

1987

Kelly K. Wynn v. Board of Review of the Industrial Commission of Utah, Department of Employment Security : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

KELLY K. WYNN,	:	
	:	
Plaintiff,	:	Case No: 87-0498-CA
	:	
vs.	:	Priority No: 6
	:	
BOARD OF REVIEW OF THE	:	
INDUSTRIAL COMMISSION OF	:	
UTAH, DEPARTMENT OF	:	
EMPLOYMENT SECURITY,	:	
	:	
Defendants.	:	

BRIEF OF PLAINTIFF
KELLY K. WYNN

A writ of review from a decision
of the Board of Review of the
Industrial Commission of Utah.

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TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF ISSUES PRESENTED ON APPEAL	1
II. REGULATION REQUIRING INTERPRETATION	1
III. STATUTE REQUIRING INTERPRETATION	5
IV. JURISDICTION OF THE COURT OF APPEALS	5
V. STATEMENT OF THE CASE	6
VI. STATEMENT OF FACTS	6
VII. SUMMARY OF ARGUMENT	9
VIII. ARGUMENT	9
POINT I	
THE COMMISSION ACTED ARBITRARILY IN DENYING CLAIMANT'S REQUEST FOR A WAIVER OF THE OVERPAYMENT	9
POINT II	
THE COMMISSION ACTED ARBITRARILY IN FAILING TO DETERMINE WHETHER THERE WAS GOOD CAUSE FOR THE DELAY IN APPEALING THE DENIAL	11
IX. CONCLUSION	14

TABLE OF AUTHORITIES

TABLE OF CASES CITED

	<u>Page</u>
<u>Thiessens v. Department of Employment Security,</u> 663 P.2d 72, 73 (Utah 1983)	12

STATUTES AND RULES CITED

20 C.F.R. §617.55	1
Utah Code Ann. §35-4-6(c) (Rep.Vol. 4B Supp. 1987)	5

IN THE UTAH COURT OF APPEALS

KELLY K. WYNN,	:	
	:	
Plaintiff,	:	
	:	Case No: 870498-CA
vs.	:	
	:	
BOARD OF REVIEW OF THE	:	
INDUSTRIAL COMMISSION	:	
OF UTAH,	:	
	:	
Defendant.	:	

STATEMENT OF ISSUES
PRESENTED ON APPEAL

1. Is there sufficient evidence in the record in support of the Commission's finding that the claimant was not entitled to a waiver of an overpayment of TRA benefits?

2. Did the Commission properly determine whether or not there was good cause for the claimant's untimely filing of an appeal from the denial of his waiver?

REGULATION REQUIRING
INTERPRETATION

20 C.F.R. §617.55 Overpayments; penalties for fraud.

(a) Determination and repayment. (1) If a state agency or a court of competent jurisdiction determines that any individual has received any payment under the Act and this Part 617 to which the individual was not

entitled, including a payment referred to in paragraph (b) or paragraph (c) of this section, such individual shall be liable to repay such amount to the State agency, and the State agency shall recover any such overpayment in accordance with the provisions of this Part 617; except that the State agency may waive the recovery of any such overpayment if the State agency determines, in accordance with the guidelines prescribed in paragraph (a)(2) of this section, that:

(i) The payment was made without fault on the part of such individual, and

(ii) Requiring such repayment would be contrary to equity and good conscience.

(2)(i) (A) In determining whether fault exists for purposes of paragraph (a)(1)(i) of this section, the following factors shall be considered:

(1) Whether a material statement or representation was made by the individual in connection with the application for TAA that resulted in the overpayment, and whether the individual knew or should have known that the statement or representation was inaccurate.

(2) Whether the individual failed or caused another to fail to disclose a material fact, in connection with an application for TAA that resulted in the overpayment, and whether the individual knew or should have known that the fact was material.

(3) Whether the individual knew or could have been expected to know, that the individual was not entitled to the TAA payment.

(4) Whether, for any other reason, the overpayment resulted directly or

indirectly, and partially or totally, from any act or omission of the individual or of which the individual had knowledge and which was erroneous or inaccurate or otherwise wrong.

(5) Whether there has been a determination of fraud under paragraph (b) of this section or section 243 of the Act.

(B) An affirmative finding on any one of the factors in paragraphs (a)(2)(i)(A)(1)-(5) of this section precludes waiver of overpayment recovery.

(ii) (A) In determining whether equity and good conscience exists for purposes of paragraph (a)(1)(ii) of this section, the following factors shall be considered:

(1) Whether the overpayment was the result of a decision on appeal, whether the State agency had given notice to the individual that the case has been appealed and that the individual may be required to repay the overpayment in the event of a reversal on appeal, and whether recovery of the overpayment will not cause extraordinary and lasting financial hardship to the individual.

(2) Whether recovery of the overpayment will not cause extraordinary financial hardship to the individual, and there has been no affirmative finding under paragraph (a)(2)(ii)(A) of this section with respect to such individual and such overpayment.

(B) An affirmative finding on either of the foregoing factors in paragraphs (a)(2)(ii)(A)(1)-(2) of this section precludes waiver of overpayment recovery.

(C) (1) For the purpose of this paragraph (a)(2)(ii), an extraordinary financial hardship shall exist if recovery of the overpayment would result directly in the individual's loss or inability

to obtain minimal necessities of food, medicine, and shelter for a substantial period of time; and an extraordinary and lasting financial hardship shall be extraordinary as described above and may be expected to endure for the foreseeable future.

(2) In applying this test in the case of attempted recovery by repayment, a substantial period of time shall be 30 days, and the foreseeable future shall be at least three months. In applying this test in the case of proposed recoupment from other benefits, a substantial period of time and the foreseeable future shall be the longest potential period of benefit entitlement as seen at the time of the request for a waiver determination. In making these determinations, the State agency shall take into account all potential income of the individual and the individual's family and all cash resources available or potentially available to the individual and the individual's family in the time period being considered.

(3) Determinations granting or denying waivers of overpayment shall be made only on request for a waiver determination. Such request shall be made on a form which shall be furnished to the individual by the State agency. Notices of determination of overpayments shall include an accurate description of the waiver provisions of paragraph (a) of this section, if the State agency has elected to allow waivers of TAA overpayments.

(4) (i) Unless an overpayment is otherwise recovered, or is waived under paragraph (a) of this section, the State agency shall recover the overpayment by deductions from any sums payable to such individual under:

(A) The Act and this Part 617;

(B) Any Federal unemployment compensation law administered by the State agency; or

(C) Any other Federal law administered by the State agency which provides for the payment of unemployment assistance or an allowance with respect to unemployment.

(ii) In addition, a State agency may recover the overpayment from unemployment insurance payable to such individual under the State law.

(iii) No single deduction under this paragraph (a)(4) shall exceed 50 percent of the amount otherwise payable to the individual, and when a deduction is made it shall be 50 percent of the amount actually payable.

STATUTE REQUIRING
INTERPRETATION

Utah Code Ann. §35-4-6(c), Replacement Vol. 4B (1987 Pocket Supplement).

(c) The claimant or any other party entitled to notice of a determination as herein provided may file an appeal from such determination with an appeal referee within ten days after the date of mailing of the notice to his last known address or, if such notice is not mailed, within ten days after the date of delivery of such notice.

JURISDICTION OF THE
COURT OF APPEALS

This is an action to review a decision of the Board of Review of the Industrial Commission over which the Court of Appeals has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(a) (Replacement Vol. 9, 1987).

STATEMENT OF THE CASE

This is an action for review of a decision of the Board of Review of the Industrial Commission denying the plaintiff's request for a waiver of an obligation to repay Trade Readjustment Act benefits overpaid to him by mistake and without fault on his part. The claimant applied for a waiver from the obligation to repay benefits. The waiver was denied. The claimant's appeal from the denial of the waiver was filed late. A hearing was held before an Administrative Law Judge who found that because the appeal was untimely, a determination of the Department of Employment Security that he did not qualify for a waiver would be affirmed. The claimant was not represented by counsel at the hearing. The Board of Review adopted the findings and conclusions of the Administrative Law Judge noting, however, that " . . . it has serious concern as respects the Department of Labor's handling of the whole TRA situation as it affects the claimant in this case and others similarly situated". (R.26)

STATEMENT OF FACTS

The claimant applied for unemployment insurance benefits against the State of Utah and was determined to be eligible as of July 8, 1984. With the exhaustion of his regular entitlement, he was eligible for extended benefits under the Federal Trade Adjustment Act. These benefits were to be paid at the rate of \$166.00 per week (R.22). After an intervening period when he received no benefits, the claimant qualified for an additional period of TRA benefits which began on July 28, 1985 and continued until May 31, 1986. On July 31, 1986 the claimant was notified that

benefits he received from January 26, 1986 until May 31, 1986 in the amount of \$2,976.00 were paid to him by mistake and that he was not entitled to them (R.22). Apparently, representatives of the Department had misunderstood a federal requirement that TRA benefits be paid in twenty-six consecutive weeks without a break. Many former employees of Kennecott Copper Co., like the claimant, were paid TRA benefits for non-consecutive weeks, and notices of overpayment were eventually given to a number of persons like the claimant (R.16-17).

The notice claimant received on July 31, 1986 informed him that the Department would take no action at that time to collect the overpayment, and that if action were to be taken at a future time, he would be notified (R.4). Shortly after the claimant received this notice, he spoke with a representative of the Department who informed him to disregard the notice of the overpayment, and that no action would be taken (R.13). At the hearing in this matter, a representative of the Department confirmed that many persons received overpayments at the same time as the claimant, and that they were all told "not to worry about it" and that no action to collect the overpayment would be taken (R.17). As a result, claimant did not appeal from the notice of the overpayment itself. The Commission correctly determined that there was good cause for not appealing at that time (R.23).

Nine months later, the claimant was mailed a form which allowed him to request a waiver of the overpayment (R.5). Claimant completed the form and returned it. A copy of this form is included here as Appendix A. The form requested the following

information which was supplied by the claimant:

I submit the following information on my income and expenses:

<u>Current Gross Monthly Income</u>	<u>Mine</u>	<u>Other Family Members</u>
Unemployment Benefits	-0-	-0-
Wages, Salary, Tips, etc.	1,409.60	-0-
Other Income (pension, welfare, investments, social security, etc.)	-0-	-0-
TOTALS: \$1,409.60		-0-
Savings or Other Cash Reserves		
TOTALS:	-0-	-0-

. . . . .

Current Household Monthly Expenses

Housing (rent or mortgage)	\$525
Utilities (gas, electric, water, etc.)	\$150
Food	\$250
Medical and Dental Costs	<u>\$ 30</u>
TOTAL:	\$955

(R.05)

On June 2, 1987, the claimant received notice that his request for a waiver was denied, since the financial information included on the form demonstrated that it would not cause him extraordinary financial hardship to repay the overpaid funds. He was informed of his right to appeal within 10 days. After

ten days had passed, he was sent a notice of the amount due (R.14).

The claimant's notice of appeal was then filed July 9, 1987 (R.7-8) and included his explanation that there had been a delay in his receipt of the notice of denial of waiver. Claimant explained at the hearing that his mother had brought in a notice of his appeal which apparently had been lost, and that she was in the building and available as a witness to testify (R.14). However, the Administrative Law Judge concluded the hearing without giving the claimant an opportunity to call her. No finding was made by the Commission as to whether or not there was good cause for the delay in filing the appeal.

SUMMARY OF ARGUMENT

1. The only basis for the Commission's denial of a waiver of the overpayment was information provided by the claimant on a form which did not elicit the information needed to make the determination. It was inherently unfair to rely solely on that form in making the decision.

2. The Commission did not properly consider whether there was good cause for the untimely appeal from the denial of the waiver, and it appears from the record that there was good cause.

ARGUMENT

POINT I

THE COMMISSION ACTED
ARBITRARILY IN DENYING
CLAIMANT'S REQUEST FOR A
WAIVER OF THE OVERPAYMENT.

The benefits in issue in this matter were federal Trade Adjustment Act payments intended to allow an extension of unemployment compensation during a period when an unemployed worker was being retrained. They were administered by the Utah Department of Employment Security pursuant to an agreement with the Department of Labor under regulations promulgated by the Department of Labor, at 20 CFR Part 617. By those regulations, the Department of Employment Security was vested with the authority to grant or deny applications for TRA benefits, and to apply the regulations of the Department of Labor in making their determinations.

Section 617.55 of the applicable regulations governs the rights of claimants who have received an overpayment through no fault of their own. They provide that in such situations the overpayment will not be recovered from the claimant if "requiring such repayment would be contrary to equity and good conscience", 20 CFR 635.17(a). The regulation goes on to provide that in making that determination, the state agency should decide whether or not a recovery of the overpayment would cause "extraordinary financial hardship" to the individual, 20 CFR 635.17(a)(2). An "extraordinary financial hardship" was defined to exist "if recovery of the overpayment would result directly in the individual's loss or inability to obtain minimal necessities of food, medicine and shelter for a substantial period of time." A substantial period of time is deemed to be thirty days, 20 CFR 617.55(a)(ii)(C)(1) and (2).

It is obvious that the single form which is the basis of the Commission's denial of the waiver (Appendix A) does not provide the information needed for making such a determination. The form requires a claimant to identify his gross earnings, with no deductions for taxes or withholding of any kind. It then asks for his expenses in only four categories: housing, utilities, food, and medical costs. No opportunity is given to inform the Department of a claimant's actual net monthly earnings. No opportunity is given to deduct from net earnings other expenses and legal obligations which a claimant must pay such as child support, or other debts such as for car loans, etc. The simple conclusion made at the bottom of claimant's request for a waiver that "income exceeds expenses" is not supported by the evidence and is wholly arbitrary.

POINT 2

THE COMMISSION ACTED
ARBITRARILY IN FAILING
TO DETERMINE WHETHER THERE
WAS GOOD CAUSE FOR THE DELAY
IN APPEALING THE DENIAL.

The Administrative Law Judge who heard the evidence in this matter affirmed the Department finding that the claimant was required to repay benefits for the sole reason that he failed to appeal from the denial of the waiver in a timely manner.

The provisions of state law which relate to appeal from determinations of eligibility for other unemployment benefits govern the appeal from a determination of entitlement to TRA

benefits and overpayments as well, 20 CFR 617.55. Utah Code Ann.

§35-4-6(C) provides as follows:

(c) The claimant or any other party entitled to notice of a determination as herein provided may file an appeal from such determination with an appeal referee within ten days after the date of mailing of the notice to his last known address or, if such notice is not mailed, within ten days after the date of delivery of such notice.

The Supreme Court has held that

notwithstanding jurisdictional limitations of this statute, the commission does afford a claimant an opportunity to show good cause why the appeal was filed late. The decision as to whether 'good cause' for delay has been demonstrated is basically a factual matter best left to the commission. Where supported by competent evidence, its findings are conclusive.

Thiessens v. Department of Employment Security, 663 P.2d 72, 73

(Utah 1983).

The record reflects no effort in this instance on the part of the Administrative Law Judge to determine whether there was good cause for the claimant's late appeal, and no finding on that issue. The claimant, who like most claimants, was unrepresented by counsel, indicated that his mother was available in the building to explain the timing of the filing, but the hearing was concluded without her testimony.

Furthermore, a representative of the Department testified that people like the claimant were repeatedly told not to worry about TRA overpayments, and that they would not be collected. The following testimony was elicited at the hearing from the claimant, and a Mrs. Love, a TRA specialist with the Department:

JUDGE: Now do you have any idea Mrs. Love why the Department at that point and time indicated to the TRA claimants that they would not be trying to collect that overpayment?

B. LOVE: No, but I know that was standard information on the second floor that -- people were coming to the counter and inquiring about the overpayment they were advised that we did not have the capabilities of doing any collections at that time and basically not to worry about it.

CLAIMANT: That's where I stand, that was what I was told.

JUDGE: Do you know whether or not any instructions might have been given to the individuals that there might be a change and that that might not in fact hold true?

CLAIMANT: No, not to my knowledge.

JUDGE: The reason I ask -- on this notice it tells individuals that provisions of the section -- it goes on to say -- let's see where did I read that . . .

B. LOVE: Something to the effect that at a later date --

JUDGE: Yeah, right here. "Any future benefits you may receive toward repayment until new federal TRA program regulations are put into effect." To your knowledge, though Department people were not advised that this might change if this changed?

B. LOVE: No, no.

JUDGE: And if a person applied for or requested an appeal to challenge this, were they discouraged from doing that, or --

B. LOVE: I don't know if discouraged -- but they were told basically -- I guess you could say discouraged because they were told that nothing had been set up and just not to worry about it. I often heard that statement "don't worry about it."

CLAIMANT: That is exactly the same thing I was told on the phone, don't worry about it, disregard it because there is not going to be anything done about it.

(R.17-18).

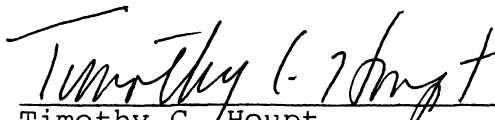
It appears that this testimony related to information that was being given out in 1986, at the time of the original notices of overpayment, rather than in the Spring of 1987 when the claimant was given an opportunity to apply for a waiver. Nonetheless, there is no evidence that anyone ever explained to the claimant that a change in policy relating to the collection of overpayments occurred and that a failure to appeal the denial of the waiver within ten days would result in an action to collect the overpaid funds. The claimant would have been justified in continuing to rely on the representations of the Department, even after filling out the waiver request. In any event, given the confusion in the record about the reason for the untimeliness of the appeal, and the absence of a finding on the issue, the matter should be remanded for further consideration.

CONCLUSION

The evidence in the record does not support either the Board of Review's denial of the claimant's request for a waiver of the overpayment, or a finding that there was no good reason for the lateness of his inter-agency appeal from the denial. Therefore, the ruling of the Commission should be reversed and

the matter should be remanded for additional evidence on both issues.

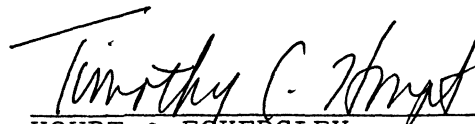
DATED this 29th day of February, 1988.


_____
Timothy C. Houpt
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed this 29th day of February, 1988, to the following:

K. Allan Zabel
1234 South Main Street
P.O. Box 11600
Salt Lake City, Utah 84147


_____
HOUP & ECKERSLEY

APPENDIX A



**REQUEST FOR WAIVER OF TRADE READJUSTMENT
ACT (TRA) NON-FAULT OVERPAYMENT**

Name Kelly K Wynn

Soc. Sec. No. 528-02-9894

I request a waiver of payment or collection of my Trade Readjustment Act (TRA) overpayment as I was not at fault in creating it and because repaying it would cause me an extraordinary financial hardship.

If you establish that you meet the Federal criteria, your Trade Act benefit overpayment will be completely waived or cancelled. If you do not complete and submit this waiver request within ten (10) days from the date issued, you will be required by Federal Regulation to make full repayment or to have your future benefit payments reduced by half each week until the amount is completely recovered.

I submit the following information on my income and expenses:

<u>Current Gross Monthly Income</u>	Mine	Other Family Members
Unemployment Benefits	<u>-0-</u>	<u>-0-</u>
Wages, Salary, Tips, etc.	<u>~~1409.60~~ 1409.60</u>	<u>-0-</u>
Other Income (pension, welfare, investments, social security, etc.)	<u>-0-</u>	<u>-0-</u>
TOTALS	\$ <u>~~1409.60~~ 1409.60</u>	\$ <u>-0-</u>
Savings or Other Cash Reserves	<u>-0-</u>	<u>-0-</u>
TOTALS	\$ <u>-0-</u>	\$ <u>-0-</u>

Current Household Monthly Expenses

Housing (rent or mortgage)	<u>\$ 525</u>
Utilities (gas, electric, water, etc.)	<u>\$ 150</u>
Food	<u>\$ 250</u>
Medical and Dental Costs	<u>30</u>
TOTAL	\$ <u>955</u>

I expect my financial situation to improve within the next 90 days.

☐ Yes ☒ No If "Yes," explain _____

EXHIBIT 5

I expect to return to work.

☐ Yes ☐ No If "Yes," complete.

_____
Date Company Name \$ Salary

I certify that the information on this form is true and correct. I understand that the law provides penalties for making false statements to obtain a waiver of an overpayment.

Kelly K Wynn
Signature

942-4244
Telephone No.

5/31/87
Date

RETURN THIS COMPLETED FORM WITHIN TEN (10) DAYS OF THE DATE ISSUED TO HAVE YOUR WAIVER REQUEST CONSIDERED. Return it to the nearest Job Service office or mail it to: Job Service, Chief of Benefits, P.O. Box 11730, Salt Lake City, Utah 84147.

Decision: ☐ Approve Waiver ☒ Deny Waiver

Reason

Income exceeds expenses
6-2-87
Claims Rep./Date 000005