

1986

Michael F. Grinnell v. Board of Review of the Industrial Commission of Utah, Department of Employment Security, and May Trucking Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL F. GRINNELL,

)

Appellant,

)

vs.

)

BOARD OF REVIEW OF THE
INDUSTRIAL COMMISSION OF
UTAH, DEPARTMENT OF EMPLOYMENT
SECURITY, and MAY TRUCKING
COMPANY,

)

Case No. 8602⁵⁶~~65~~

)

)

Respondents.

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Priority #6

BRIEF OF APPELLANT

Appeal from the Decision of the Board of Review of the
Industrial Commission of Utah.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES PRESENTED ON APPEAL	iii
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
THERE ARE TWO STANDARDS OF REVIEW IN CASES OF THIS TYPE WHICH ARE BASED ON THE RATIONALITY OF THE BOARD OF REVIEW'S DECISION.	4
A. <u>THE STANDARD OF REVIEW FOR FACTUAL FINDINGS OF THE BOARD OF REVIEW IS BASED ON STATUTE.</u>	4
B. <u>THE STANDARD OF REVIEW OF THE LEGAL STANDARDS APPLIED BY THE BOARD OF REVIEW IS BROADER THAN THE REVIEW OF FACTUAL FINDINGS.</u>	7
1. The ALJ's Decision That Appellant Was Without the Requisite Knowledge Was Reasonable and Rational.	8
2. The Board's Decision That Appellant Was Disqualified From Receiving Unemployment Benefits is Not Reasonable or Rational.	9
CONCLUSION	12
ADDENDUM	A-1
CERTIFICATE OF SERVICE	A-28

TABLE OF AUTHORITIES

CASES

<u>Board of Education of Sevier County School District v. Board of Review</u> , 701 P.2d 1064 (Utah 1985)	8
<u>Kehl v. Board of Review</u> , 700 P.2d 1129 (Utah 1986)	7
<u>Logan Regional Hospital v. Board of Review</u> , ____ P.2d ____, 39 Utah Adv. Rep. 34 (Utah 1986)	11
<u>Trotta v. Department of Employment Security</u> , 664 P.2d 1195 (Utah 1983)	4,6,7
<u>Wright's Furniture Mill, Inc. v. Industrial Commission</u> , 707 P.2d 113 (Utah 1985)	8

STATUTES AND RULES

Utah Code Annotated §35-4-10(1) (1953, as amended)	4
Utah Department of Employment Security Rule A71-07-1:5(II)-1	8, 9, 10
49 C.F.R. §395.3	11
49 C.F.R. §395.13	11

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. WHETHER THE BOARD OF REVIEW'S DECISION IS SUPPORTED BY
SUBSTANTIAL EVIDENCE.

2. WHETHER THE BOARD OF REVIEW'S DECISION IS WITHIN THE
LIMITS OF REASONABLENESS AND RATIONALITY.

STATEMENT OF FACTS

Appellant was employed as a truck driver for May Trucking Company (May) in Layton, Utah, from 20 September, 1984 to 19 December, 1985. (R. at 37). Appellant's job function was to perform cross-country driving for May. On or about 20 December, 1985, after Appellant returned from an assignment, May discovered that on that trip the road speed governor on Appellant's truck had been tampered with. (R. at 39). The governor is normally set at approximately sixty-two miles per hour (62 mph). (R. at 39). The Rockwell trip master computer on board the truck showed that the Appellant had averaged 4 or 5 miles per hour over the governor's limit on the last trip. (R. at 41). May had an incentive bonus program which provided that if a driver drove under 60, that driver got a three cent per mile additional bonus, and Appellant had received that bonus quite often. (R. at 42). The daily trip reports also showed that from 21 November, 1985 to 22 November, 1985, Appellant had driven approximately 21 1/2 hours out of 24 hours. (R. at 44).

Both the tampering with the road governor and the excessive driving time were violations of May's company policy by Appellant. Although these violations could result in termination, Appellant was merely suspended from work because of his exemplary driving record. (R. at 9, 24, 48, 69). As a condition to returning to work Appellant was required to submit to a urinalysis test. (R. at 69). May felt that petitioner could not have driven for the sustained

period without some type of chemical assistance. (R. at 46). The urinalysis showed a trace of marijuana in Appellant's system. (R. at 9, 46). Appellant was terminated at that point by May.

Appellant filed for unemployment benefits and was denied on 24 January, 1986. Appellant requested and had a hearing before the Administrative Law Judge (ALJ) on 19 February, 1986. (R. at 9). In a written opinion, the ALJ found that Appellant was not discharged for disqualifying reasons and allowed unemployment benefits. (R. at 11). The ALJ's decision was based partly on the fact that Appellant's violations of the speed and hour policies would not alone have resulted in termination. (R. at 10). Although the ALJ found the employer was justified in its drug policy, the ALJ found insufficient evidence to support May's claim that Appellant understood that any use of drugs would result in termination (R. at 10). Appellant testified that he understood he could only be terminated if drug use influenced his driving performance or if he used drugs in or around a company vehicle. (R. at 10, 17). Petitioner also testified that he had not consumed drugs for quite some time. (R. at 25), that he had not used drugs while driving (R. at 16, 26), and that he was not a regular drug user. (R. at 17, 26). Consequently, the ALJ allowed benefits.

On appeal by May to the Board of Review of the Industrial Commission (Board) the ALJ's decision was reversed. (R. at 6). The Board acknowledged insufficient

evidence as to a discharge based on drug usage. (R. at 6). The Board, however, felt that the speed and hour violations occurring during Appellant's last trip for May were serious enough, coupled with the drug usage, to warrant the discharge of petitioner. (R. at 7). The decision of the Board was split with commissioners Hadley and Hannan reversing the ALJ, and commissioner Belka dissenting. Commissioner Belka agreed that the drug usage evidence was insufficient. He felt, however, that the violations of speed were not serious since Appellant had averaged 66 mph, but the employer had authorized speeds of 62 mph which also violated the law. (R. at 8).

After the Board's decision, Appellant filed a notice of appeal. The matter is now before this Court.

SUMMARY OF THE ARGUMENT

The standard of review for decisions of the Board of Review is twofold. The Board's findings of fact will not be disturbed if supported by substantial evidence. In this appeal the record shows that the ALJ's findings, not the Board's findings, are supported by substantial evidence and should be followed by this Court. Those findings (the ALJ's) indicate that Appellant was discharged for non-disqualifying reasons and, thus, that Appellant is entitled to unemployment benefits.

The conclusions of law made by the Board must be reasonable and rational. In this appeal, again, it is the

ALJ's conclusions that are reasonable and rational, not the Board's conclusions. The evidence shows that Appellant was not discharged for just cause. As to marijuana usage, both the ALJ and the Board agree that Appellant was without the knowledge requirement. As to the tampering and excessive driving time, the evidence supports the conclusion that Appellant was without sufficient culpability. Thus, the conclusion that Appellant was discharged for just cause is erroneous and the ALJ's conclusion that Appellant was discharged for non-disqualifying reasons should be reinstated.

ARGUMENT

THERE ARE TWO STANDARDS OF REVIEW IN CASES OF THIS TYPE WHICH ARE BASED ON THE RATIONALITY OF THE BOARD OF REVIEW'S DECISION.

A. THE STANDARD OF REVIEW FOR FACTUAL FINDINGS OF THE BOARD OF REVIEW IS BASED ON STATUTE.

This Court is bound by the findings of fact of the Commission and Board of Review if supported by evidence, pursuant to §35-4-10(1) Utah Code Annotated (1953, as amended). Trotta v. Department of Employment Security, 664 P.2d 1195 (Utah 1983). The Board of Review (Board) did not make written findings of fact; however, in its written decision there is no indication that it was not following the findings of fact adopted by the Administrative Law Judge (ALJ). Consequently, this Court could conclude that the Board incorporated the ALJ's findings of fact into its decision. The Board simply disagreed with the ALJ's conclusions.

The Board did, however, dispute one finding of the ALJ. The ALJ found that Appellant was discharged because traces of marijuana were found in his system. The Board found that Appellant was discharged on the basis of four cumulative events:

1. Alteration of the 62 MPH road speed governor;
and
2. Evidence that the on-board computer showed the truck had averaged 66 MPH; and
3. Evidence that the truck had been operated for 22 hours during a 24 hour period; and
4. Applicant was tested and found to have traces of marijuana in his system.

The difference is that the Board found Appellant was discharged for reasons one through four, while the ALJ found that Appellant was discharged only for reason four. The ALJ found that for reasons one through three, Appellant was merely suspended.

This distinction is critical. If the finding of the ALJ is followed, then Appellant was not discharged for disqualifying reasons and is entitled to unemployment benefits. Not only was this the decision of the ALJ, but it also appears that the Board agreed with that consequence. The Board, in its decision, acknowledged that there was very likely insufficient evidence to show when Appellant had used marijuana and what effects it had on Appellant if any. The only reason the Board reversed the ALJ, as stated previously,

was due to the cumulative facts rather than the marijuana fact alone. A close examination of the proceedings before the ALJ, and certain other documents in the record, shows the Board's finding is not based on substantial evidence. Trotta v. Department of Employment Security, 664 P.2d 1195, 1198 (Utah 1983) (and cases there cited).

A letter dated 16 January, 1986 from Mr. Greg Weigel, Personnel Manager of May Trucking, was received by Appellant. The letter first states that Appellant was discharged for violating the safety regulations on logging and driving time. But apparently this is not why Appellant was actually terminated, because the letter goes on to say that Appellant was only suspended due to his previous good driving record. The letter makes it clear that Appellant was terminated only after the urinalysis tested positive for marijuana. Thus, the letter is evidence that goes against the Board's decision.

In the hearing before the ALJ, a representative of the employer was asked what brought on the termination. The representative responded that it was a combination of things and then said, "Had it not been for the positive results on the drug test, Mr. Grinnell probably would have had a two-week suspension and then it would have been over with." After determining that the marijuana problem alone was a ground for termination, the representative also stated that tampering and excessive hours were also grounds for termination. But the point was reiterated that the violation

that brought on the termination was the marijuana test. The testimony heard by the ALJ showed that Appellant was terminated for marijuana usage. Based on this and other testimony, the ALJ found no knowledge on Appellant's part and, thus, that he was not discharged for disqualifying reasons. This Court has held that because of the technical experience of the ALJ, and the ALJ's ability to more closely evaluate the testimony proffered, great deference should be afforded to the ALJ's decision. Kehl v. Board of Review, 700 P.2d 1129, 1133 (Utah 1985). The testimony at the hearing, then also goes against the Board's decision and supports the ALJ's decision.

In conclusion, the ALJ's decision is supported by substantial evidence. The letter and the testimony both support the ALJ's finding that Appellant was not discharged for the tampering or traveling violations, but only for the urinalysis results. The Board's decision that Appellant was discharged for the tampering or traveling violations is not supported by substantial evidence. Therefore, this Court should follow the findings of the ALJ and not the Board, in making its decision.

B. THE STANDARD OF REVIEW OF THE LEGAL STANDARDS APPLIED BY THE BOARD OF REVIEW ARE BROADER THAN THE REVIEW OF FACTUAL FINDINGS.

This Court has stated that it will not defer to the legal standard applied by the Board of Review except under legislative intent expressed in statutory language. Trotta v. Department of Employment Security, 664 P.2d 1195, 1198

(Utah 1983). The court there stated that the review of the legal standards applied by the Board of Review is considerably broader than its review of the factual findings of the Board. Id. Yet, this Court has also stated that the Board's decision shall be affirmed unless as a matter of law only the opposite conclusion could be drawn from the facts. Board of Education of Sevier County School District v. Board of Review, 701 P.2d 1064 (Utah 1985). It appears, then, that the rule of review currently adopted by the court is that stated in Wright's Furniture Mill, Inc. v. Industrial Commission, 707 P.2d 113 (1985). There the court deferred to the ALJ's application of law to fact so long as the decision is "reasonable and rational." In the instant case, based on his technical expertise or more extensive experience in the administrative agency, the ALJ concluded that Appellant had not been discharged for disqualifying reasons. This conclusion is well documented in the ALJ's decision. The evidence was clear that Appellant did not meet the knowledge standard required for a finding of discharge for just cause. The legal conclusion is clear that absent knowledge, culpability and control, the claimant is not disqualified from receiving unemployment benefits. Utah Department of Employment Security Rule A71-07-1:5(II)-1.

1. The ALJ'S Decison That Appellant Was Without The Requisite Knowledge Was Reasonable and Rational.

The ALJ, after finding that Appellant was discharged because of the urinalysis test results, turned to

the question of whether Appellant was discharged for just cause. A determination of just cause is based on the three factors of knowledge, culpability and control. Rule A71-07-1:5(II)-1. All three factors must be present to establish just cause. The ALJ found that in this case the factor of knowledge was missing and therefore Appellant was not discharged for just cause.

The employer testified that it was company policy to discharge for any use of drugs whether on or off the road, and that Appellant knew this. Appellant, however, testified that he did not know any use was grounds for discharge, although he knew that use while driving or while around the truck was grounds for discharge. He also testified that he had not used marijuana for quite some time, and that even then he did not use it regularly. The ALJ found that there was insufficient evidence to support the employer's position and thus found that Appellant had not been shown to have the required knowledge for a just cause discharge. This legal conclusion is fully substantiated by the evidence and should not be disturbed by this Court.

2. The Board's Decision That Appellant Was Disqualified From Receiving Unemployment Benefits is Not Reasonable Nor Rational.

The Board agreed that the evidence on marijuana usage was insufficient to establish knowledge and so just cause, but found disqualifying behavior in the tampering and traveling time. As has been discussed, this finding of the Board is not supported by substantial evidence, and is also

reversible as a misapplication of the law.

The Board concluded that because Appellant could have been terminated for the tampering and traveling time violations he was terminated for just cause. This conclusion is in error. First, the two violations do not result in mandatory discharge as evidenced by the employer's testimony that Appellant was only suspended for those violations. The Board cannot decide for the employer that discharge was warranted when the employer has already made the decision not to discharge Appellant. Second, although not couched in this specific language, Appellant's conduct fails to meet the culpability requirement of a discharge for just cause.

The issue of culpability starts with a consideration of the seriousness of the conduct as it affects continuance of the employment relationship. The Department of Employment Security's rules state in part:

(1) Longevity and prior work record are important in determining if the act or omission is an isolated incident or a good faith error in judgment. An employee who has historically complied with work rules does not demonstrate by a single violation, even though harmful, that such violations will be repeated and therefore require discharge to avoid future harm to the employer...

Rule A71-07-1:5(II)-1.B.1.a.(1).

This is precisely the situation involved in the instant case. By the employer's own admission, Appellant had an exemplary work record. Thus, Appellant was put on suspension and not discharged. The Board found that the tampering and traveling time violations were violations occurring on the last trip

Appellant made for the employer, i.e. a single violation. Thus, the element of fault is lacking. Even though Appellant's conduct might be grounds for discharge, without fault it is not sufficient for disqualification of unemployment benefits. Logan Regional Hospital v. Board of Review, ____P.2d____, 39 Utah Adv. Rep. 34, 36 (August 5, 1986).

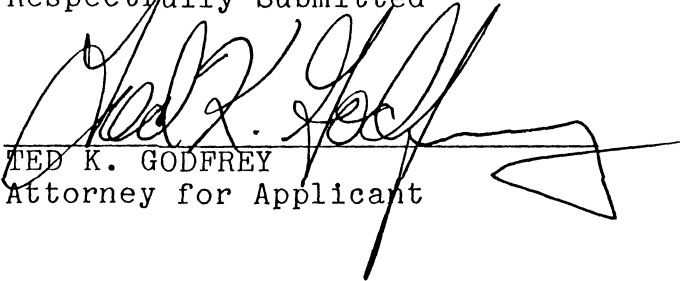
It should also be noted what the Department of Transportation's remedy is for traveling time violations. 49 C.F.R. §395.13(a) declares that the Federal Highway Administration's special agent can declare a driver out of service. The agent must also contact the motor carrier and advise it of that fact. The motor carrier cannot allow an out of service driver to operate a motor vehicle until the driver complies with the rules. §395.3 provides the maximum driving and on-duty time allowable. To be back in-service the driver only needs to take one week off if such driver has been on duty more than 60 hours in the last seven (7) consecutive days. Or if the driver has driven more than ten (10) hours or been on duty more than fifteen (15) hours, such driver must take eight (8) consecutive hours off duty. Once that is accomplished the driver can be released from being out of service. §395.13(c)(1)(i). The policy is not to keep worn-out drivers off the road, but to assure that drivers on the road are fully rested. Since Appellant was suspended for at least one week, he would have had plenty of time to rest up to get back on the road. This is another reason why the Board's decision is not reasonable or rational.

CONCLUSION

Because the ALJ's findings are supported by substantial evidence, and because the ALJ's decision is according to the law, the Board of Review's decision should be reversed since it is not supported by the evidence nor is it reasonable or rational. The ALJ's decision should be reinstated.

DATED this 27th day of August, 1986.

Respectfully Submitted



TED K. GODFREY
Attorney for Applicant

ADDENDUM

- | | | |
|----|---|------|
| 1. | Section 35-4-10 Utah Code Annotated (1953, as amended) | A-2 |
| 2. | Utah Department of Employment Security Rule A71-07-
1:5(II)-1 | A-4 |
| 3. | 49 C.F.R. Sections 395.1 through 395.13 | A-11 |
| 4. | Decision of the Board of Review of the Industrial Commission
of Utah | A-21 |
| 5. | Decision of the Administrative Law Judge | A-24 |
| 6. | Letter from May Trucking to Appellant date January 16,
1986 | A-27 |

Labor-Industrial Commission

tion The moneys shall be invested in the following readily marketable classes of securities, bonds or other interest-bearing obligations of the United States of America, of this state, or of any county, city, town, or school district of this state, at current market prices for the bonds. The investment shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. 1983 35-4-10. Review of decision or determination. 35-4-10. Appeal referees - Board of review - Witness fees - Judicial review by Court of Appeals - Exclusive procedure. (a) A review of a decision or determination involving contribution liability or applications for refund shall be made by the commission or its authorized representative in accordance with the provisions of this act. The decision of the representative conducting the review is deemed the decision of the commission. The commission or its authorized representative conducting the review may refer the matter to an appeal referee, may decide the application for review on the basis of any facts and information as may be obtained or may, in its discretion, hear argument or hold a hearing to secure further facts. After the review, notice of the decision shall be given to the employing unit. The decision made pursuant to the review is the final decision of the commission unless, within ten days after the date of notification or mailing of the decision, a further appeal is initiated under the provisions of this section. (b) Within ten days after the mailing or personal delivery of a notice of a determination or decision rendered following a review under Subsection (a), an employing unit may appeal to an appeal referee by filing a notice of appeal. The appeal referee shall give notice of the pendency of the appeal to the commission, which is then a party to the proceedings. After affording the parties reasonable opportunity for a fair hearing, he shall make findings and conclusions and on that basis affirm, modify, or reverse the determination. The parties shall be promptly notified of the referee's decision and furnished a copy of the decision and findings. The decision is the final decision of the commission unless within ten days after the date of mailing of notice to the parties' last known addresses or in the absence of a mailing within ten days after the delivery of notice, further appeal is initiated under the provisions of this section. (c) The commission shall appoint one or more impartial appeal referees consisting in each case of a salaried referee selected in accordance with Subsection 35-4-11(d) to hear and decide referrals or appeals relating to claims for benefits or to decisions affecting employing units referred to. No referee may participate in any case in which he is an interested party. Each decision of a referee shall represent his independent judgment. (d)(1) The governor shall appoint a review board composed of three impartial members to hear and decide referrals and appeals from the decision of appeal referees. The members shall be: one industrial commissioner, one member who is representative of employers, and one member who is representative of employees. In addition, the governor shall appoint two alternates who are representative of employers and two alternates who are representative of employees. The alternates shall serve in the absence of the regular member or members. The commissioner shall be the chairman, and all records

on appeals shall be maintained in the offices of the commission, those records to include an appeal docket showing the receipt and disposition of the appeals on review. In the absence of a regular member the chairman shall designate an alternate. Every case shall be decided by a full three-member board. The members and the alternates shall be appointed for two-year terms commencing July 1 and ending June 30; the first appointment effective July 1, 1949. The members of the board other than the commissioner shall be paid a per diem for each day of attendance necessary and expenses incurred, in the performance of their duties, as provided by law. At the board's request the legal counsel of the commission shall act as an impartial aid to the board in outlining the facts and the issues. (2) The board of review within the time specified for the filing of appeals may allow an appeal from a decision of an appeals referee on application filed within the designated time by any party entitled to notice of the decision. An appeal filed by the party shall be allowed as of right if the decision did not affirm a prior decision. Upon appeal the board of review may on the basis of the evidence previously submitted in the case, or upon the basis of any additional evidence it requires, affirm, modify, or reverse the findings, conclusions, and decision of the appeal referee. The board of review shall promptly notify the parties to any proceedings before it of its decision, including its findings and conclusions, and the decision is final unless within ten days after mailing of notice to the parties' last known addresses or in the absence of mailing within ten days after the delivery of the notification further appeal is initiated under the provisions of this section. However, upon denial by the board of review of an application for appeal from the decision of an appeal referee the decision of the appeal referee is deemed to be a decision of the board of review within the meaning of this paragraph for purposes of judicial review and is subject to judicial review within the time and in the manner provided. (e) The manner in which disputed matters are presented, the reports required from the claimant and employing units and the conduct of hearings and appeals shall be in accordance with regulations prescribed by the commission for determining the rights of the parties, whether or not the regulations conform to common-law or statutory rules of evidence and other technical rules of procedure. When the same or substantially similar evidence is relevant and material to the matters in issue in more than one proceeding, the same time and place for considering each matter may be fixed, hearings jointly conducted, a single record of the proceedings made, and evidence introduced with respect to one proceeding considered as introduced in the others, if in the judgment of the appeal referee having jurisdiction of the proceedings, the consolidation would not be prejudicial to any party. A full and complete record shall be kept of all proceedings in connection with a disputed matter. All testimony at any hearing upon a disputed matter shall be reported but need not be transcribed unless the disputed matter is appealed. (f) Except for reconsideration of any determination under the provisions of Subsection 35-4-6(b), any right, fact, or matter in issue, directly passed upon or necessarily involved in a determination or redetermination which has become final, or in a decision on appeal under this section which has become final, is conclusive for all the purposes of

this act as between the commission, the claimant, and all employing units that had notice of the determination, redetermination, or decision. Subject to appeal proceedings and judicial review as provided in this section, any determination, redetermination, or decision as to rights to benefits is conclusive for all the purposes of this act and is not subject to collateral attack by any employing unit, irrespective of notice.

(g) Witnesses subpoenaed under this section are allowed fees as provided by law for witnesses in the district court of the state. The fees are part of the expense of administering this act.

(h) Any decision in the absence of an appeal as provided becomes final ten days after the date of notification or mailing and judicial review may be permitted only after any party claiming to be aggrieved has exhausted his remedies before the commission and board of review as provided by this act. The commission is a party to any judicial action involving any decisions and shall be represented in the judicial action by any qualified attorney employed by the commission and designated by it for that purpose or at the commission's request by the attorney general.

(i) Within ten days after the decision of the board of review has become final, any aggrieved party may secure judicial review by commencing an action in the Court of Appeals against the board of review for the review of its decision, in which action any other party to the proceeding before the board of review shall be made a defendant. In that action a petition, which shall state the grounds upon which a review is sought, shall be served upon a member of the board of review or upon that person the board of review designates. This service is considered completed service on all parties but there shall be left with the party served as many copies of the petition as there are defendants and the board of review shall mail one copy to each defendant. With its answer, the board of review shall certify and file with the court all documents and papers and a transcript of all testimony taken in the matter together with its findings of fact and decision. The board of review may also, in its discretion, certify to the court questions of law involved in any decision by it. 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, are conclusive and the jurisdiction of the court is confined to questions of law. It is not necessary in any judicial proceeding under this section to enter exceptions to the rulings of the commission or the board of review, and no bond is required for entering the appeal. Upon final determination of the judicial proceeding, the commission shall enter an order in accordance with the determination. In no event may a petition for judicial review act as a supersedeas.

(j) The procedure provided for hearings and decisions with respect to any decision or determination of the commission affecting claimants or employing units under this act is the sole and exclusive procedure notwithstanding any other provision of this act.

35-4-11. Administration of employment security act.

(1) It is the duty of the industrial commission to administer this act; and it is entitled to adopt, amend, or rescind any general rules, regulations, and special orders, to employ persons, make expenditures, require reports, make investigations, make audits of any or all funds provided for under this

act at times it deems necessary, and take any other action it deems necessary or suitable to that end. The commission shall create the department of employment security for the purpose of administering this act. All personnel of that department, including a full-time administrator, shall be employed on a nonpartisan merit basis. The full-time administrator shall, with the approval of the commission, determine the department's organization and methods of procedure in accordance with the provisions of this act, and he shall, under direction of the commission, supervise the department personnel and its operations. The department of employment security shall have an official seal which shall be judicially noticed. Not later than the first day of October of each year, the commission shall submit to the governor a report covering the administration and operation of this act during the preceding calendar year and shall make any recommendations for amendments to this act as the commission deems proper. The report shall include a balance sheet of the moneys in the fund in which there shall be provided, if possible, a reserve against liability in future years to pay benefits in excess of the then current contributions, which reserve shall be set up by the commission in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period. Whenever the commission believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, it shall promptly inform the governor and the legislature and make appropriate recommendations.

(2) Any two commissioners constitute a quorum. No vacancy impairs the right of the remaining commissioners to exercise all the powers of the commission.

Regulations - General Rule - Special Orders:

(b) General rules and special orders may be adopted, amended, or rescinded by the commission only after an appropriately noticed public hearing or opportunity to be heard thereon. Regulations of the commission may be adopted, amended, or rescinded and become effective as prescribed by the commission. General rules become effective ten days after filing with the lieutenant governor and publication in one or more newspapers of general circulation in this state as the commission shall prescribe. Special orders become effective ten days after notification or mailing to the last known address of the individuals or concerns affected thereby.

Printing and Distribution of Act and Rules of Commission.

(c) The commission shall cause to be printed for distribution to the public the text of this act, the commission's general rules, its regulations and its annual reports to the governor, and any other material the commission deems relevant and suitable and shall furnish the same to any person upon application.

Personnel Merit System.

(d) The commission shall appoint on a nonpartisan merit basis, fix the compensation, and prescribe the duties and powers of officers, accountants, attorneys, experts, and other personnel as necessary in the performance of its duties. The commission shall provide for a merit system covering all those persons, classify and fix the minimum standards for the personnel and formulate salary schedules for the service so classified. The commission shall hold or provide for holding examinations to determine the

1-07-1:5 DEPARTMENT OF EMPLOYMENT SECURITY -- RULES AND REGULATIONS

1)-1 35-4-5(b) DISCHARGE

Section 35-4-5: "An individual shall be ineligible for benefits or for purposes of establishing a waiting period:

(b)(1) For the week in which he has been discharged for just cause or for an act or omission in connection with employment, not constituting a crime, which is deliberate, willful, or wanton and adverse to the employer's rightful interest, if so found by the commission, and thereafter until the claimant has earned an amount equal to at least six times the claimant's weekly benefit amount in bona fide covered employment."

A. GENERAL DEFINITION

Ordinarily accepted concepts of justice are used in determining if a discharge is disqualifying under the "just cause" provisions of the Act. Just cause is defined as a job separation that is necessary due to the seriousness of actual or potential harm to the employer provided the claimant had knowledge of the employer's expectations and had control over the circumstances which led to the discharge. Just cause is not established if the reason for the discharge is baseless, arbitrary or capricious or the employer has failed to uniformly apply reasonable standards to all employees when instituting disciplinary action. The purpose of this section is to deny benefits to individuals who bring about their own unemployment by conducting themselves, with respect to their employment with callousness, misbehavior, or lack of consideration to such a degree that the employer was justified in discharging the employee. However, when an employee is discharged by his employer, such discharge may have been the result of incompetence, lack of skill, or other reasons which are beyond the claimant's control. The question which must be established by the evidence is whether the claimant is at fault in his resulting unemployment. Unemployment insurance benefits will be denied if the employer had just cause for discharging the employee. However, not every cause for discharge provides a basis to deny benefits. In order to have just cause for discharge pursuant to Section 35-4-5(b)(1) there must be some fault on the part of the employee involved.

B. JUST CAUSE

1. The basic factors which establish just cause, and are essential for a determination of ineligibility are:

a. Culpability

This is the seriousness of the conduct or the severity of the offense as it affects continuance of the employment relationship. The discharge must have been necessary to avoid actual or potential harm to the employer's rightful interests. A discharge would not be considered "necessary" if it is not consistent with reasonable employment practices. The wrongness of the conduct must be considered in the context of the particular employment and how it affects the

employer's rights. If the conduct was an isolated incident of poor judgment and there is no expectation that the conduct will be continued or repeated, potential harm may not be shown and therefore it is not necessary to discharge the employee.

(1) Longevity and prior work record are important in determining if the act or omission is an isolated incident or a good faith error in judgement. An employee who has historically complied with work rules does not demonstrate by a single violation, even though harmful, that such violations will be repeated and therefore require discharge to avoid future harm to the employer. For example: A long term employee who does not have a history of tardiness or absenteeism is absent without leave for a number of days due to a death in his immediate family. Although this is a violation of the employer's rules and may establish just cause for discharging a new employee, the fact that the employee has established over a long period of time that he complies with attendance rules shows that the circumstance is more of an isolated incident rather than a violation of the rules that is or could be expected to be habitual. In this case, because the potential for harm to the employer is not shown, it is not necessary for the employer to discharge the employee, and therefore just cause is not established.

b. Knowledge

The employee must have had a knowledge of the conduct which the employer expected. It is not necessary that the claimant intended to cause harm to the employer, but he should reasonably have been able to anticipate the effect his conduct would have. Knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a pertinent written policy, except in the case of a flagrant violation of a universal standard of behavior. If the employer's expectations are unclear, ambiguous or inconsistent, the existence of knowledge is not shown. A specific warning is one way of showing that the employee had knowledge of the expected conduct. After the employee is given a warning he should be given an opportunity to correct objectionable conduct. Additional violations occurring after the warning would be necessary to establish just cause for a discharge.

(1) For Example: When the employer has an established procedure of progressive discipline, such procedures generally must have been followed in order to establish that the employee had knowledge of the expected behavior or the seriousness of the act. The exception is that very severe conduct may justify immediate discharge without following a progressive disciplinary program.

c. Control

The conduct must have been within the power and capacity of the claimant to control or prevent.

2. Just cause may not be established when the reason for discharge is based on such things as mere mistakes, inefficiency, failure of performance as the result of inability or incapacity, inadvertence in isolated instances, good-faith errors in judgment or in the exercise of discretion, minor but casual or unintentional carelessness or negligence, etc. These examples of conduct are

alifying because of the lack of knowledge or control. However, continuing inefficiency, repeated carelessness, or lack of care exercised by ordinary, reasonable workers in similar circumstances, may be disqualifying depending on the reason and degree of the carelessness, the knowledge and control of the employee.

3. The term "just cause" as used in Section 5(b)(1) does not lessen the requirement that there be some fault on the part of the employee involved. Prior to the 1983 addition of the term "just cause" the Commission interpreted Section 5(b)(1) to require an intentional infliction of harm or intentional disregard of the employer's interests. The intent of the Legislature in adding the words "just cause" to Section 5(b)(1) was apparently to correct this restrictive interpretation. While some fault must be present, it is sufficient that the acts were intended, the consequences were reasonably foreseeable, and that such acts have serious effect on the employee's job or the employer's interests.

BURDEN OF PROOF

1. In a discharge, the employer initiates the separation and, as such, is the primary source of information with regard to the reasons for the dismissal. The employer has the burden of proof which is the responsibility to establish the facts resulting in the discharge. The employer is required by the Statute in Section 35-4-11(g) to keep accurate records and to provide correct information to the Department for proper administration of the Act. Although the employer has the burden to establish just cause for the discharge, if sufficient facts are obtained from the claimant, a decision will be made based on the information available. The failure of one party to provide information does not necessarily result in a ruling favorable to the other party.

2. All interested parties have the right to give rebuttal to information contrary to the interests of that party.

QUIT OR DISCHARGE

The determination of whether a separation is a quit or a discharge is made by the Department based on the circumstances which resulted in the separation. The conclusions on the employer's records, the separation notice or the claimant's report are not controlling on the Department.

1. Discharge Before Effective Date of Resignation.

When an individual notifies an employer that he intends to leave as of a definite date in the future and is discharged prior to that date, the cause for the separation on the day the separation takes place is the controlling factor in determining whether it was a quit or discharge. Although the separation might have been motivated by the claimant's announced resignation, the employer was the moving party in ending the employment prior to the resignation date. Therefore, the immediate reason was more closely related to the employer's action than to the claimant's announced intention to quit. Unless disqualifying

conduct is involved, the separation is considered to be for the convenience of the employer. However, if the employee is merely relieved of work responsibilities but is paid through the date of his announced resignation, it is not a discharge, but a quit.

2. Leaving in Anticipation of Discharge.

When an employee leaves work in anticipation of a possible discharge or layoff, and if the reason for the discharge would not be disqualifying, the separation is generally considered to be a voluntary quit. However, an individual who leaves work to avoid virtually certain discharge for disqualifying conduct cannot thereby avoid the disqualifying provisions of Section 35-4-5(b), and the separation is considered a discharge rather than voluntary leaving.

3. Employee Knows His Action Will Result in Discharge

Absences taken without permission, or other actions contrary to specific unreasonable instructions from the employer, are generally considered a voluntary separation rather than discharge, if the worker was given a choice of complying or being separated.

E. DISCIPLINARY SUSPENSION OR INVOLUNTARY FURLOUGH

When an employee is put on a disciplinary suspension or involuntary furlough, he may meet the definition of "unemployed". If the claimant files during the suspension or furlough, the reason for the suspension or furlough must be adjudicated as a discharge, even though the claimant is still attached to the employer and expects to return to work. A suspension which was reasonable and necessary to prevent potential harm to the employer or to maintain necessary discipline would generally result in a disqualification under this section provided the elements of control and knowledge are present. Failure to return to work at the end of the definite period of suspension or furlough would be considered a voluntary quit and eligibility would then be determined consistent with Section 35-4-5(a), if the claimant had not been previously denied.

F. PROXIMAL CAUSE -- Relation of Offense to Discharge

1. The cause for discharge is that conduct which motivates the employer to make the decision to terminate the employee's services. If the decision has truly been made, it is generally demonstrated by way of notice to the employee or the initiation of a personnel action. Although the employer may learn of other offenses following the making of the decision to terminate, the reason for the discharge is limited to that conduct of which the employer was aware prior to making the decision. However, if the employer discharges a person because of some preliminary evidence of certain conduct, but does not obtain all of the proof of the conduct until after the separation notice is given, it could still be concluded that the discharge was caused by that conduct which the employer was investigating. Eligibility for benefits will then be determined by considering the extent of culpability, knowledge and control.

2. When the discharge does not occur immediately after the employer becomes aware of an offense, a presumption arises that there were other reasons for the discharge. This relationship between the offense and the discharge must be established both as to cause and time. The presumption that the conduct was the cause of the discharge may be overcome by a showing that the delay was due to such things as investigation, arbitration, or hearings conducted with regard to the employee's conduct. When a grievance or arbitration is pending with respect to the discharge, the Department's decision will be based on the information available to the Department. The Department's decision is not binding on the grievance resolution process or an arbitrator and the decision of the arbitrator is not binding on the Department. When an employer is faced with the necessity of a reduction in his workforce but uses an employee's prior conduct as the criteria for determining who will be laid off, the lack of work is the primary motivation or cause of the discharge, not the conduct.

IN CONNECTION WITH EMPLOYMENT

Disqualifying conduct is not limited to offenses which take place on the employer's premises or during business hours. It is only necessary that the conduct have such "connection" to the employee's duties and to the employer's business that it is a subject of legitimate and significant concern to the employer. All employers, both public and private have the right to expect employees to refrain from acts which are detrimental to the business or would bring dishonor on the business name or the institution. Legitimate interests of employers include, but are not limited to: goodwill of customers, reputation of the business, efficiency, business costs, morale of employees, discipline, honesty, trust and loyalty.

EXAMPLES OF REASONS FOR DISCHARGE

In all the following examples, the basic elements of just cause must be considered in determining eligibility for benefits. The following examples do not include all reasons for discharge.

1. Violation of Company Rules

If an employee violates reasonable rules of the employer and the three elements of culpability, knowledge and control are established, benefits must be denied.

a. The reasonableness of the employer's rules will depend on the necessity for such a rule as it affects the employer's interests. Rules which are contrary to general public policy or which infringe upon the recognized rights and privileges of individuals may not be reasonable. An employer must have broader prerogatives in regulating conduct when employees are on the job than when they are not. An employer must be able to make rules for employee on-the-job conduct that reasonably further the legitimate business interests of the employer. An employer is not required to impose only minimum standards, but there may be some justifiable cause for violations of rules that are unreasonable or unduly harsh, rigorous or exacting. When rules are changed, adequate notice and reasonable opportunity to comply must be afforded. If the employee believes

a rule is unreasonable, he has the responsibility to discuss his concerns with the employer and give the employer an opportunity to take corrective action:

b. Discharges may be regulated by an employment contract or collective bargaining agreement. Just cause for the discharge is not established if the employee's conduct was consistent with his rights under such contract or the discharge was contrary to the provisions of such contract.

c. Habitual offenses may not be disqualifying conduct if it is found that the act was condoned by the employer or was so prevalent as to be customary. However, when the worker is given notice that the conduct will no longer be tolerated, further violations could result in a denial of benefits.

d. Culpability may be established even if the result of the violation of the rule does not in and of itself cause harm to the employer, but the resultant lack of compliance with rules diminishes the employer's ability to have order and control. Culpability is established if termination of the employee was required to maintain necessary discipline in the company.

e. Knowledge of the employer's standards of behavior is usually provided in the form of verbal instructions, written rules and/or warnings. However, a warning is not always necessary for a disqualification to apply in cases of violations of a serious nature of universal standards of conduct of which the claimant should have been aware without being warned.

2. Attendance Violations

a. It is the duty of the worker to be punctual and remain at work within the reasonable requirements of the employer. Discharge for unjustified absence or tardiness is considered disqualifying if the worker knows that he is violating attendance rules. Such violations are generally a serious matter of concern to employers as attendance standards are necessary to maintain order, control, and productivity. Discharge for an attendance violation beyond the control of the worker is not disqualifying unless the worker reasonably could have given notice or obtained permission consistent with the employer's rules.

b. In cases of termination for violations of attendance standards, the employee's recent history of attendance shall be considered to determine if the violation is an isolated incident, or demonstrates a pattern of unjustified absences within the control of the employee. Flagrant misuse of attendance privileges may result in a denial of benefits even if the last incident was beyond the employee's control.

3. Falsification of Work Record

The duty of honesty is inherent in any employee/employer relationship. A statement made in an application for a job may be considered as connected with the work, even though it is made before the work begins. An individual begins his obligations as an employee when he makes an application for work. One of those obligations is to give the employer truthful answers to all

aterial questions. Any falsification of information which may operate to expose the employer to possible loss, litigation, or damage would be considered aterial and therefore may establish culpability. If the claimant made a false statement while applying for work in order to be hired, benefits may be denied even if the claimant would have otherwise remained unemployed and eligible for the receipt of unemployment benefits depending upon the degree of knowledge, culpability and control.

4. Insubordination

Authority is required in the work place to maintain order and efficiency. An employer has the right to expect that lines of authority will be maintained; that reasonable orders, given in a civil manner, will be obeyed; that supervisors will be respected and that their authority will not be undermined. In determining when insubordination (resistance to authority) becomes disqualifying conduct, the fact that there was a disregard of the employer's interests is of major importance. Mere protests or dissatisfaction without an overt act is not a disregard of the employer's interests. However, provocative remarks to a superior or vulgar or profane language in response to a civil request may be insubordination if it is conducive to disruption of routine, negation of authority and impairment of efficiency. Mere incompatibility or emphatic insistence or discussion by an employee who was acting in good faith is not disqualifying conduct.

5. Loss of License

When an employee loses a license which he knows is required for the performance of the job, and the individual had control over the circumstances which resulted in the loss of the license, such conduct is disqualifying. For example, if the claimant worked as a driver, and lost his license because of a conviction for driving under the influence (DUI), culpability is established if he fails to obtain a permit to drive at work or the conviction would expose the employer to additional liabilities. The employer cannot authorize an employee to drive in violation of the law. Also, additional insurance costs or other liabilities are a legitimate concern of the employer. Knowledge is established because it is a matter of common knowledge in the state of Utah that driving under the influence of alcohol is a violation of the law and is punishable by loss of the individual's driving privileges. Judicial notice can be taken of this fact because a question relative to this matter is on every driver's license test. He had control in that he made a conscious decision to risk loss of the license when he failed to make arrangements for transportation prior to becoming under the influence of intoxicants.

. EFFECTIVE DATE OF DISQUALIFICATION

The Act provides that any disqualification under this section will include the week in which the claimant was discharged . . ." However, to avoid confusion, the denial of benefits will begin with the Sunday of the week for which the claimant has filed for benefits.

Items 27 through 27B: Mark appropriate boxes to indicate road surface condition, number of lanes, and if the highway was divided by a median or curbing.

Item 27C: Mark appropriate box.

Item 28: An account of the accident containing the most reliable information to which the motor carrier has access at the time of reporting, sufficiently detailed and complete to convey an understanding of his version of the accident shall be entered under this item. This account should be continued on an extra sheet of paper if more space is needed.

Item 29: Print or type name and title of person signing report.

Items 30, 31 and 32: Complete appropriate entries. In item 31 include area code.

[37 FR 22868, Oct. 26, 1972]

PART 395—HOURS OF SERVICE OF DRIVERS

Sec.

395.1 Compliance with, and knowledge of, the rules in this part.

395.2 Definitions.

395.3 Maximum driving and on-duty time.

395.7 Travel time.

395.8 Driver's record of duty status.

395.10 Adverse driving conditions.

395.11 Emergency conditions.

395.12 Relief from regulations.

395.13 Drivers declared out of service.

AUTHORITY: Sec. 204, 49 Stat. 546, as amended; 49 U.S.C. 304, unless otherwise noted.

SOURCE: 33 FR 19758, Dec. 25, 1968, unless otherwise noted.

§ 395.1 Compliance with, and knowledge of, the rules in this part.

(a) *General.* Except as provided in paragraph (b) of this section, every motor carrier and its officers, drivers, agents, employees, and representatives shall comply with the rules in this part, and every motor carrier shall require that its officers, drivers, agents, employees, and representatives be conversant with the rules in this part.

(b) *Lightweight mail trucks.* The rules in this part do not apply to a driver who drives only a motor vehicle that—

(1) Is used exclusively to transport mail under contract with the U.S. Postal Service; and

(2) Has a manufacturer's gross vehicle weight rating of 10,000 pounds or less.

[37 FR 26113, Dec. 8, 1972]

§ 395.2 Definitions.

As used in this part, the following words and terms are construed to mean:

(a) *On-duty time.* All time from the time a driver begins to work or is required to be in readiness to work until the time he is relieved from work and all responsibility for performing work. The term "On-duty" time shall include:

(1) All time at a carrier or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier.

(2) All time inspecting equipment as required by §§ 392.7 and 392.8 or otherwise inspecting, servicing, or conditioning any motor vehicle at any time;

(3) All driving time as defined in paragraph (b) of this section;

(4) All time, other than driving time, in or upon any motor vehicle except time spent resting in a sleeper berth as defined in paragraph (g) of this section;

(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded;

(6) All time spent performing the driver requirements of §§ 392.40 and 392.41 relating to accidents;

(7) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle;

(8) Performing any other work in the capacity of, or in the employ or service of, a common, contract or private motor carrier.

(b) *Driving time.* The terms "drive" and "driving time" shall include all time spent at the driving controls of a motor vehicle in operation.

(c) *Seven consecutive days.* The term "7 consecutive days" means the period of 7 consecutive days beginning on any day at the time designated by the motor carrier for a 24-hour period.

(d) *Eight consecutive days.* The term "8 consecutive days" means the period of 8 consecutive days beginning on any

at the time designated by the carrier for a 24-hour period.

Twenty-four hour period. The "24-hour period" means any 24 consecutive hour period beginning at the time designated by the motor carrier at the terminal from which the driver is normally dispatched.

Regularly employed driver. The "regularly employed driver" means a driver who in any period of 7 consecutive days is employed or used solely by a single motor carrier.

Sleeper berth. The term "sleeper berth" means a berth conforming to the requirements of § 393.76 of this chapter.

Driver-salesman. The term "driver-salesman" means any employee who is employed solely as such by a motor carrier of property by motor vehicle, who is engaged both in selling goods or services, or the use of goods, delivered by motor vehicle the sold or provided or upon which services are performed, who does so within a radius of 100 miles from the point at which he reports for duty, who devotes not more than 50 percent of his hours on duty to driving the motor vehicle, and the term "selling goods" for purposes of this subsection shall include in all cases solicitation or obtaining of reorders or new accounts, and also include other selling or marketing activities designed to retain the customer or to increase the sale of goods or services, in addition to solicitation or obtaining of reorders or new orders.

Multiple stops. All stops made in the village, town, or city may be treated as one.

Principal place of business or office address. The principal place of business or main office address is the geographic location designated by the motor carrier where the driver is required to be maintained by the carrier and it will be made available for inspection.

I.C. 304, 1653; 49 CFR 1.46 and

19758, Dec. 25, 1968, as amended at 46424, July 10, 1980; 47 FR 53389, 1982]

§ 395.3 Maximum driving and on-duty time.

(a) Except as provided in paragraphs (c) and (e) of this section and in § 395.10, no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive:

(1) More than 10 hours following 8 consecutive hours off duty; or

(2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.

(3) Exemption: Drivers using sleeper berth equipment as defined in § 395.2(g), or who are off duty at a natural gas or oil well location, may cumulate the required 8 consecutive hours off duty resting in a sleeper berth in two separate periods totaling 8 hours, neither period to be less than 2 hours, or resting while off duty in other sleeping accommodations at a natural gas or oil well location.

(b) Except as provided in paragraph (e) of this section, no motor carrier shall permit or require any driver used by it to be on duty, nor shall any such driver be on duty, more than 60 hours in any 7 consecutive days as defined in § 395.2(c) regardless of the number of motor carriers using the driver's services. *Provided, however,* That carriers operating vehicles every day in the week may permit drivers to remain on duty for a total of not more than 70 hours in any period of 8 consecutive days. *Provided further, however,* That the limitations of this paragraph shall not apply with respect to any driver-salesman whose total driving time does not exceed 40 hours in any 7 consecutive days.

(c) The provisions of paragraph (a) of this section shall not apply with respect to drivers used wholly in driving motor vehicles having not more than 2 axles and whose gross weight, as defined in § 390.10, does not exceed 10,000 pounds, unless such vehicle is used to transport passengers or explosives or other dangerous articles of such type and in such quantity as to require the vehicle to be specifically marked or placarded under the Hazardous Materials Regulations, § 177.823 of this title, or when operated without cargo under conditions which require the vehicle to be so

marked or placarded under the cited regulations: *Provided further, however*, That this section shall not apply with respect to drivers of motor vehicles engaged solely in making deliveries for retail stores during the period from December 10 to December 25, both inclusive, of each year.

(d) In the instance of drivers of motor vehicles used exclusively in the transportation of oilfield equipment, including the stringing and picking up of pipe used in pipelines, and servicing of the field operations of the natural gas and oil industry, any period of 8 consecutive days may end with the beginning of any off-duty period of 24 or more successive hours.

(e) A driver who is driving a motor vehicle in the State of Alaska must not drive or be permitted to drive more than 15 hours following 8 consecutive hours off duty. A driver who is driving a motor vehicle in the State of Alaska must not drive or be permitted to drive after he has been on duty for 20 hours or more following 8 consecutive hours off duty. A driver who drives a motor vehicle in the State of Alaska must not be on duty or be permitted to be on duty more than—

(1) 70 hours in any period of 7 consecutive days, if the carrier for whom he drives does not operate every day in the week; or

(2) 80 hours in any period of 8 consecutive days, if the carrier for whom he drives operates every day in the week.

(f) In the case of specially trained drivers of specially constructed oil well servicing vehicles, on-duty time shall not include waiting time at a natural gas or oil well site; *Provided*, That all such time shall fully and accurately accounted for in records to be maintained by the motor carrier. Such records shall be made available upon request of the Federal Highway Administration.

[33 FR 19758, Dec. 25, 1968, as amended at 36 FR 20369, Oct. 21, 1971; 45 FR 46424 and 46425, July 10, 1980]

§ 395.7 Travel time.

When a driver at the direction of a motor carrier is travelling, but not driving or assuming any other responsibility to the carrier, such time shall be

counted as on-duty time unless the driver is afforded at least 8 consecutive hours off duty when arriving at destination, in which case he shall be considered off duty for the entire period.

§ 395.8 Driver's record of duty status.

(a) Every motor carrier shall require every driver used by the motor carrier to record his/her duty status, in duplicate, for each 24-hour period. Every driver who operates a motor vehicle shall record his/her duty status, in duplicate, for each 24-hour period. The duty status time shall be recorded on a specified grid, as shown in paragraph (g) of this section. The grid and the requirements of paragraph (d) of this section may be combined with any company forms. The previously approved format of the Daily Log, Form MCS-59 or the Multi-day Log, MCS-139 and MCS-139A, which meets the requirements of this paragraph, may continue to be used.

(b) The duty status shall be recorded as follows:

(1) "Off duty" or "OFF."

(2) "Sleeper berth" or "SB" (only if a sleeper berth used).

(3) "Driving" or "D."

(4) "On-duty not driving" or "ON."

(c) For each change of duty status (e.g., the place of reporting for work, starting to drive, on-duty not driving and where released from work), the name of the city, town, or village, with State abbreviation, shall be recorded.

NOTE: If a change of duty status occurs at a location other than a city, town, or village, show one of the following: (1) The highway number and nearest milepost followed by the name of the nearest city, town, or village and State abbreviation, (2) the highway number and the name of the service plaza followed by the name of the nearest city, town, or village and State abbreviation, or (3) the highway numbers of the nearest two intersecting roadways followed by the name of the nearest city, town, or village and State abbreviation.

(d) The following information must be included on the form in addition to the grid:

(1) Date;

(2) Total miles driving today;

(3) Truck or tractor and trailer number;

ne of carrier;
ver's signature/certification;
hour period starting time (e.g.
t, 9:00 a.m., noon, 3:00 p.m.);
in office address;
marks;
al mileage today;
ume of co-driver;
me terminal address;
otal hours (far right edge of

ipping document number(s),
of shipper and commodity;
lgin; and
Destination or turnaround

lure to complete the record of
ivities, failure to preserve a
f such duty activities, or
f false reports in connection
h duty activities as prescribed
hall make the driver and/or
er liable to prosecution.

driver's activities shall be re-
in accordance with the follow-
sions:

tries to be current. Drivers
p their record of duty status
o the time shown for the last
f duty status.

ries made by driver only. All
lating to driver's duty status
egible and in the driver's own
ing.

e. The month, day and year
beginning of each 24-hour
all be shown on the form
g the driver's duty status

al mileage driven. Total mile-
n during the 24-hour period
ecorded on the form contain-
river's duty status record.

icle identification. The carri-
le number or State and li-
mber of each truck, truck
und trailer operated during
our period shall be shown on
containing the driver's duty
ord.

ie of carrier. The name(s) of
r carrier(s) for which work is
d shall be shown on the form
g the driver's duty status
hen work is performed for
n one motor carrier during
24-hour period, the begin-
finishing time, showing a.m.
orked for each carrier shall

be shown after each carrier name.
Drivers of leased vehicles shall show
the name of the motor carrier per-
forming the transportation.

(7) *Signature/certification.* The
driver shall certify to the correctness
of all entries by signing the form con-
taining the driver's duty status record
with his/her legal name or name of
record. The driver's signature certifies
that all entries required by this sec-
tion made by the driver are true and
correct.

(8) *Time base to be used.* (i) The driv-
er's duty status record shall be pre-
pared, maintained, and submitted
using the time standard in effect at
the driver's home terminal, for a 24-
hour period beginning with the time
specified by the motor carrier for that
driver's home terminal.

(ii) The term "7 or 8 consecutive
days" means the 7 or 8 consecutive 24-
hour periods as designated by the car-
rier for the driver's home terminal.

(iii) The 24-hour period starting time
must be identified on the driver's duty
status record. One-hour increments
must appear on the graph, be identi-
fied, and preprinted. The words "Mid-
night" and "Noon" must appear above
or beside the appropriate one-hour in-
crement.

(9) *Main office address.* The motor
carrier's main office address shall be
shown on the form containing the
driver's duty status record.

(10) *Recording days off duty.* Two or
more consecutive 24-hour periods off
duty may be recorded on one duty
status record.

(11) *Total mileage today.* Total mile-
age today shall be that mileage trav-
eled while driving, on duty not driving,
and resting in a sleeper berth, as de-
fined in § 395.2(g) during the day cov-
ered by the record of duty status.

(12) *Home terminal.* The driver's
home terminal address shown shall be
that at which the driver normally re-
ports for duty.

(13) *Total hours.* The total hours in
each duty status: off duty other than
in a sleeper berth; off duty in a sleeper
berth; driving, and on duty not driv-
ing, shall be entered to the right of
the grid, the total of such entries shall
equal 24 hours.

Federal Highway Administration, DOT

§ 395.8

(14) Shipping document number(s), or name of shipper and commodity shall be shown on the driver's record of duty status.

(15) *Origin and destination.* The name of the place where a trip begins and the final destination or farthest turn-around point shall be shown. If the trip requires more than 1 calendar day, the record of duty status for each day shall show the original and final

destination. If a driver departs from and returns to the same place on any day, the destination shall be indicated by entering the farthest point reached followed by the words "and return".

(g) *Graph grid.* The following graph grid must be incorporated into a motor carrier recordkeeping system which must also contain the information required in paragraph (d) of this section.

rid - Horizontally

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100	101	102	103	104	105	106	107	108	109	110	111	112	113	114	115	116	117	118	119	120	121	122	123	124	125	126	127	128	129	130	131	132	133	134	135	136	137	138	139	140	141	142	143	144	145	146	147	148	149	150	151	152	153	154	155	156	157	158	159	160	161	162	163	164	165	166	167	168	169	170	171	172	173	174	175	176	177	178	179	180	181	182	183	184	185	186	187	188	189	190	191	192	193	194	195	196	197	198	199	200	201	202	203	204	205	206	207	208	209	210	211	212	213	214	215	216	217	218	219	220	221	222	223	224	225	226	227	228	229	230	231	232	233	234	235	236	237	238	239	240	241	242	243	244	245	246	247	248	249	250	251	252	253	254	255	256	257	258	259	260	261	262	263	264	265	266	267	268	269	270	271	272	273	274	275	276	277	278	279	280	281	282	283	284	285	286	287	288	289	290	291	292	293	294	295	296	297	298	299	300	301	302	303	304	305	306	307	308	309	310	311	312	313	314	315	316	317	318	319	320	321	322	323	324	325	326	327	328	329	330	331	332	333	334	335	336	337	338	339	340	341	342	343	344	345	346	347	348	349	350	351	352	353	354	355	356	357	358	359	360	361	362	363	364	365	366	367	368	369	370	371	372	373	374	375	376	377	378	379	380	381	382	383	384	385	386	387	388	389	390	391	392	393	394	395	396	397	398	399	400	401	402	403	404	405	406	407	408	409	410	411	412	413	414	415	416	417	418	419	420	421	422	423	424	425	426	427	428	429	430	431	432	433	434	435	436	437	438	439	440	441	442	443	444	445	446	447	448	449	450	451	452	453	454	455	456	457	458	459	460	461	462	463	464	465	466	467	468	469	470	471	472	473	474	475	476	477	478	479	480	481	482	483	484	485	486	487	488	489	490	491	492	493	494	495	496	497	498	499	500	501	502	503	504	505	506	507	508	509	510	511	512	513	514	515	516	517	518	519	520	521	522	523	524	525
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Graph Grid - Vertically

OFF DUTY
SLEEPER
BERTH
DRIVING
ON DUTY
(near Driving)

REMARKS

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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(h) *Graph grid preparation.* The graph grid may be used horizontally or vertically and shall be completed as follows:

(1) *Off duty.* Except for time spent resting in a sleeper berth, a continuous line shall be drawn between the appropriate time markers to record the period(s) of time when the driver is not on duty, is not required to be in readiness to work, or is not under any responsibility for performing work.

(2) *Sleeper berth.* A continuous line shall be drawn between the appropriate time markers to record the period(s) of time off duty resting in a sleeper berth, as defined in § 395.2(g). (If a non sleeper berth operation, sleeper berth need not be shown on the grid.)

(3) *Driving.* A continuous line shall be drawn between the appropriate time markers to record the period(s) of time on duty driving a motor vehicle, as defined in § 395.2(b).

(4) *On duty not driving.* A continuous line shall be drawn between the appropriate time markers to record the period(s) of time on duty not driving specified in § 395.2(a).

(5) *Location—remarks.* The name of the city, town, or village, with State abbreviation where each change of duty status occurs shall be recorded.

NOTE: If a change of duty status occurs at a location other than a city, town, or village, show one of the following: (1) The highway number and nearest milepost followed by the name of the nearest city, town, or village and State abbreviation, (2) the highway number and the name of the service plaza followed by the name of the nearest city, town, or village and State abbreviation, or (3) the highway numbers of the nearest two intersecting roadways followed by the name of the nearest city, town, or village and State abbreviation.

(i) *Filing driver's record of duty status.* The driver shall submit or forward by mail the original driver's record of duty status to the regular employing motor carrier within 13 days following the completion of the form.

(j) *Drivers used by more than one motor carrier.* (1) When the services of a driver are used by more than one motor carrier during any 24-hour period in effect at the driver's home

terminal, the driver shall submit a copy of the record of duty status to each motor carrier. The record shall include:

(i) All duty time for the entire 24-hour period;

(ii) The name of each motor carrier served by the driver during that period; and

(iii) The beginning and finishing time, including a.m. or p.m., worked for each carrier.

(2) Motor carriers, when using a driver for the first time or intermittently, shall obtain from the driver a signed statement giving the total time on duty during the immediately preceding 7 days and the time at which the driver was last relieved from duty prior to beginning work for the motor carriers.

(k) *Retention of driver's record of duty status.* (1) Driver's records of duty status for each calendar month may be retained at the driver's home terminal until the 20th day of the succeeding calendar month. Such records shall then be forwarded to the carrier's principal place of business where they shall be retained with all supporting documents for a period of 6 months from date of receipt.

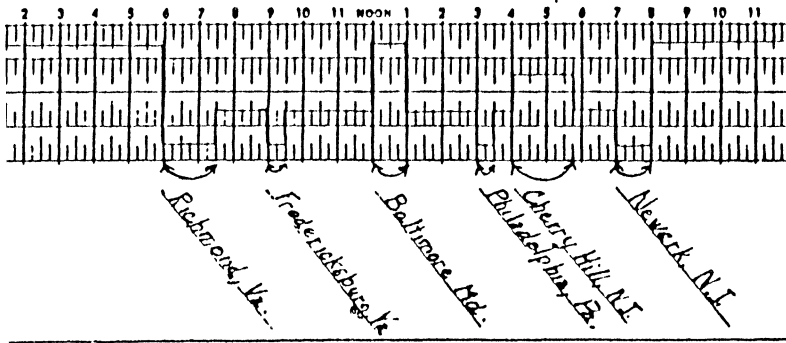
(2) *Exception.* Upon written request to, and with the approval of, the Associate Regional Administrator for Motor Carrier Safety for the region in which the motor carrier has its principal place of business, a motor carrier may forward and maintain such records at a regional or terminal office. The addresses and jurisdictions of the Associate Regional Administrator's offices are shown in § 390.40 of this subchapter.

(3) The driver shall retain a copy of each record of duty status for the previous 7 consecutive days which shall be in his/her possession and available for inspection while on duty.

NOTE: Driver's Record of Duty Status.

The graph grid, when incorporated as part of any form used by a motor carrier, must be of sufficient size to be legible.

The following executed specimen grid illustrates how a driver's duty status should be recorded for a trip from Richmond, Virginia, to Newark, New Jersey. The grid reflects the midnight to midnight 24-hour period.



Midnight to Midnight Operation

In this instance reported for motor carrier's terminal. The driver for work at 6 a.m., helped with dispatch, made a pretrip performed other duties until the driver began driving. At 1 p.m. the driver had a minor accident in Virginia, and spent one half day with the local police. Arrived at the company's Baltimore terminal at noon and went to minor repairs were made to the truck. At 1 p.m. the driver resumed driving and made a delivery in Philadelphia, between 3 p.m. and 3:30 p.m. the driver started driving again at Cherry Hill, New Jersey, the driver entered the truck for a rest break until 5:45 p.m. the driver resumed driving and the driver arrived at the terminal in Newark, New Jersey.

At 8 p.m. the driver prepared paperwork including the driver's record of duty condition report, Insurance report, Fredericksburg, Virginia accident report, the next day's dispatch, the driver went off duty.

Exemptions—(1) 100 air-mile
A driver is exempt from the provisions of this section if:

(i) The driver operates within a 100-mile radius of the normal work area;

(ii) The driver, except a driver salesperson, is released from work at the end of the day;

(iii) The driver has 8 consecutive hours off duty for each 12 hours on duty;

(iv) The driver does not exceed 10 hours maximum driving time following 8 consecutive hours off duty;

(v) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:

(A) The time the driver reports for duty each day;

(B) The total number of hours the driver is on duty each day;

(C) The time the driver is released from duty each day; and

(D) The total time for the preceding 7 days in accordance with paragraph (j)(2) of this section for drivers used for the first time or intermittently.

(2) Drivers of lightweight vehicles.
The rules in this section do not apply to a driver of a lightweight vehicle as defined in § 390.17.

(3) Drivers operating in Hawaii.
The rules in this section do not apply to a driver who drives a motor vehicle in the State of Hawaii, if the motor carrier who employs the driver maintains and retains for a period of 6 months accurate and true records showing—

(i) The total number of hours the driver is on duty each day; and

(ii) The time at which the driver reports for, and is released from, duty each day.

(Approved by the Office of Management and Budget under control number 2125-0016)

(49 U.S.C. 304, 1653; 49 CFR 1.46 and 301.60; 49 U.S.C. 3102; 49 CFR 1.48(b))

Federal Highway Administration, DOT

§ 395.13

[47 FR 53389, Nov. 26, 1982, as amended at 49 FR 38290, Sept. 28, 1984; 49 FR 46147, Nov. 23, 1984]

§ 395.10 Adverse driving conditions.

(a) Except as provided in paragraph (b) of this section, a driver who encounters adverse driving conditions (as defined in paragraph (c) of this section) and cannot, because of those conditions, safely complete the run within the 10 hour maximum driving time permitted by § 395.3(a) may drive and be permitted or required to drive a motor vehicle for not more than 2 additional hours in order to complete that run or to reach a place offering safety for vehicle occupants and security for the vehicle and its cargo. However, that driver may not drive or be permitted or required to drive—

(1) For more than 12 hours in the aggregate following 8 consecutive hours off duty; or

(2) After he has been on duty 15 hours following 8 consecutive hours off duty.

(b) A driver who is driving a motor vehicle in the State of Alaska and who encounters adverse driving conditions (as defined in paragraph (c) of this section) may drive and be permitted or required to drive a motor vehicle for the period of time needed to complete the run. After he completes the run, that driver must be off duty for 8 consecutive hours before he drives again.

(c) "Adverse driving conditions" means snow, sleet, fog, other adverse weather conditions, a highway covered with snow or ice, or unusual road and traffic conditions, none of which were apparent on the basis of information known to the person dispatching the run at the time it was begun.

[38 FR 1590, Jan. 16, 1973]

§ 395.11 Emergency conditions.

In case of any emergency, a driver may complete his run without being in violation of the provisions of these regulations, if such run could reasonably have been completed without such violation.

§ 395.12 Relief from regulations.

These regulations shall not apply to any carrier subject thereto when transporting passengers or property to

or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster.

§ 395.13 Drivers declared out of service.

(a) *Authority to declare drivers out of service.* Every special agent of the Federal Highway Administration (as defined in Appendix B to this subchapter) is authorized to declare a driver out of service and to notify the motor carrier of that declaration, upon finding at the time and place of examination that the driver has violated the out of service criteria as set forth in paragraph (b) of this section.

(b) *Out of service criteria.* (1) No driver shall drive after being on duty in excess of the maximum periods permitted by this part.

(2) No driver required to maintain a record of duty status under § 395.8 shall fail to have a record of duty status current on the day of examination and for the prior 7 consecutive days.

(3) *Exception.* A driver failing only to have possession of a record of duty status current on the day of examination and the prior day, but has completed records of duty status up to that time (previous 8 days), will be given the opportunity to make the duty status record current.

(c) *Responsibilities of motor carriers.* (1) No motor carrier shall:

(i) Require or permit a driver who has been declared out of service to operate a motor vehicle until that driver may lawfully do under the rules in this part.

(ii) Require a driver who has been declared out of service for failure to prepare a record of duty status to operate a motor vehicle until that driver has been off duty for 8 consecutive hours and is in compliance with this section. The consecutive 8 hour off duty period may include sleeper berth time.

(2) A motor carrier shall complete the "Motor Carrier Certification of Action Taken" portion of the form MCS-63 (Driver-Vehicle Examination Report) and deliver the copy of the form either personally or by mail to

sociate Regional Administrator
otor Carrier Safety, Federal
y Administration, at the ad-
pecified upon the form within
following the date of examina-
the motor carrier mails the
elivery is made on the date it is
rked.

Responsibilities of the driver. (1)
er who has been declared out
ce shall operate a motor vehi-
ll that driver may lawfully do
r the rules of this part.

o driver who has been declared
service, for failing to prepare a
of duty status, shall operate a
vehicle until the driver has
f duty for 8 consecutive hours
a compliance with this section.

driver to whom a form has
ndered declaring the driver out
ce shall within 24 hours there-
eliver or mail the copy to a
or place designated by motor
o receive it.

ection 395.13 does not alter the
us materials requirements pre-
in § 397.5 pertaining to attend-
d surveillance of motor vehi-

304, 1655(e); 49 CFR 1.48 and

1963, June 18, 1979, as amended at
192, Nov. 26, 1982]

396—INSPECTION, REPAIR, AND MAINTENANCE

pe.
pection, repair, and maintenance.
rientation.
safe operations forbidden.
pection of motor vehicles in oper-

river vehicle inspection report(s).
river inspection.
iveaway-towaway operations, in-
ons.

ry: Sec. 204, 49 Stat. 546, as
(49 U.S.C. 304), sec. 6, Pub. L. 89-
at. 937 (49 U.S.C. 1655); 49 CFR
0).

44 FR 38526, July 2, 1979, unless
noted.

ope.
eral—Every motor carrier, its
drivers, agents, representa-
d employees directly con-

cerned with the inspection or mainte-
nance of motor vehicles shall comply
and be conversant with the rules of
this part.

(b) *Exemption*—(1) *Intracity oper-
ations.* The rules in this part do not
apply to a driver or vehicle wholly en-
gaged in exempt intracity operations
as defined in § 390.16 of this subchap-
ter.

(2) *Lightweight mail trucks.* The
rules in this part do not apply to a
motor carrier or driver engaged in
transporting mail under contract with
the U.S. Postal Service in motor vehi-
cles having a manufacturer's gross ve-
hicle weight rating of 4,535 kg (10,000
pounds) or less.

§ 396.3 Inspection, repair, and mainte- nance.

(a) *General*—Every motor carrier
shall systematically inspect, repair,
and maintain, or cause to be system-
atically inspected, repaired, and main-
tained, all motor vehicles subject to its
control.

(1) Parts and accessories shall be in
safe and proper operating condition at
all times. These include those specifi-
ed in Part 393 of this subchapter and
any additional parts and accessories
which may affect safety of operation,
including but not limited to, frame
and frame assemblies, suspension sys-
tems, axles and attaching parts,
wheels and rims, and steering systems.

(2) Pushout windows, emergency
doors, and emergency door marking
lights in buses shall be inspected at
least every 90 days.

(b) *Required records*—For vehicles
controlled for 30 consecutive days or
more, the motor carriers shall main-
tain, or cause to be maintained, the
following records for each vehicle:

(1) An identification of the vehicle
including company number, if so
marked, make, serial number, year,
and tire size. In addition, if the motor
vehicle is not owned by the motor car-
rier, the record shall identify the
name of the person furnishing the ve-
hicle;

(2) A means to indicate the nature
and due date of the various inspection
and maintenance operations to be per-
formed;

BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

SMH/TK/LRB/mgn

MICHAEL F. GRINNELL	:	
S.S.A. No. 384 62 5299	:	
	:	Case No. 86-A-563
vs.	:	DECISION
	:	Case No. 86-BR-106
DEPARTMENT OF EMPLOYMENT SECURITY	:	

After careful consideration of the record and testimony in the above-entitled matter, the Board of Review hereby reverses the decision of the Administrative Law Judge which allowed benefits to the claimant effective December 29, 1985, pursuant to §35-4-5(b)(1) of the Utah Employment Security Act, on the grounds the claimant was discharged from his employment but not for conduct which is disqualifying under the provisions of §35-4-5(b)(1) of the Utah Employment Security Act; and held the employer, May Trucking Company, liable for benefit charges in connection with this claim. Benefits are denied to the claimant effective December 29, 1985 and continuing until he has worked in bona fide covered employment and earned wages equal to at least six times his weekly benefit amount and is otherwise eligible, on the grounds the claimant was discharged from his employment for conduct which is disqualifying under the provisions of §35-4-5(b)(1) of the Act. This disqualification establishes an overpayment in the amount of \$1,351, pursuant to §35-4-6(e) of the Act, which must be offset by future benefits to which the claimant may become eligible during his current benefit year. The employer, May Trucking Company, is relieved of benefit charges in connection with this claim.

In reversing the decision of the Administrative Law Judge, the Board of Review notes that the claimant was discharged from his employment after returning from a trip when the employer learned: (1) that the truck's road speed governor had been altered to allow driving in excess of the 62-mile per hour maximum speed the governor would have allowed; (2) noted that the on-board computer showed the truck had averaged about 66 miles per hour; (3) that the claimant had operated his vehicle for nearly 22 hours out of a 24-hour period, which is clearly a violation of both the United States Department of Transportation Hours of Service Regulations and company policy; and (4) on a urinalysis test for drug usage he was found to have used a controlled substance (marijuana).

The Board of Review acknowledges that there may well be insufficient evidence respecting the claimant's use of marijuana to demonstrate when the claimant had actually used the drug or what effect, if any, the use of the drug had upon his driving ability. Nevertheless, the Board of Review does not accept the ALJ's conclusion that the claimant's discharge

BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

MICHAEL F. GRINNELL
S.S.A. No. 384 62 5299

vs.

DEPARTMENT OF EMPLOYMENT SECURITY

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Case No. 86-A-563

DECISION

Case No. 86-BR-106

Page 2

should be adjudicated solely on the basis of the evidence respecting the claimant's use of marijuana. The employer clearly testified that it was the cumulative effect of all of the above-listed factors which resulted in a decision to terminate the claimant. The employer has noted in its appeal that the number of hours which the claimant drove in a 24-hour period exceeded double the federal permissible limit and at speeds substantially in excess of the maximum speed limit. Moreover, these violations of company policy, as well as state and federal laws, were not just isolated incidents that had accumulated over the period of the claimant's employment, but rather were an accumulation of evidence respecting the claimant's conduct on the last trip he drove for the employer. The fact that it took the employer several days to accumulate and evaluate the evidence cannot be used as a basis for looking only at the strength or weakness of the last evidence obtained in making the determination of whether the claimant should be disqualified under the provisions of §35-4-5(b)(1) of the Act and entirely disregarding the more substantial evidence respecting other acts that were part of the same incident.

This decision will become final ten days after the date of mailing hereof, and any further appeal must be made directly with the Utah Supreme Court at the State Capitol Building, Salt Lake City, Utah, within ten days after this decision becomes final. To file an appeal with the Supreme Court, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35-4-10(1) of the Utah Employment Security Act, followed by a Docketing Statement and a Legal Brief.

/S/ Stephen M. Hadley
/S/ James F. Hannan

I dissent.

I don't feel that the urinalysis test for drug usage results were that conclusive, particularly where they were taken nearly a week after the

0007

BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

MICHAEL F. GRINNELL
S.S.A. No. 384 62 5299

vs.

DEPARTMENT OF EMPLOYMENT SECURITY

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Case No., 86-A-563

DECISION

Case No. 86-BR-106

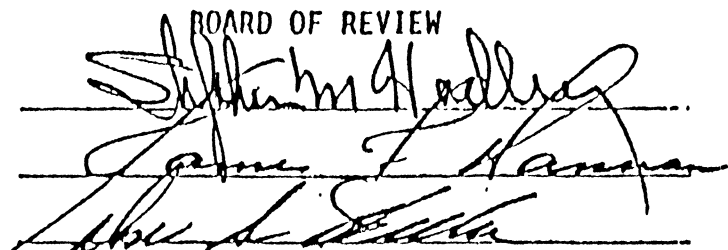
Page 3

claimant's return from the trip. Moreover, I do not find that the claimant's driving 66 miles per hour, which admittedly is in violation of the law, is that appreciably higher than 62 miles an hour, also in violation of the law, which the employer basically authorized as evidenced by the fact that that's the speed at which the governor was set.

/S/ Don S. Belka

Dated this 29th day of April, 1986.

Date Mailed: May 1, 1986.

BOARD OF REVIEW


000

THE INDUSTRIAL COMMISSION OF UTAH
DEPARTMENT OF EMPLOYMENT SECURITY

Appeals Tribunal

Decision of Administrative Law Judge

Michael F. Grinnell	:	S.S.A. No. 384 62 5299
2575 Hwy 89	:	
Brigham City, Utah 84302	:	Case No. 86-A-563

APPEAL FILED: January 29, 1986

DATE OF HEARING: February 19, 1986

APPEARANCES: Claimant/Employer

PLACE OF HEARING: Brigham City, Utah

The Department's decision dated January 24, 1986 denied unemployment insurance benefits effective December 29, 1986 on the grounds the claimant was discharged for just cause. Section 35-4-5(b)(1) and 35-4-7(c)(3)(F) of the Utah Employment Security Act are quoted on the attached sheet.

FINDINGS OF FACT:

Prior to filing a claim for unemployment insurance benefits effective December 29, 1985, the claimant worked as a tractor trailer driver for May Trucking Company from September 20, 1984 to December 19, 1985. His weekly benefit amount is \$193.00 for 26 weeks.

The claimant was discharged when he was determined to have traces of the drug marijuana in his system. After returning from a trip, a mechanic reported to the employer the dashboard on the claimant's truck had been removed and an air control valve on the governor had been altered. The governor controlled the truck's speed to below 62 miles per hour. An on board computer showed the truck had averaged about 66 miles per hour. When confronted about the problem, the claimant told the safety director he had air brake problems and he had tried to correct the difficulties. While the investigation into the air valve was being conducted, the safety director discovered the claimant had recorded an excessive driving time on his log. He had shown nearly 22 hours of driving time in a 24 hour period. The claimant had violated ICC standards by driving without taking proper break time. He was put on suspension as a result of the two incidents and the safety director ordered him to take a physical examination and a urine analysis because there was a serious question as to his ability to drive the extended time period without using amphetamines or other such drugs. The urine analysis established he had the trace of marijuana in his system. The claimant was discharged at that time.

The employer's policy prohibited the use of drugs or alcohol while employed by the company, but there was no written rules available to explain the details of the policy. The safety director felt the rule applied to a driver regardless of when the drugs were used. The claimant understood the rule was violated if the driver

consumed the substances while in or around a truck or under the influence of the substances while operating the vehicle. He had consumed the drug about two to three weeks before the test was administered and he had not used the substance regularly. The urine analysis test had been conducted by a local laboratory, but there was no information available to explain what influence the amount of drug in the claimant's system might have had on the claimant.

The claimant had a good performance record with the employer and he had not had any prior disciplinary problems. Due to his record, the employer had chosen to give him a suspension following the incidents involving the governor and the ICC violation of excessive driving time rather than discharge him.

REASONING AND CONCLUSION OF LAW:

A denial of unemployment insurance benefits following a discharge is based on a fault concept, as explained in the following decision:

When an employee is discharged by his employer, such discharge may have been the result of incompetence, lack of skill, or other reasons which are clearly beyond the claimant's control. The fact of willful or wanton conduct is not established merely by the claimant's knowledge that he is violating a reasonable rule of the employer; rather, it must be shown from the evidence that the claimant knew or had reason to know that his conduct may result in loss of employment. (Utah Board of Review, 80-BR-322.)

In the present case, the evidence clearly established the claimant's discharge was the result of the discovery of a drug in his system and the other incidents were not the primary reason for the termination. The employer was justified in having a policy designed to control and eliminate the problems of drug or alcohol used among its truck drivers, but in this instance there is substantial confusion as to the understanding of that rule and the application of the rule in the claimant's case. The claimant testified credibly that he had not consumed the drug for a considerable amount of time and he was not a regular user of the drug. He understood he was not in violation of the rule unless the drug had an influence on his driving performance or he had consumed the drug in or around a company vehicle. There was insufficient evidence provided to support the employer's contention the claimant knew he would be terminated for any use of drugs and the employer did not meet its burden of proof in this case to show the claimant had knowledge he would lose his job under the circumstances. It is therefore concluded the claimant was not discharged for just cause in accordance with the Utah Employment Security Act.

It is noted this decision does not attempt to determine the reasonableness of the employer's rule.

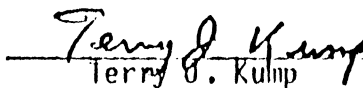
The Utah Employment Security Act relieves an employer of charges for unemployment insurance benefits when the claimant was discharged for reasons which are disqualifying under Section 35-4-5(b) of the Act. The Act does not grant relief when the reason for the discharge would not have resulted in a disqualification, even if the discharge resulted from circumstances over which the employer had no control. In

s case, the claimant was not discharged for disqualifying reasons and the
loyer is, therefore, ineligible for relief of charges.

ISION:

decision of the Department Representative is reversed and benefits are allowed
ective December 29, 1985 pursuant to Section 35-4-5(b)(1) of the Utah Employ-
it Security Act provided the claimant was otherwise eligible.

employer, May Trucking Company, is not relieved of charges as provided by
tion 35-4-7(c)(3)(F) of the Utah Employment Security Act and is liable for its
-rated share of benefit costs paid to this claimant.


Terry O. Kulp
Administrative Law Judge
DEPARTMENT OF EMPLOYMENT SECURITY

is decision will become final unless within ten days from February 26, 1986,
rther written appeal is made to the Board of Review (P. O. Box 11600, Salt Lake
ty, Utah 84147) setting forth the grounds upon which the appeal is made.

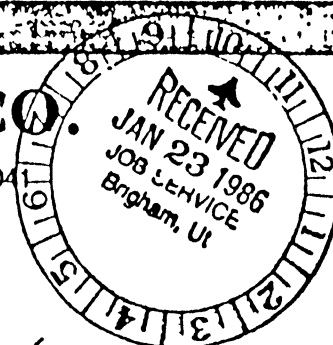
tachment

May Trucking Company



MAY TRUCKING CO.

POST OFFICE BOX 218 ■ LAYTON, UTAH 84041



615C
Michael Grinnell

384 625299

January 16, 1986

To Whom it May Concern:

Mr. Grinnell was discharged for violation of company rules and regulations by tampering with the equipment he operated and by violating U.S. Department of Transportation Rules and Regulation by accumulating a number of log and hours of service violations. Particular sections he violated are DOT safety regulations 395.3 and 395.13 concerning the amount of driving time allowed and its logging. Mr. Grinnell was suspended for only one week due to his previously exemplary employment here. One condition to return to work is a physical exam and urinalysis. Mr. Grinnell's urinalysis returned positive for marijuana and subsequent testing confirmed the first analysis. Marijuana usage is in violation of U.S. DOT rule 392.4 at which point, Mr. Grinnell was terminated.


Sincerely,

Greg Weigel
Personnel Manager

EXHIBIT 2

CERTIFICATE OF SERVICE

I hereby certify that I served four (4) true and correct copies of the foregoing BRIEF OF APPELLANT by placing the same in United States mail, postage prepaid, addressed to LINDA WHEAT FIELD, Attorney for the Board of Review of the Industrial Commission of Utah, 1234 South Main Street, P.O. Box 11600, Salt Lake City, Utah 84147 this 27th day of August, 1986.



TED K. GODFREY
Attorney for Appellant