

2008

# Hughes General Contractors vs. Workforce Appeals Board department of workforce services, scooter m. hammer : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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HUGHES GENERAL CONTRACTORS,

Petitioner and Appellant,

vs.

WORKFORCE APPEALS BOARD,  
Department of Workforce Services,  
Scooter M. Hammer, Claimant,

Respondents-Appellees.

**BRIEF OF APPELLANT  
HUGHES GENERAL CONTRACORS**

Appeal No. 20080404-CA  
Workforce Appeals Board No. 08-  
B-00140

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**APPEAL FROM THE WORKFORCE APPEALS BOARD, STATE OF UTAH  
DEPARTMENT OF WORKFORCE SERVICES**

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FILED

UTAH APPELLATE COURTS

OCT 10 2008

## **LIST OF PARTIES**

All parties to this appeal and to the proceedings below are as follows:

- (1) Hughes General Contractors. Petitioner and Appellant;
- (2) Workforce Appeals Board, Department of Workforce Services of the State of Utah, Appellee-Respondent;
- (3) Scooter M. Hammer. Claimant.

## **LIST OF PARTIES**

All parties to this appeal and to the proceedings below are listed in the case caption.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
STATEMENT OF JURISDICTION.....	4
ISSUES PRESENTED FOR REVIEW.....	4
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS.....	4
STATEMENT OF THE CASE.....	6
SUMMARY OF ARGUMENT.....	7
ARGUMENT.....	7
CONCLUSION.....	10
ADDENDUM A Statute, Rule	
ADDENDUM B Decision of the Workforce Services Appeals Board	

## TABLE OF AUTHORITIES

Utah Code Annotated 35A-4-102.....	4, 6, 7, 9.
UAC R994-405-204.....	4, 5, 7, 9, 10, 11.
<u>Kennecott Copper Corp. Emp. V. Department of Employment Sec. of Indus. Commission</u> , 372 P.2d 987, (Utah 1962).....	8.
<u>West Jordan v. Morrison</u> , 656 P.2d 445 (Utah 1982).....	9.

## **JURISDICTION**

This court has jurisdiction of this appeal pursuant to Utah Code Ann. §35A-4-508(8).

## **ISSUES PRESENTED FOR REVIEW**

### **ISSUE #1:**

Contrary to the decision of the Department of Workforce Services (“Department”) ALJ as affirmed by the Board, the decision of the ALJ is contrary to the stated purposes of the Employment Security Act as set forth in Utah Code Annotated 35A-4-102;

### **ISSUE #2:**

Contrary to the decision of the ALJ as affirmed by the Board, an employer has the right to cure a termination prior to the expiration of a two-week notice period by paying an employee in accordance with Utah Administrative Code (“UAC”) Rule R994-405-204.

## **DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS**

There are two determinative provisions of law and rule; the first is Utah Code Annotated 35A-4-102, and the second is Utah Administrative Code (“UAC”) Rule R994-405-204. These two provisions are set forth below in their entirety.

### **35A-4-102. Public policy -- General welfare requires creation of unemployment reserves -- Employment offices.**

As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people

of this state. Unemployment is therefore a subject of general interest and concern that requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with a nation-wide system of employment services, by devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of unemployment. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state, for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons.

#### **R994-405-204. Quit or Discharge.**

The circumstances of the separation as found by the Department determine whether it was a quit or discharge. The conclusions on the employer's records, the separation notice, or the claimant's report are not controlling.

(1) Discharge Before Effective Date of Resignation.

(a) Discharge.

If a claimant notifies the employer of an intent to leave work on a definite date, and the employer ends the employment relationship prior to that date, the separation is a discharge unless the claimant is paid through the resignation date. Unless there is some other evidence of disqualifying conduct, benefits will be awarded.

(b) Quit.

If the claimant gives notice of an intent to leave work on a particular date and is paid regular wages through the announced resignation date, the separation is a quit even if the claimant was relieved of work responsibilities prior to the effective date of resignation. A separation is also a quit if a claimant announces an intent to quit but agrees to continue working for an indefinite period, even though the date of separation is determined by the employer. The claimant is not considered to have quit merely by saying he or she is looking for a new job. If a claimant resigns but later decides to stay and announces an intent to remain employed, the reasonableness of the employer's refusal to continue the employment is the primary factor in determining whether the claimant quit or was discharged. If the employer had already hired a replacement, or had taken other action because of the claimant's impending quit, it may not be practical for the employer to allow the claimant to rescind the resignation, and it would be held the separation was a quit.



(2) Leaving in Anticipation of Discharge.

If a claimant leaves work in anticipation of a possible discharge and if the reason for the discharge would not have been disqualifying, the separation is a quit. A claimant may not escape a disqualification under the discharge provisions, Subsection 35A-4-405(2)(a), by quitting to avoid a discharge that would result in a denial of benefits. In this circumstance the separation is considered a discharge.

(3) Refusal to Follow Instructions.

If the claimant refused or failed to follow reasonable requests or instructions, and knew the loss of employment would result, the separation is a quit.

## **STATEMENT OF THE CASE**

This case is an appeal by the employer Petitioner of a decision of the Workforce Appeals Board that affirmed an Administrative Law Judge's ("ALJ") decision granting unemployment benefits to Scooter M. Hammer ("Claimant"). (R 047.) The Department of Workforce Services allowed benefits to the Claimant (R 013), the Petitioner appealed that decision to an ALJ (R 014) who ruled in favor of the Department (R 031), and the Workforce Appeals Board, as noted above, affirmed the decision of the ALJ (R 047).

The facts of the case are straightforward. On December 20, 2007, the Claimant called his supervisor and stated that he needed to give two weeks notice of his intent to quit his employment with the Petitioner (R 020). The Claimant was leaving his employment with the Petitioner to accept a position with another employer (R 008, R 009). The following day the foreman spoke to the Claimant and stated to the Claimant that because of the dearth of work over the holidays that the Claimant should end his employment with the Petitioner immediately (R 021). The Petitioner did not pay the Claimant through the proposed two-week notice period (R 029). After the Claimant filed a claim with the Department of Workforce Services ("Department") the Petitioner asked a Department representative if a payment for the two-week notice period could be paid

prior to the time the Department made a decision, and the Petitioner was told by the representative that a payment could not be made (R 025).

### **SUMMARY OF ARGUMENT**

The first argument of the Petitioner is simply that UAC Rule R994-405-204(1)(a) (“Rule”) runs directly contrary to the Utah Employment Security Act (“Act”) as set forth in Utah Code Annotated (“UCA”) 35A-4-102 because the Rule only benefits someone who already has a job who of their own volition leaves that job. The Act, however, was intended to address the “economic insecurity” and associated deleterious effects on those who by no fault of their own suffer the misfortunes of unemployment.

The second argument is that even if the Rule is deemed by this court to be consistent with the policy of the Act, nothing in the Rule precludes the employer from curing a termination prior to the end of a notice period after an employee makes a claim for unemployment. The Petitioner in this case should have had the opportunity to cure its “discharge” (id) of the Claimant after the Claimant filed his claim with the Department.

### **ARGUMENT**

#### **I. UAC RULE R994-405-204 (1)(a) IS CONTRARY TO THE PURPOSES OF THE EMPLOYMENT SECURITY ACT.**

UAC Rule 994-405-204(1)(a) only benefits those who are already employed but choose to leave their employment and, therefore, is directly contrary to the stated purpose of the State of Utah Employment Security Act (“Act”). As in this case, the Claimant would not have suffered the insecurity and deleterious effects of unemployment because he made the choice to submit a two-week notice of termination without any discussion

with his employer in order to begin a job with another employer. (R 008.) But because his employer, the Petitioner, ended the Claimant's employment prior to the expiration of the two-week resignation notice period the Petitioner now benefits from a law intended for those who do not have the choice to resign.

In the State of Utah the "primary purpose [of the Act] is to assist the worker and his family in times when, *without fault on his part*, he is out of work." Kennecott Copper Corp. Emp. v. Department of Employment Sec. of Indus. Commission 13 Utah 2d 262, 372 P.2d 987, (Utah 1962 ). (Emphasis added.) In this case, the Claimant was gainfully employed by the Petitioner, but expressed his desire to no longer work for the Petitioner; the Claimant provided the Petitioner with no other reason for leaving than that he desired to accept a position with another employer. (R 008) Had the Claimant decided to stay he may have continued to work for Hughes as long as he desired to do so. (R 022, Line 1.)

Traditionally, an employee submits a notice of his or her intention to resign for the benefit of the employer in order for the employer to have sufficient time to replace the resigning employee. It is, therefore, the Petitioner's position that an employee who submits a notice of his or her intention to resign accepts the risk of termination prior to a notice period. There is simply no statutory requirement that an employer must keep an employee on its payroll, or pay him or her, when an employee decides they want to quit their job, as was the case in this Appeal. The Department, however, has taken the existing statute with its clear policy provisions stated by the Legislature to benefit only those who have no choice about whether to keep their jobs, and brought those who *do* have the choice to keep their jobs under the protection of the Act.

The Department, by adopting the Rule, has effectively created law that runs contrary to state statute and, moreover, created bad public policy. The Rule grants additional employment rights to an employee that is not grounded in legislation or common law. The Department should simply not be allowed to create rules that go well beyond the authority granted to it by the legislature, and by adopting R994-405-204 (1)(a) the Department has done just that.

The Rule and its application in this case derogates from the very purpose for which the Act was created, which is to “lighten [the] burden [of unemployment] which now so often falls with crushing force upon the unemployed worker and his family.”

Utah Code Annotated 35A-4-102. As stated by Chief Justice Hall in 1982:

Clearly, the legislature's intent was to provide benefits to the unemployed, but to restrict those benefits to a class of workers who become unemployed *by no fault of their own*. Any application of the statute, or interpretation of the ordinary meaning of its terms, should be consistent and reconcilable with this underlying purpose. Although the act should be liberally construed, it does not follow that it should be construed unrealistically or unreasonably, and certainly not so liberally construed so as to defeat the very purpose of the act. West Jordan v. Morrison, 656 P.2d 445 (Utah 1982), *Hall dissenting*.

The cause of the Claimant leaving his employment with Hughes was his own desire to resign in order accept a position with another employer. (R 008) The Claimant did not object to his supervisor’s suggestion that he leave his employment prior to his designated resignation date (R 021), and but for his stated desire to leave his employment with Hughes, the Claimant could have remained employed with Hughes (R 022, line 1.) The Act was not created for those who, like the Claimant no longer want to work. It was

created for those who, “*by no fault of their own*” are involuntarily separated from their Employment. (West Jordan v. Morrison, 656 P.2d 445 (Utah 1982), *Hall dissenting*).

The Act was not designed to protect the Claimant; he had a job with the Petitioner that he intended to quit, and the Petitioner no longer needed him to stay an additional two weeks if he wanted to work for someone else. This court should declare the Rule as contrary to state statute and public policy, and the decision of the Board should be overturned and the Claimant should be disqualified from receiving benefits because he made the choice to resign from his employment with the Petitioner.

**II. AN EMPLOYER HAS THE RIGHT TO CURE A TERMINATION WITHIN THE PERIOD OF NOTICE OF RESIGNATION BY PAYING AN EMPLOYEE AFTER HE OR SHE FILES A CLAIM WITH THE DEPARTMENT.**

The ALJ stated in his decision that “the rule does not allow the employer to cure the discharge by paying the claimant through the two-week period after the claimant has filed his claim for benefits.” (R 030.) UAC R994-405-204, however, is silent as to whether the employer’s failure to pay the claimant after he or she files a claim can be cured.

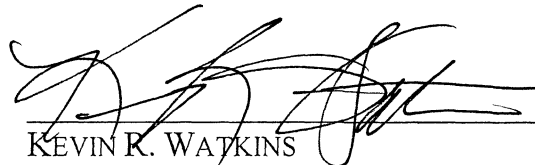
In the instant case, the employer was prepared to pay the claimant, but was instructed by the Department not to do so until after it had made its initial decision. (R 023.) Because the question of payment through the alleged two-week notice given by the claimant was never raised by the claimant at the time he was separated from his employment, and because UAC R994-405-204 is silent on the matter, the Employer

should be provided the opportunity to cure any such non-payment even after the claimant's claim is or was filed with the Department.

### **CONCLUSION**

Based upon the arguments set forth above this court should declare that Rule R994-405-204 (1)(a) is not authorized by statute and contrary to public policy and order that the decision of the ALJ and the Board be reversed. In addition this Court should also declare that the Petitioner has the right to cure a termination prior to the end of a stated resignation period even after a claimant files a claim with the Department, and order that this case be remanded to the Department in order for the Petitioner to make such a cure.

Respectfully submitted this 7th day of October, 2008.

  
KEVIN R. WATKINS  
*Attorney for Petitioner*

ADDENDUM A

~~FILED  
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UTAH APPELLATE COURTS  
OCT 07 2008

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**IN THE UTAH COURT OF APPEALS**

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HUGHES GENERAL  
CONTRACTORS,

Appellant and Petitioner,

v.

WORKFORCE APPEALS BOARD,  
Department of Workforce Services,  
Scooter M. Hammer, Claimant,

Respondents.

**CERTIFICATE OF SERVICE,  
BRIEF OF APPELLANT  
HUGHES GENERAL  
CONTRACTORS**

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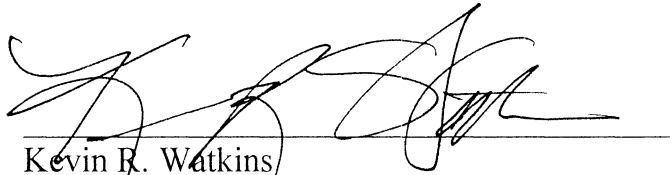
Hughes General Contractors, Inc., ("Petitioner"), through counsel hereby certifies  
that a copy of the **BRIEF OF APPELLANT HUGHES GENERAL CONTRACTORS**  
filed in this Court has been served by mail upon:

Suzan Pixton  
Department of Workforce Services  
P.O. Box 45244  
Salt Lake City, Utah 84145-0244

Scooter M. Hammer  
353 North 800 East  
Layton, Utah 84041



Dated this 7<sup>th</sup> day of October, 2008.

A handwritten signature in black ink, appearing to read 'Kevin R. Watkins', is written over a horizontal line.

Kevin R. Watkins  
*General Counsel*  
*Attorney for Petitioner*

ADDENDUM A

**35A-4-102. Public policy -- General welfare requires creation of unemployment reserves -- Employment offices.**

As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern that requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with a nationwide system of employment services, by devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of unemployment. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state, for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons.

**R994-405-204. Quit or Discharge.**

The circumstances of the separation as found by the Department determine whether it was a quit or discharge. The conclusions on the employer's records, the separation notice, or the claimant's report are not controlling.

(1) Discharge Before Effective Date of Resignation.

(a) Discharge.

If a claimant notifies the employer of an intent to leave work on a definite date, and the employer ends the employment relationship prior to that date, the separation is a discharge unless the claimant is paid through the resignation date. Unless there is some other evidence of disqualifying conduct, benefits will be awarded.

(b) Quit.

If the claimant gives notice of an intent to leave work on a particular date and is paid regular wages through the announced resignation date, the separation is a quit even if the claimant was relieved of work responsibilities prior to the effective date of resignation. A separation is also a quit if a claimant announces an intent to quit but agrees to continue working for an indefinite period, even though the date of separation is determined by the employer. The claimant is not considered to have quit merely by saying he or she is looking for a new job. If a claimant resigns

but later decides to stay and announces an intent to remain employed, the reasonableness of the employer's refusal to continue the employment is the primary factor in determining whether the claimant quit or was discharged. If the employer had already hired a replacement, or had taken other action because of the claimant's impending quit, it may not be practical for the employer to allow the claimant to rescind the resignation, and it would be held the separation was a quit.

(2) Leaving in Anticipation of Discharge.

If a claimant leaves work in anticipation of a possible discharge and if the reason for the discharge would not have been disqualifying, the separation is a quit. A claimant may not escape a disqualification under the discharge provisions, Subsection 35A-4-405(2)(a), by quitting to avoid a discharge that would result in a denial of benefits. In this circumstance the separation is considered a discharge.

(3) Refusal to Follow Instructions.

If the claimant refused or failed to follow reasonable requests or instructions, and knew the loss of employment would result, the separation is a quit.



WORKFORCE APPEALS BOARD  
Department of Workforce Services  
Division of Adjudication

SCOOTER M. HAMMER, CLAIMANT  
S.S.A. No. XXX-XX-1349

:

:

Case No. 08-B-00140

HUGHES GENERAL CONTRACTORS INC., :  
EMPLOYER

**DECISION OF WORKFORCE APPEALS BOARD:**

The decision of the administrative law judge is affirmed.

Benefits are allowed.

The employer is not relieved of benefit charges.

**HISTORY OF CASE:**

In a decision dated February 7, 2008, Case No. 08-A-00218, the administrative law judge affirmed the Department decision and allowed unemployment insurance benefits to the claimant effective December 16, 2007. The employer, Hughes General Contractors Inc., was ineligible for relief of benefit charges in connection with this claim.

**JURISDICTION OF WORKFORCE APPEALS BOARD:**

The Workforce Appeals Board has authority to review the administrative law judge's decision pursuant to §35A-4-508(4) and (5) of the Utah Employment Security Act and the Utah Administrative Code (1997) pertaining thereto.

**EMPLOYER APPEAL FILED:** March 10, 2008.

**ISSUES BEFORE WORKFORCE APPEALS BOARD AND APPLICABLE PROVISIONS OF UTAH EMPLOYMENT SECURITY ACT:**

1. Did the employer have just cause for discharging the claimant pursuant to the provisions of §35A-4-405(2)(a)?
2. Is the employer eligible for relief of charges pursuant to the provisions of §35A-4-307(1)?

**FACTUAL FINDINGS:**

The Workforce Appeals Board adopts in full the factual findings of the administrative law judge

**REASONING AND CONCLUSIONS OF LAW:**

On December 20, 2007, the claimant gave the employer two weeks notice of his intent to quit. The claimant gave notice because he was to begin a new job on January 7, 2008. On December 21, 2007, the day after the claimant gave his two weeks' notice, the employer told the claimant that because of a slowdown in work, it would accept his resignation immediately and the claimant no longer needed to report for work. The employer did not pay the claimant through the two week notice period.

The claimant filed for unemployment benefits on December 21, 2007. The Department allowed benefits and the employer appealed. After benefits were awarded, the employer called the Department to ask if it could pay the claimant for the two week notice period and avoid paying for unemployment. The employer's attorney testified during the hearing that he was told he could not pay the claimant for the two weeks. On closer questioning, the attorney stated the Department told him to wait until "we're through with this and we'll let you know." The attorney also admitted that the Department did nothing to prevent the employer from paying the claimant. The attorney testified because the Department did not contact him, he did not pay the claimant.

The Department's policy, which is consistent with its rules, is that if an employer lets the claimant go prior to the expiration of the notice period and pays the claimant at the time, benefits will not be awarded. The Department has consistently held, however, that the employer cannot attempt to cure the problem by offering to pay, or paying, the claimant at a later date.

Department rules provide:

**R994-405-106.      Quit or Discharge.****(6)      Resignation Intended.****(a)      Quit.**

If a claimant gives notice of his or her intent to leave at a future date and is paid regular wages through the announced resignation date, the separation is a quit even if the claimant was relieved of work responsibilities prior to the effective date of the resignation. A separation is also a quit if a claimant announces an intent to quit but agrees to continue working for an indefinite period as determined by the employer, even though the date of separation was determined by the employer. If a claimant resigns but later decides to stay and attempts to remain employed, the reasonableness of the employer's refusal to continue the employment is the primary factor in determining if the claimant quit or was discharged. For example, if the employer had already hired a replacement, or taken other action because of the

claimant's impending quit, it may not be practical for the employer to allow the claimant to rescind the resignation, and the separation is a quit.

(b) Discharge.

**If a claimant submitted a resignation to be effective at a definite future date, but was relieved of work responsibilities and was not paid regular wages through the balance of the notice period, the separation is considered a discharge as the employer was the moving party in determining the final date of employment.** Merely assigning vacation pay not previously assigned to the notice period does not make the separation a quit. [emphasis supplied]

In *West Jordan v. Morrison*, 656 P 2d 445, (Utah 1982), the claimant gave the employer a letter of resignation on November 26, 1980. The letter stated his last day of work would be December 10, 1980. The employer told the claimant it was accepting his resignation as of the date of the resignation letter, November 26, 1980. The employer would not allow the claimant to work through the notice period and did not pay the claimant through the notice period.

The court relied, for its ruling, on Utah Code subsection 35-4-5(a). That provision has been renumbered and is now subsection 35A-4-405(1) which reads:

**35A-4-405. Ineligibility for benefits.**

Except as otherwise provided in Subsection (5), an individual is ineligible for benefits or for purposes of establishing a waiting period:

(1) (a) For the week in which the claimant left work voluntarily without good cause, if so found by the division, and for each week thereafter until the claimant has performed services in bona fide, covered employment and earned wages for those services equal to at least six times the claimant's weekly benefit amount.

(b) A claimant may not be denied eligibility for benefits if the claimant leaves work under circumstances where it would be contrary to equity and good conscience to impose a disqualification.

(c) Using available information from employers and the claimant, the division shall consider for the purposes of this chapter the reasonableness of the claimant's actions, and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.

The employer in *West Jordan* argued that the claimant in that case should be ineligible for unemployment benefits after December 10, 1980, the date he would have left had the employer not discharged him effective November 26, 1980. The court held.



The employer asserts that because the claimant would have left work voluntarily on December 10 anyway, his eligibility a month later should not be affected by the employer's decision to make the resignation effective immediately. The employer urges an interpretation of § 35-4-5(a) which would state, in effect, "An individual shall be ineligible for benefits . . . for *[any]* week in which the claimant left work voluntarily without good cause . . . and for each week thereafter . . ." *Id* (Emphasis added.) In other words, the employer would have us consider the week in which the claimant offered to resign without regard for the week in which he actually left work.

We have frequently stated that this Court's primary responsibility in construing legislative enactments is to give effect to the Legislature's underlying intent. *See, e.g., Millett v. Clark Clinic Corp., Utah, 609 P.2d 934 (1980)*. We have also said that a statute should be applied according to its literal wording unless it is unreasonably confused or inoperable. *See Gord v. Salt Lake City, 20 Utah 2d 138, 434 P.2d 449 (1967)*. We must assume that each term in the statute was used advisedly by the Legislature and that each should be interpreted and applied according to its usually accepted meaning. Where the ordinary meaning of the terms results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction to the express purpose of the statute, it is not the duty of this Court to assess the wisdom of the statutory scheme. *See, e.g., Knox v. Thomas, 30 Utah 2d 15, 512 P.2d 664 (1973); Gord, supra*.

With these principles in mind, we hold that the ordinary meaning of the terms does not support the interpretation advanced by the employer. It is clear that the purpose of § 35-4-5 is to set out various conditions under which a claimant is ineligible for benefits. One of these conditions is the voluntary departure from employment without good cause. By its wording, the statute directs our attention to the week in which the claimant left work--not the week that he might have left work, or offered to leave work, but the week in which the claimant actually *left* work. There is no question that the claimant left work the week of November 26, 1979, and that his leaving *that week* was not voluntary.

In this case, the claimant left work on December 21, 2007. The employer determined when the claimant's employment was to end. During the hearing the employer's witnesses testified the claimant was let go on December 21 because it was a slow period for the employer and since the claimant announced his intention to quit in two weeks anyway, the employer just let him go early. Under the statute and the rules, it is the week when the job separation occurred that is used to determine the reason for the separation. On December 21, 2007, the employer discharged the claimant without just cause or laid him off due to a reduction in force. The claimant did not know announcing his intent to quit in two weeks would result in his early discharge. Because the knowledge prong of the just cause test has not been proved, the control element is not present either.

Because the claimant did not know what the consequences of his actions would be, he could not conform his behavior to the employer's demands. The employer did not prove culpability. None of the elements of just cause were proved.

When the claimant filed his claim for benefits, the employer was contacted to provide information about the separation. The employer was sent an "Official Notice of Claim Filed" form. The form is a fill in the blank form. The employer filled out the form stating the claimant quit and was "not required by us to work through end of [sic] week ". The initial adjudicator contacted the employer by telephone. A representative of the employer company told the adjudicator that because work is slow for the employer it decided to let the claimant leave early "rather than give him busy work." At no time did the employer state in the initial adjudication phase that it wanted to pay the claimant through the two week notice period.

It is assumed, from the record, that it was only after the employer was notified the claimant was awarded benefits that the employer asked if it could pay the claimant through the notice period. Although the employer's witness testified the Department told the employer it could not pay the claimant through the notice period, this may have been a misunderstanding. The Department has consistently held that payment after the claim is filed and the initial determination is made cannot cure the problem. It is more likely that the employer was told paying the claimant through the notice period at that late date would not change the Department's decision.

The employer's argument that it should be allowed to pay the claimant through the notice period now and be relieved of its obligation to pay charges on the unemployment claim is not persuasive. Determining the cause of a job separation looks to the facts as existed at the time of the separation. Department of Labor standards currently require that the initial decision be made within two weeks of the date when the claim is filed. Because of this time frame, and the fact that the decision is made based on the facts at the time the separation occurred, the Department does not consider any actions taken by a party after the separation occurs.

Unemployment compensation is a program operated by a state federal partnership. If a state does not follow federal regulations in paying unemployment benefits, employers in that state are required to pay a different, and higher, federal unemployment insurance rate. By agreeing to abide by the federal regulations, Utah employers pay a lower unemployment tax rate.

42 U.S.C. §503 provides:

(a) Provisions required. The Board [Secretary of Labor] shall make no certification for payment to any State unless it finds that the law of such State, approved by the Board Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Board [Secretary of Labor] shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Board [Secretary of Labor] to be reasonably calculated to insure full payment of unemployment compensation when due; . . .

That section was interpreted by the U. S. Supreme Court in *California Dep't of Human Resource Development v. Java*, 402 U.S. 121, (1971). The claimants in *Java* were initially found eligible for unemployment benefits and the employers appealed. Under California law at the time, unemployment benefits immediately ceased pending the employers' appeal. When their benefits stopped, the claimants initiated a class action claiming the California statute in question was unconstitutional and a violation of 42 USC 503(1).

The U.S. Supreme Court unanimously upheld the lower court's finding that the California statute was unconstitutional and violated 42 USC 503(1). In so holding the court noted that the system for determining eligibility in California at the time was that when a claimant filed a claim for benefits, an interview was scheduled with an eligibility interviewer. The interview was scheduled for three weeks after the claim was filed. In those three weeks, the interviewer gathered information from both parties. Both parties were given notice of the interview and invited to participate. The claimant's eligibility was determined at that interview and notice of the decision was sent to the claimant and the employer.

[T]he interview for the determination of eligibility is the critical point in the California procedure. In the Department's own terms, it is "the point at which any issue affecting the claimant's eligibility is decided and fulfills the Department's legal obligation to insure that . . . benefits *are paid promptly if claimant is eligible*." L. O. M. § 1400.1 (1) (emphasis added). If the initial determination is favorable to the claimant, payments begin immediately, and for 95-98% of the claims, former employers do not appear or seek a hearing; no further problem arises as to initial eligibility. The Department sends out a notice to the employer informing him [sic] that the claimant has been found eligible, and that the employer may appeal within 10 days. *Cal. Unemp. Ins. Code* § 1328. . . .

If the employer appeals, payment of the claimant's benefits is stopped pending determination on appeal before an Appeals Board Referee. *Id.*, § 1335; see L. O. M. § 1474. The automatic suspension of benefits upon the employer's appeal, after an initial determination of eligibility, is the aspect of the California procedure challenged here. By that time the claimant may have received one or perhaps two payments. When the employer appeals, a hearing is then scheduled at which both the parties may appear and be represented, call witnesses, and present evidence. "A

referee after affording a reasonable opportunity for fair hearing, shall, unless such appeal is withdrawn, affirm, reverse, or modify any determination which is appealed . . . ." *Cal Unemp Ins Code § 1334*. The appeal affords a *de novo* consideration. Generally, processing of the employer's appeal takes between six and seven weeks, between the date of filing the appeal and the date of mailing the decision or dismissal.

If upon appeal the Referee finds the claimant eligible, payments are reinstated at once and continue even if the employer exercises his right to appeal further to the Appeals Board. *Cal Unemp Ins Code § 1335 (b)*. Meanwhile as much as seven to 10 weeks may have elapsed. The record indicates that employers are successful in less than 50% of their appeals from initial determinations of eligibility.

The dispositive issue is the determination of whether *§ 1335 of the California Unemployment Insurance Code* violates the command of *42 U S C. § 503 (a)(1)* that state unemployment compensation programs must "be reasonably calculated to insure full payment of unemployment compensation when due." The purpose of the federal statutory scheme must be examined in order to reconcile the apparent conflict between the provision of the California statute and *§ 303 (a)(1)* of the Social Security Act.

It is true, as appellants argue, that the unemployment compensation insurance program was not based on need in the sense underlying the various welfare programs that had their genesis in the same period of economic stress a generation ago. A kind of "need" is present in the statutory scheme for insurance, however, to the extent that any "salary replacement" insurance fulfills a need caused by lost employment. The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee. Probably no program could be devised to make insurance payments available precisely on the nearest payday following the termination, but to the extent that this was administratively feasible this must be regarded as what Congress was trying to accomplish. The circumstances surrounding the enactment of the statute confirm this.

. . .

We conclude that the word "due" in *§ 303 (a)(1)*, when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment.

. . .

It would frustrate one of the Act's basic purposes -- providing a "substitute" for wages -- to permit an employer to ignore the initial interview or fail to assert and document a claimed defense, and then effectuate cessation of payments by asserting a defense to the claim by way of appeal. If the employer fails to present any evidence, he has in effect defaulted, and neither he nor the State can with justification complain if, on a *prima facie* showing, benefits are allowed. If the employer's defenses are not accepted and the claim is allowed, that also constitutes a determination that the benefits are "due."

The facts in this case are different from the facts in *Java* but the same principles apply. Unemployment benefits must be paid when due and here those benefits were due when the separation occurred, December 21, 2007. The decision is made based on the facts at the time of the job separation. If either party were allowed to effectively change those facts, it would make it impossible for either party to know when a final decision had been made. While it is true the employer here attempted to cure the problem before the hearing before the administrative law judge, if the Department allowed such action, it would not be making its decision based on "the week in which the claimant left work" but on some later date. If that were allowed, it would have to be determined how long a party had to cure the problem. Under those circumstances, a claimant would never know if his benefits would continue.

There is an additional problem in this case. The claimant testified he gave notice of his intent to quit because he was to start a new job on January 7, 2008. Given those facts, the claimant may have had good cause to quit. Evidence was not taken to establish good cause because it was determined the claimant did not quit but was discharged. But, if the employer were allowed to pay the claimant some time after the decision is made, the Department would have to start over and evaluate the claim in terms of a quit.

Judicial and administrative economy requires that decisions reach finality at some point. If either party were allowed to effectively change the facts, as the employer requests here, finality would be an illusion. The Department bases its decision on the facts as existed "the week in which the claimant left work." The employer's argument is without merit.

The reasoning and conclusions of law of the administrative law judge are adopted in full.

#### **DECISION:**

The decision of the administrative law judge allowing unemployment insurance benefits to the claimant effective December 16, 2007, under the provisions of §35A-4-405(2)(a) of the Utah Employment Security Act is affirmed.

The employer, Hughes General Contractors Inc., is ineligible for relief of benefit charges in connection with this claim as provided by §35A-4-307(1) of the act.

**APPEAL RIGHTS:**

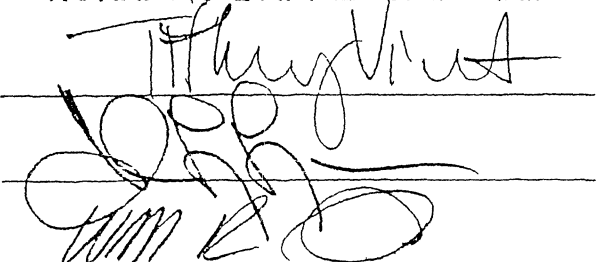
Pursuant to §63-46b-13(1)(a) of the Utah Administrative Procedures Act, you may request reconsideration of this decision within 20 days from the date this decision is issued. Your request for reconsideration must be in writing and must state the specific grounds upon which relief is requested. The request must be filed with the Workforce Appeals Board at 140 East 300 South, Salt Lake City, Utah, or may be mailed to the Workforce Appeals Board at P.O. Box 45244, Salt Lake City, Utah 84145-0244. A copy of the request for reconsideration must also be mailed to each party by the person making the request. If the Workforce Appeals Board does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied pursuant to §63-46b-13(3)(b) of the Utah Administrative Procedures Act. The filing of a request for reconsideration is not a prerequisite for seeking judicial review of this order. If a request for reconsideration is made, the Workforce Appeals Board will issue another decision. This decision will set forth the rights of further appeal to the Court of Appeals and time limitation for such an appeal.

You may appeal this decision to the Utah Court of Appeals. Your appeal must be submitted in writing within 30 days of the date this decision is issued. The Court of Appeals is located on the fifth floor of the Scott M. Matheson Courthouse, 450 South State Street, P. O. Box 140230, Salt Lake City, Utah 84114-0230. The appeal must show the Workforce Appeals Board, Department of Workforce Services and any other party to the proceeding as Respondents. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35A-4-508(8) of the Utah Employment Security Act; §63-46b-16 of the Utah Administrative Procedures Act; and Rule 14 of the Utah Rules of Appellate Procedure, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure.

Date Issued April 11, 2008

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WORKFORCE APPEALS BOARD

  
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