R0010)

ARGUMENT POINT I

DEFENDANTS' REGULATIONS ESTABLISH THE ELEMENTS TO SUSTAIN A DISQUALIFICATION FOR FRAUD AND THE STANDARD OF PROOF; THE FIVE ELEMENTS SET FORTH IN THE REGULATIONS ARE PRESENT IN EACH OF THESE CASES AND THE DISQUALIFICATION FOR FRAUD IN EACH WAS PROPERLY IMPOSED: THE FINDINGS OF THE REFEREE IN EACH CASE ARE IN COMPLIANCE WITH THE SAID REGULATIONS AND ARE VALID. THE ISSUE OF FAULT RAISED BY THE PLAINTIFFS IS NOT PERTINENT HERE, BUT IF IT DID APPLY THE REFEREE WOULD BE JUSTIFIED IN FINDING EACH PLAINTIFF TO BE AT FAULT.

The provision of the Utah Employment Security Act involved in this appeal is Section 35-4-5(e):

An individual shall be ineligible for benefits or for purposes of establishing a waiting period:

For the week with respect to which he had willfully made a false statement or representation or knowingly failed to report a material fact to obtain any benefit under the provisions of this Act, and for the 51-week period immediately following and until he has repaid to the fund all monies he received by reason of his fraud and which he received during such following 51-week disqualification period, provided that determinations under this subsection shall be made only upon a sworn written admission, or after due notice and recorded hearing; provided that when a claimant waives the recorded hearing a determination shall be made based upon all of the facts which the Commission, exercising due diligence, has been able to obtain; and provided further that such determination shall be appealable in the manner provided by this Act for appeals from other benefit determinations.

Defendant's regulations explaining and clarifying said section of the law are contained in the General Rules of Adjudication of the Utah Department of Employment Security issued in April 1976. The pertinent provisions thereof are:

Code 340.1 The meaning of the Act is clear as it pertains to the period of disqualification, any resulting overpayment, the necessity of a sworn admission or recorded hearing, appeals, etc. There are, however, essential elements that must be present before a disqualification can be imposed against any individual for fraud. It must be found to exist by clear, cogent, and convincing evidence; not presumed. If direct evidence is not present, circumstantial evidence, if clear and convincing, is sufficient for establishing a case of fraud.

In a case involving fraud or misrepresentation, the five following elements must be present:

1. A factual *representation*, statement, or *silence* when there is a duty to speak. Whether silence amounts to a willful misrepresentation is dependent upon the facts of the situation and the *intent* of the party who fails to speak.
2. *The materiality* of the statement, representation, or silence. It must be shown that the fund was prejudiced by the conduct and that it would have affected the individual's right to benefits. A moral wrong is not a violation of Section 35-4-5(e) unless it is material.
3. *The falsity* of the representation or statement.
4. *The speaker's knowledge* of its falsity or ignorance of its truth or knowledge of its importance.
5. *The speaker's intention* that his representation or silence was to be acted upon by the person to whom it was made or from whom it was withheld.

In summary, the individual who has either "willfully made a false statement or representation" or "knowingly failed to report" is disqualified if his act was with regard to a "material fact."

An overpayment resulting from a determination assessing a disqualification for fraud includes the total amount of benefits paid to the individual during the disqualification period. The overpayment does not include any benefits paid for a period after the 52-week disqualification period if such benefits were paid prior to discovery of the fraud.

After the 52-week disqualification period has expired, a claimant who is otherwise eligible for benefits may file for such benefits, but may not receive them until all monies he received by reason of his fraud during the disqualification period have been repaid, either by cash payment or offset by valid claims. This does not deter any collection actions by the Department.

(A) PLAINTIFF MINEER

Element number 1 requiring a factual representation or silence when there is a duty to speak is satisfied by the response of plaintiff Mineer to questions number 10 and 12 of the Continued Interstate Claim filled out by the said plaintiff in Pasco, Washington, (R0019, R0029) wherein she answered "no" to the question: "Did you work or earn wages at any time during the calendar week ending October 5, 1974?" In response to question 12-d, plaintiff answered "no" to the question: During the week ending October 5, 1974, "were you in training or attending school?"

Element 2 as regards materiality is certainly satisfied. The fund was prejudiced by reason of the incorrect statement of the plaintiff in that she was paid benefits which she would not have received if she had stated the matter truthfully and correctly.

Element 3 is satisfied in that there is no question that the statements or responses to question 10 and question 12 on the Continued Interstate Claim were false.

As regards Element number 4 relating to the speaker's knowledge as to the falsity of the representation or ignorance of its truth or knowledge of its importance, suffice it to say at this point that the finder of the facts was amply justified in finding that this element was present. The matter of the sufficiency of the evidence to sustain the finding by the referee and the Board of Review that this element was present will be examined in detail in Point II, *infra*.

As to Element number 5 respecting the speaker's intention that her representation or silence be acted upon by the defendant, an examination of the transcript and the record discloses that this element was also amply present justifying the Referee and Board of Review in finding it thus. This element also will be considered in greater detail as respects the sufficiency of the evidence to support such a finding under Point II, *infra*.

(B) PLAINTIFF ROSKELLEY

Element number 1 requiring a factual representation or silence when there is a duty to speak is satisfied by the response of Plaintiff Roskelley to questions number 2a, b, and c of the weekly claim form for the week ending April 19, 1975, filled out by said plaintiff (R0030)

said questions number 2a, b, and c of the weekly claim form for the week ended April 26, 1975, filled out by said plaintiff (R0031) he reported work for ABC Construction eight hours Tuesday, six hours Wednesday, and eight hours Friday, and earnings of \$132.41; and in response to question number 12 stated that he started work at ABC Inc. on April 22, 1975 (R0031).

Element 2 as regards materiality is certainly satisfied. The fund was prejudiced by reason of the incorrect statement of the plaintiff in that he was paid benefits which he would not have received if he had stated the matter truthfully and correctly.

Element 3 is satisfied in that there is no question that the statements or responses to questions number 2a, b, and c of said weekly claim forms for the week ending April 19, 1975, and the week ending April 26, 1975, and to question number 12 for the week ending April 26, 1975, were false. (R0012, R0013, R0032)

Regarding Elements number 4 and 5, as in the case of Plaintiff Mineer, ~~these matters as~~ to the knowledge of the falsity and intent that it be acted upon by the ~~defendant will be~~ examined in detail in Point II, *infra*. Both elements, as such examination ~~in Point II will~~ disclose, are amply present justifying the Referee and Board of Review in ~~finding it thus~~.

(C) REGARDING BOTH PLAINTIFFS

Plaintiffs refer to defendant's Regulation 340.2 which relates to Section 35-4-6(d) and 35-4-6(e) of the Utah Employment Security Act.

Section 35-4-6(d). Any person who, by reason of his fraud, has received any sum as benefits under this act to which he was not entitled shall be liable to repay such sum to the Commission for the fund. If any person, by reason of his own fault, has received any sum as benefits under this act to which under a redetermination or decision pursuant to this section, he has been found not entitled he shall be liable to repay such sum, and/or shall, in the discretion of the Commission, be liable to have such sum deducted from any future benefits payable to him. In any case in which under this subsection a claimant is liable to repay to the Commission any sum for the fund, such sum shall be collectable in the same manner as provided for contributions due under this act.

Section 35-4-6(e). If any person has received any sum as benefits under this act to which under a redetermination or decision he was not entitled, and it has been found that he was without fault in the matter, he is not liable to repay such sum but shall be liable to have such sum deducted from any future benefits payable to him with respect to the benefit year current at the time of such receipt.

Rules of Adjudication, Code 340.2 An examination of the above sections of the law reveals that overpayments are repayable in definitely specified ways depending on where the *fault* lies or depending on the existence of *fraud*. The latter, of course, must be first established as provided by Section 5(e) (See 340.1) and any resulting overpayment must be repaid to the fund. (See 340.1 concerning restitution of overpayments resulting from disqualifications under Section 5(e).) (emphasis added)

Rules of Adjudication, Code 340.1 After the 52-week disqualification period has expired, a claimant who is otherwise eligible for benefits may file for such benefits but may not receive them until all the monies he received by reason of his fraud during the disqualification period have been repaid, either by cash payment or offset by valid claims. This does not deter any collection actions by the Department.

It is not necessary to apply the second sentence of Section 6(d) because in this situation the first sentence of said section of the Act applies. Each plaintiff by reason of his/her *fraud* has received benefits under the Act to which he/she was not entitled and must repay such sum to the Commission. The Commission does not have discretion in either case where fraud was involved as it has in the case of a person who was not guilty of fraud but who received benefits by reason of his own *fault*. It is not necessary to go into the question of fault nor to consider the Department Regulations referred to by plaintiffs in their brief when dealing with ones such as the plaintiffs who have become liable to make restitution by reason of fraud under Section 5(e) of the Act.

Rules of Adjudication, Code 340.2 Fault cannot be assumed and the burden of proving that it exists falls to the Department. When a question of fault arises, it is usually a question of whether the person properly gave specific information having a bearing on his eligibility. In fairness to the individual, it must first be found that he had knowledge sufficient to make him think that the information might be important. He is then under obligation to make proper inquiry to determine definitely what is required. Inasmuch as each claimant is advised of his rights and responsibilities at the beginning of his claim series and since he certifies to eligibility requirements when continuing his claims, he should have sufficient knowledge to put him on notice that certain subjects might be important factors relative to a claim for benefits. The claimant is then under obligation to make proper inquiry and failure to do so constitutes fault. In summary, when a claimant has knowledge of the importance of certain information but makes his own determination that the information is not material or if he just simply ignores it, he does so at his own risk. He cannot be relieved of his obligation to speak and his failure to do so places the fault on him.

Although it is not necessary to consider the tests set forth in the regulations to determine fault, if such tests were to be applied the trier of the facts would be amply

Mineer did not receive a booklet advising her of her rights and responsibilities when she initiated her original claim. The important thing is that the Referee be convinced that in fact the plaintiff was aware of her rights and responsibilities and that plaintiff had sufficient knowledge to put her on notice that certain subjects might be important factors relative to a claim for benefits. In this regard the mere fact that in order to receive benefits a form had to be completed every two weeks and a response to questions relating to hours worked and wages earned of any kind during specific weeks enumerated would put anyone on notice that such information was important relative to a claim for benefits. The same is true with respect to the question regarding whether the claimant was in training or attending school during the particular weeks (R0029). The same is also true as regards the importance of reporting a paycheck when received if a claimant mistakenly did not report the same during the week when the hours were actually worked and the money was actually earned (R0020). Plaintiff Mineer in this instance cannot beg the question by saying that she did not receive a booklet at the outset when from all the circumstances it is very clear that she was on notice that the above-mentioned matters were important factors relative to her claim for benefits. She should have answered the questions correctly and made a proper and honest disclosure, or at least should have made inquiry. In accordance with the regulations her failure to make inquiry constituted fault.

With respect to Plaintiff Roskelley, it is admitted that he did receive an "Unemployment Insurance Handbook," advising him of his rights and responsibilities (R0012, R0014, R0015), and that he was aware of its contents and the necessity to complete the weekly claim forms correctly and in particular to report his earnings. "I knew I had to report the money because the handbook did say that." (R0015) In order to receive benefits each week the plaintiff was required to complete the weekly claim form and respond to the questions therein respecting days and hours worked and date of starting work at a new job. Just above plaintiff's signature each weekly claim card provides: "My statements are correct. I know the law provides penalties for false statements." It is clear that plaintiff was aware of the importance of said information. He ignored the question on his weekly claim

card regarding hours worked and total gross earnings for the week ending April 19, 1975

(R0030), and he incorrectly stated the date he started work for ABC Construction on the weekly claim card for the week ending April 26, 1975 (R0031). The Referee was justified in finding, in accordance with said regulation 340.2, supra, that Plaintiff Roskelley was at fault.

POINT II

THE FINDINGS OF THE REFEREE AND THE BOARD OF REVIEW THAT EACH OF THE PLAINTIFFS DID KNOWINGLY WITHHOLD THE MATERIAL FACTS OF HIS/HER WORK AND EARNINGS ARE SUPPORTED BY THE EVIDENCE AND ARE CONCLUSIVE.

It should be noted that one known false statement or known failure to report a material fact to obtain a benefit is sufficient to invoke this Section [5(e)] of the Act, (quoted in Point I, supra.) and that the 52-week disqualification then takes effect and weekly benefits thereafter received within the disqualification period although pursuant to submission of perfectly honest weekly claim forms are overpayments and must be repaid to the Department. *David A. Whitcome v. Department of Employment Security and Board of Review of the Industrial Commission of Utah*, Utah Supreme Court Case No. 14735, May 1977.

Section 35-4-10(i), Utah Code Annotated 1953, second paragraph, provides in part:

In any judicial proceeding under this section the findings of the commission and the board of review as to the facts if supported by evidence shall be conclusive and the jurisdiction of said court shall be confined to questions of law.

This Court has consistently from time to time ruled that where the findings of the Commission and the Board of Review are supported by evidence, they will not be disturbed. In this regard, the Court said in *Kennecott Copper Employees v. Department of Employment Security* (1962) 13 U. 2d 262, 373 P. 2d 987:

We are obliged to analyze this determination in accordance with the established Rules of Review: that the Evidence is to be looked at in the light most favorable to the findings: in so doing, if there is evidence of any substance whatever which can reasonably be regarded as supporting the determination made, it must be affirmed; and conversely, a reversal and the compelling of such an award could be justified only if there was no substantial evidence to sustain the determination, and there was proof of facts giving rise to the right of compensation so clear and persuasive that the Commission's refusal to accept it and make an award was clearly capricious, arbitrary, and unreasonable.

The findings of the Referee as affirmed by the Board of Review are amply supported by the evidence.

(A) PLAINTIFF MINEER

Plaintiff Mineer started work for Albertson's, Inc., in Richland, Washington, on October 3, 1974, (R0018, R0027, R0031) and worked for one full day and the next day for two or three hours. On October 15, 1974, the Plaintiff filled out, signed, and submitted a bi-weekly Continued Interstate Claim to the Employment Security Department in Pasco, Washington. A copy of this form is Exhibit 1 attached to the transcript (R0029). The Plaintiff admits that she filled out said claim and signed the same (R0019). Said claim specifically required information regarding work and earnings during the week ending October 5, 1974. Plaintiff failed to report the above work and earnings at Albertson's, Inc.

Q This claim doesn't show any work or earnings reported. Question No. 10 asks for you to report work and earnings. Will you read Question No. 10 aloud for me please.

A During the week claimed in No. 7 and No. 8 above, did you work or earn wages of any kind? If yes, furnish the information below for each day you worked or earned wages. Show wages before deductions.

Q That has been checked no. Did you check that no.

A Yes. (R0019)

In response to the referee's inquiry as to why the Plaintiff had failed to report the \$26.28 which she earned at Albertson's, she responded that she wasn't sure that she would be paid and "was more or less being trained." (R0019)

Q Why did you fail to report the \$26.28 you earned from Albertsons during the week of October 5th.

A As I stated before, I didn't think I was going to get paid because when I went in for the job the man said if I worked out I could get it and I had never worked in a meat market like that before so I was more or less being trained.

Q You weren't sure whether you would be paid or not?

A No.

Q Question No. 12 states that during the week or weeks claimed in No. 7 and 8 above, were you and it's got multiple choices here that you answer — it states under Item D — in training or attending school, and that's been checked no. You told me here that you were in training and I'm wondering why you didn't check that yes.

A Well, at the time — I don't really know it's been so long ago but probably because there's such a span of time I probably completely forgot about it.

The Plaintiff's answers quoted above to the Referee's questions are contradictory and vague. First the Plaintiff said she didn't think she was going to be paid because she was more or less being trained. In this day and age one would be hard put to find a training program where the employee is not being paid while he is being trained. Be that as it may, if Plaintiff did genuinely and sincerely feel that she was in a training program, she can't explain why then she failed to indicate in response to question 12-d that she was engaged in a training program at Albertson's. Her answer, "Well, at the time — I don't really know how long ago but probably because there's such a span of time I probably completely forgot about it," is such that the Referee was completely justified in not giving credence to the explanation of her failure to report that she was in training.

Two to four weeks later the plaintiff was in fact paid by Albertson's, Inc., for her work on October 3 and 4, 1974 (R0019). Certainly at this point Plaintiff was aware that she was working for wages at Albertson's on the two days in question. However, when she later bi-weekly interstate claim which covered the week that she actually received the payment from Albertson's, she failed to report said work and earnings.

Q Were you still filing for benefits when Albertsons did pay you?

A Yes.

Q Why didn't you report the information at that time.

A I really didn't know I had to.

Q Didn't you know you had to report all work and earnings while filing for benefits?

A No. \$26.00 I didn't.

Q Question No. 10 that you read a moment ago states during the weeks claimed in No. 7 and No. 8 above did you work or earn wages of any kind? That requires a yes or no answer and you indicated no on that claim.

A I didn't know I was being paid.

Q Then on the week you did get paid you would have had earnings and still apparently you indicated no. I don't see any claims in the record that were filed for the next 3-4 weeks on which you recorded any work or earnings.

A No, it wasn't. (R0020)

A further point which goes to the credibility of the Plaintiff was the fact that she misrepresented employers contacted when filling out Item #15 on said Continued Interstate Claim (R0030). In listing employers, etc., she had contacted regarding work she did not list Albertson's as having been contacted, when she did make contact and had actually worked there during the week in question.

The Plaintiff does not dispute that she did work at Albertson's and earned \$26.28 during the week ending October 5, 1974, nor does she dispute that she failed to report the same.

(B) PLAINTIFF ROSKELLEY

On April 20, 1975, Plaintiff Roskelley signed and filed a weekly claim card for Defendant for the week ending April 19, 1975, (R0012, R0030) whereon he indicated that he had not worked any hours and had no earnings. Plaintiff admits that he did not work said week for ABC Inc. and earned \$126.11 (\$132.41) (R0031)

Q I have here a report of earnings from Associated Brigham Contractors. It has a date of 25 November 1975 and it shows that during the period April 13, to April 19, 1975, you worked for them and earned \$126.11. Do you know if that information is correct or not?

A When's this?

Q The period April 13 to April 19, 1975.

A Yes. (R0012)

On the weekly claim card for the week ending April 26, 1975, which Plaintiff Roskelley filled out on April 27, 1975, he reported a false back to work date of April 22, 1975. Plaintiff actually started work at ABC Inc. on April 14, 1975. (R0013, R0029, R0030) Plaintiff's purpose was to be consistent with a false representation on his claim card for the week ending April 19, 1975, that he worked no hours and had no earnings, then the misrepresentation of the date of starting work on April 22, 1975, follows. If he was genuinely mistaken as regards reporting the hours worked and the earnings on the card for the week when he actually received his pay, he would have reported the correct date he returned to work and not been concerned with the need to cover up to avoid discovery of his

Plaintiff's explanation that he did not know how to fill out his weekly claim card for the week ending April 19, 1975, is not believable. (R0013, R0014) All he had to do was answer the questions on the card, i.e.,

2. If you worked during the week shown above, complete
a, b, c, d

- a - name and address of employer _____
- b - Total hours worked each day (box labeled for each day of the week with space to fill in the hours worked on the particular day)
- c - Total gross earnings (before deductions) whether paid or not were: _____
- d - Check reason for separation from above employment:
☐ reduction of force, ☐ other (explain on reverse)

Plaintiff testified that he received the Unemployment Insurance Handbook and had read (R0012, R0015) Any question that Plaintiff might have had after reading the plain instructions above for completing Item 2 of the weekly claim card would have been answered by the handbook. Quoting from the decision of the Appeals Referee:

The "Unemployment Insurance Handbook" which the claimant received clearly states that all work and earnings should be reported for the week in which the services were performed although the claimant may not yet have been paid. In addition there is an example showing how the claim should be completed. . . . (R0010)

Plaintiff Roskelley worked during the week ending April 26, 1975, and earned \$255.04. (R0032) Having worked that week Plaintiff cannot claim that it makes no difference as just simply being reported in the wrong week because it resulted in Plaintiff receiving undeserved benefits. He did not attempt to pay them back until the Defendant contacted the Plaintiff as part of its investigation of the matter. (R0025)

In light of the testimony, exhibits and other evidence in the record above cited, the Referee and Board of Review were justifiably convinced that the Plaintiff Mineer when filing said Interstate Claims and the Plaintiff Roskelley when filing said weekly claims, knowingly withheld the material facts of his/her said work and earnings to obtain benefits to which he/she was not entitled. The evidence in support of the decisions as reviewed here-

in was clear, cogent and convincing, and thus satisfied and exceeded the standard of proof

required by the regulations of Defendant (General Rules of Adjudication, Code 340.1) The decisions of the Referee and the Board of Review being supported by the evidence are therefore conclusive. (UCA 35-4-10(i))

POINT III

SECTION 35-4-5(e), UTAH CODE ANNOTATED 1953, AS AMENDED, IS CLEAR AND UNAMBIGUOUS AND REQUIRES THAT AN INDIVIDUAL SHALL BE INELIGIBLE FOR BENEFITS OR FOR ESTABLISHING A WAITING WEEK FOR THE WEEK WITH RESPECT TO WHICH HE DID THE ACTS OR OMISSIONS SPECIFIED IN THE LAW AND FOR THE 51-WEEK PERIOD IMMEDIATELY FOLLOWING. IT CANNOT BE CONSTRUED TO IMPOSE THE DISQUALIFICATION PERIOD PROSPECTIVELY.

Section 35-4-5 of the Utah Employment Security Act sets forth various criteria for determining that an individual shall be ineligible for unemployment insurance benefits. Some of the factors which cause ineligibility for varying periods of time are as follows:

- a. Voluntarily leaving work without good cause — 2 to 6 weeks ineligibility starting with the week he voluntarily left work without good cause.
- b. Being discharged for misconduct — 2 to 10 weeks ineligibility, starting with the week discharged.
- c. Failure without good cause to apply for or accept available suitable work — 2 to 6 weeks ineligibility, starting with the week of such failure.
- d. Unemployment due to stoppage of work because of strike — starting with the first week a specified individual is unemployed due to a strike and continuing each week during said strike.
- e. Willfully making a false statement or representation or knowingly failing to report a material fact to obtain a benefit under the act — 52 weeks ineligibility starting with the week of the false representation or failure to report a material fact.
- f. Receiving or seeking benefits from some other state — starting the first week and continuing during each week that he receives or is seeking unemployment insurance benefits in another jurisdiction.

g. Registered at and attending school — starting the first week and continuing during each week that he is registered at and attending school.

h. Receiving or entitled to receive wages in lieu of notice, accrued vacation, etc. — starting the first week and continuing during each week that he receives, or is entitled to receive, said wages in lieu of notice, accrued vacation, etc.

Individuals employed by institutions of higher education during summer vacation and vacation between terms — starting the first week and continuing during each week of said vacations.

Each of the above mentioned criteria specifies that the ineligibility shall start the week that the particular condition or circumstance is extant and not the week that the commission shall discover the same.

It is true that the 52-week disqualification period of Section 5(e) is a long and harsh disqualification. However, there are other disqualifications mentioned above which could be more severe. The disqualification under "g" for being registered at and attending school would continue for several years. Item "d", unemployment due to stoppage of work because of strike, could continue for an indefinite period of time. It is true that of all of the circumstances mentioned above which could cause a disqualification, the one which is most likely to result in an overpayment is the 5(e) fraud provision which is involved in this appeal. Under item "c," failure to apply for or accept available suitable work, frequently benefits will be paid before the failure is discovered and an overpayment will have accrued. Under the other disqualifications there will not usually be an overpayment involved unless the claimant has misrepresented or failed to disclose, in other words, unless there is a Section 5(e) fraud involved. For example, under item "g," registered at and attending school, a claimant on his original claim for unemployment benefits might misrepresent that he was not registered at and attending school when he actually was attending school. In such case he would receive unemployment benefits in the usual course until it was discovered that he was not eligible because of school attendance. The benefits he received during the disqualification period would constitute an overpayment and Section 5(e) would apply as

well as 5(g)—5(e) because he knowingly failed to report the material fact of his school attendance to obtain benefits.

With respect to those disqualifications mentioned above which set a specific number of weeks of disqualification, the disqualification for fraud, 5(e), is by far the longest, i.e., 52 weeks. It is understandable that the Legislature was reasonably and justifiably most concerned with fraud as compared with the other reasons justifying disqualification. Thus in order to discourage the obtaining of benefits through "fraud" as it is defined in the Act, the Legislature set up the 52-week disqualification, starting with the week with respect to which the fraud was committed.

Section 5(e) of the Act is not ambiguous and is clear as to when the disqualification period shall start. No doubt there are those who do not agree with the way the law is written and think that some other way would be better. Until the Legislature changes the law and the courts declare it to be unconstitutional or otherwise invalid, we have no choice but to accept what the Legislature has done.

If the law were to provide as Plaintiffs propose to change it the same sort of injustice could occur. Under the hypothetical scheme Plaintiffs propose if A has a job during the disqualification period invoked as of the date that the fraud is discovered, he loses no benefits. If B *does not have* a job during a similar disqualification period, he loses the benefits which he would have been entitled to except for the discovery of his fraud. Thus B would have suffered no actual loss of benefits because he had a job, whereas A would have felt the sting of the disqualification and been deprived of benefits because he *did not have* a job during the disqualification period as proposed by Plaintiffs.

Under the plan which Plaintiffs propose as well as under the law as it presently stands, the individual who has a job during the disqualification period will not feel the sting of the disqualification, whereas under both the person who is out of work during the disqualification period will feel the sting of the disqualification. Under the law as it stands the individual must repay to the Department the benefits mistakenly paid to him when he was not eligible. Under the plan of Plaintiffs the disqualified individual normally would not

have to repay benefits because the Department would declare him ineligible and he would

not receive benefits. The net effect is the same in both cases. Under the law as it is the ineligible claimant receives benefits prior to discovery of the fraud which he must repay; while under Plaintiffs' plan he would receive no benefits. In both cases he comes out with zero.

Plaintiffs refer to the case of *State of Utah v. One Porsche*, 526 P 2d 917 (1974) in their brief regarding penalty, forfeiture, and excessiveness of the penalty. It would seem that the majority (3 to 2) held in *One Porsche* that the purpose of the criminal statute involved in that case was to deter the transportation of a controlled substance for distribution and not personal possession and consumption. Reference is made in the decision to absurd results that could apply from enforcement of the literal wording of the statute respecting possession. The results the majority of the court felt were not in line with the intent of the Legislature. The dissent seemed satisfied from the record that Defendant was engaged in transporting a controlled substance for distribution while the majority felt that the possession was for personal use.

Although the Court mentions the point of harshness of the penalty as applied to simple possession of marijuana and the idea that forfeitures are frowned upon in law, it would appear that the decision was really based upon the fact that the statute was aimed at transportation for purpose of distribution and not possession, and the Court would not enforce the rigorous forfeiture provision in a case not within the intent and purpose of the Legislature, i.e., possession for personal consumption.

The Section 5(e) disqualification which is before the court is not a *penalty* in the sense that Plaintiffs are assessed with a charge for wrongdoing such as a fine. By committing the "fraud" as defined in the Act, the Plaintiffs became ineligible for benefits for a 52-week period of time. The money which he/she received while ineligible each held as a trustee. It did not belong to them. Each has a duty to return it to the rightful owner, i.e., the Unemployment Compensation Fund.

The Section 5(e) disqualification is also not a *forfeiture* in the sense of a divestiture of property without compensation. (36 Am. Jur. 2d, Forfeiture and Penalties, Section 1.) The money received by Plaintiffs during the disqualification period did not belong to him/her.

In the *One Porsche* case, supra, the defendant owned the car originally and the proceeding was to transfer title to the sovereign. Here, the proceeding in question is a matter of recovering back from the Plaintiffs money which belongs to the Fund which Plaintiffs hold as trustees for the benefit of the Fund.

The purpose of the Employment Security Act is to assist those unemployed persons who are entitled to cash benefits, and the purpose of Section 5(e) of the Act is to discourage fraud and to encourage honesty and complete and full disclosure on the part of all claimants for benefits under the Act. The Legislature has deemed it proper in order to achieve its said purpose of honesty and full disclosure, to require a rigorous deprivation of benefits in the nature of a penalty against a person for fraud as it is defined in the Act. Certainly to avoid the sort of fraudulent conduct which the trier of the facts has found to have been committed by the Plaintiffs in this case was directly within this purpose of the Legislature.

The Utah Supreme Court has already considered the severity of such deprivation of benefits in the case of *Decker v. Industrial Commission, Department of Employment Security*, 533 P. 2d 898 (1975) and found that "under the statute it does not appear that the fact finder or this court has the discretion to reduce or to forgive any part of the penalty." The ruling in *Decker*, supra, would seem to be controlling in this instance.

POINT IV

SECTION 35-4-5(e), UTAH CODE ANNOTATED, 1953, AS AMENDED, DOES NOT VIOLATE THE DUE PROCESS CLAUSES OF THE CONSTITUTIONS OF UTAH AND THE UNITED STATES.

Plaintiffs state on page 19 of their brief that it is a requirement of Defendants that the funds received by Plaintiffs during their 52-week disqualification period must be repaid before either will again be eligible for unemployment compensation. This is not correct. The requirements of Defendants in this regard are set forth in Defendant's General Rules of Adjudication, Code 340.1, quoted supra under Point I.

After the 52-week disqualification period has expired, a claimant who is otherwise eligible for benefits may file for such benefits, but may not receive them until all the monies he received by reason of his fraud during the disqualification period have been repaid, either by cash payment or offset by valid claims.

This does not deter any collection action by the Department.

After the 52-week disqualification period has expired the Plaintiffs can again file for benefits. He/she must meet all of the other eligibility requirements of the law. If he/she does, he/she will be entitled to Unemployment Compensation Benefits but would not actually receive them because they would be set off against the amount of the overpayment owed by Plaintiffs to the Fund. When the full amount owed has been offset, Plaintiffs would then be entitled to receive the weekly cash benefits so long as he/she is still eligible.

Section 5(e) and Section 6(d) of the Utah Employment Security Act clearly do not operate arbitrarily or capriciously or unreasonably. It would seem to be quite normal and reasonable to offset the amount due from a claimant on an overpayment before paying a claimant benefits in a new benefit year.

U.C.A. 35-4-22(d) (1) "Benefit year" means the 52 consecutive week period beginning with the first week with respect to which an individual files for benefits and is found to have an insured status.

Also said sections do have a very real and substantial relation to the object of the act to provide benefits to those entitled to them and to discourage fraud and to encourage honesty and full disclosure on the part of claimants for benefits.

POINT V

SECTION 35-4-5(e) AS APPLIED BY DEFENDANTS DOES NOT DENY PLAINTIFFS EQUAL PROTECTION OF THE LAW UNDER THE CONSTITUTIONS OF UTAH AND THE UNITED STATES.

There is nothing in the constitution which guarantees unemployment compensation to any person. *Turner v. Department of Employment Security*, 531 P. 2d 870 (1975).

The Utah Supreme Court in *Townsend v. Board of Review of the Industrial Commission*, 493 P. 2d 614 (1972) considered the Utah Employment Security Act in connection with equal protection of the law guaranteed by the constitution of Utah and the United States. The Court quoted from *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) in enunciating the rule:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical

nicety or because in practice it results in some inequality." (Citation) "The problem of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific," (Citation) "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (Citation)

* * * * *

. . . But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. (Citation) It is enough that the State's action be rationally based and free from invidious discrimination

It is hard to think of a more reasonable or logical classification than the one in this case. Those who have received benefits to which they were not entitled must repay them. Those who have not received benefits that they were not entitled to have nothing to repay. The classification which Plaintiffs complain of is really the basic classification of the Employment Security Law. Those who are not employed and otherwise eligible receive money each week from an agency of the Government. Those individuals who are employed and working receive no such weekly payment. If employed people received the same payment each week from the agency as those who are unemployed, then the classification which the Plaintiffs complain of would no longer exist.

CONCLUSION

The findings of fact and decisions of the Appeals Referee as affirmed by the Board of Review in respect to both Plaintiffs are in compliance with Defendant's regulations relating to fraud and standard of proof. The evidence in support of the decisions in both cases substantially exceeds the test of *Kennecott Copper Employees v. Department of Employment Security*, supra page 10, that "if there is evidence of any substance whatever which can reasonably be regarded as supporting the determination made, it must be affirmed."

U.C.A. 35-4-5(e) 1953, as amended, is clear and unambiguous and cannot be construed to impose the disqualification period prospectively after the date of the discovery of the fraud as Plaintiffs propose. Said Section 5(e) as applied does not violate Due Process or

Equal Protection. After the 52-week disqualification period has expired, if Plaintiffs are otherwise eligible, each may qualify for benefits. They would be applied on the overpayment owed by each Plaintiff to the Department. Such procedure of applying accruing benefits on the overpayment rather than paying directly to Plaintiffs is quite normal and not at all arbitrary or capricious. The classification complained of by Plaintiffs is "rationally based and free from invidious discrimination." *Dandridge v. Williams*, supra page 20. The decision of the Referee and the Board of Review in this case should, therefore, be affirmed.

Respectfully submitted,

ATTORNEYS FOR DEFENDANTS

ROBERT B. HANSEN,
Attorney General

FLOYD G. ASTIN
WINSTON M. FAUX
Special Assistants
Attorney General

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