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John P. Whitcome v. Department of Employment Security and Board of Review of the Industrial Commission of Utah : Brief of Appellant

Utah Supreme Court

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E M E C O U R T
E O F U T A H

JOHN P. WHITCOME,

Plaintiff,

vs.

Case No. 14736

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

Defendants.

BRIEF OF APPELLANT

Appeal from the Board of Review of the Industrial Commission

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BRIEF OF APPELLANT

NATURE OF THE CASE

Appellant is appealing from a decision of the Board of Review, Industrial Commission of Utah denying unemployment benefits under the Employment Security Act of Utah Code Annotated [hereinafter cited as U. C. A.]

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Decision of the Board of the Board of Review and a determination of benefits under the provisions of U. C. A.

STATEMENT OF FACTS

Appellant, John P. Whitcome, responsible management employee at Valley Roofing Company, initiated a claim for unemployment benefits under the Employment Security Act on November 10, 1975. Valley Roofing Company is a corporation owned by Claimant and his wife, Carole Whitcome, President of the company.

Appellant began working for Valley Roofing in May, 1974. He stopped working and effective October 27, 1974 his benefits were assessed at $93.00 per week, $93.00 effective March 23, 1975, under the extended benefit program. He began working again May 17, 1975. The weeks for which benefits have been denied are those ended April 5 - May 24, 1976. Appellant worked for only one week in May for which he was paid $200.00 Appellant received a check for $100.00 in April which was a draw on future employment and not a wage as defined in the Code. During the remainder of the weeks, Appellant was unemployed.

Upon filing for benefits on November 10, 1975, claimant indicated that he was hired by Valley Roofing Company on April 1, 1975 and submitted a separation notice showing the same date. Then on December 4, 1975, the claimant signed a statement in which he stated that he began work

on or about April 7, 1975 and that he was paid $100.00 during the week of April 12, 1975. This statement was written by John Warner, investigator for the Department after a conference with Appellant lasting approximately 4 1/2 - 5 hours.

Appellant is charged with knowingly failing to report material facts of his employment to obtain benefits under the Employment Security Act. As a result of this hearing held in the office of the Utah Department of Employment Security in Logan, Utah, Appellant was disqualified under provisions of Sec. 35 -4-5 (e) U. C. A. and ordered to repay $837.00 which he received for the weeks within his disqualification period. The Board of Review found the decision of the Appeals Referee to be supported by the evidence. Appellant brings this appeal on the grounds that the findings are not supported by the evidence.

ISSUES PRESENTED

1. APPELLANT, HAVING RECEIVED NO WAGES OR EARNINGS DURING ANY WEEKS CLAIMED AND HAVING MET ALL ELIGIBILITY REQUIREMENTS OF SEC. 35-4-4, IS THEREBY ENTITLED TO BENEFITS UNDER THE EMPLOYMENT SECURITY ACT.

II. THE BOARD OF REVIEW ERRED IN NOT REVERSING THE APPEAL REFEREE'S DECISION BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUSTAIN IT AND THERE WAS PROOF OF FACTS TO SHOW CLAIMANT'S RIGHT TO COMPENSATION.

ARGUMENT

ISSUE NO. I

APPELLANT, HAVING RECEIVED NO WAGES OR EARNINGS DURING ANY WEEKS CLAIMED AND HAVING MET ALL ELIGIBILITY REQUIREMENTS OF SEC. 35-4-4, IS THEREBY ENTITLED TO BENEFITS UNDER THE EMPLOYEMENT SECURITY ACT.

The primary question presented by the Board of Review's Decision is whether Appellant worked for any income or wage during the weeks ending April 5 - May 24, 1975, which he failed to report to the Department of Employment Security. While Section 35-4-10(h) U. C. A. provides that "[i]n any judicial proceeding under this section the findings of the Commission and the Board of Review as to the facts if- supported by evidence shall be conclusive and the jurisdiction of said court shall be confined to questions of law" (emphasis added), there is no uncontroverted substantial evidence which tends to show that Appellant was employed during the weeks in question.

To be eligible for benefits, one must be unemployed as defined in Sec. 35-4-22 U.C.A. A person is unemployed "in any week during which he performs no services and with respect to which no wages are payble to him, or in any

week or less than full time work if the wages payable to him with respect to such week are less than his weekly benefit amount.

Appellant received no wages during the weeks in question. A review of the checks, received as Exhibit 8 the hearing, demonstrates that during the months of April and May, only the following checks were written to John Whitcome:

Check #333 on 4/11/75 in the amount of $100.00

Check #356 on 5/19/75 in the amount of $188.00

The $100.00 check, however, was a draw on the future earnings of Valley Roofing's first job of the spring (Tr. 29). This amount was erroneously reported later in May as earnings (tr. 29). The $188.00 check was earned was wages; however, this amount was properly reported as earnings for the work done during the week of May 17th (Tr. 28). This was the only week Appellant was employed during the weeks in question.

MR. ANDERSON: Okay, so in fact, before June 1, 1975, what you're saying is you worked one week in May.

MR. WHITCOME: Right, and reported it. (Tr. 29).

Under Section 35-4-22 (p) U. C. A., wages "means all remuneration for personal services including commissions and bonuses and the cash valye of all remuneration in any medium other than cash."

Clearly, an advance for living expenses does not become a "wage" under this definition and Appellant should not be penalized.

The fact that Appellant was not employed is substantiated also by the signed statements submitted by Valley Roofing Company's first customers. Marlin C. Roth's statement is lucid:

> "Roof was installed approximately May 15th of 1975. However, Valley Roofing had constructed the roof weeks ahead of time, but was unable to install roof because of bad weather conditions. Had many problems in construction due to weather. (Exhibit 8)

Aaron Tracy of Aaron Tracy Building Specialities stated:

> "Valley Roofing did a job for Aaron Tracy Builders, starting approximately May 12, 1975. This job had been ready weeks ahead of time, but due to weather we had, late snows in May and the first week in June, we were unable to have the job fully complete until the middle of June." (Exhibit 9).

Representations of E. A. Miller and Sons Packing, C., Inc. also stated:

> "Weather did not permit Valley Roofing to start his work until the end of May." (Exhibit 10).

The answer to why appellant did not commence working until April is clear.

> MR. ANDERSON: After that time do you have any recollection as to why you didn't get to working until the middle of May.

MR. WHITCOME: Yeah, it was because of the weather -- last year the weather was really bad because at the same time the other roofers in the valley were crying they had work they couldn't get done. (Tr. 29).

It is more than clear to one considering all the evidence that no wages were paid and no services were performed between the weeks ending April 5th and May 24, 1975 which were not reported.

Further, Appellant complied with all eligibility requirements of Sec. 35-4-4 U. C. A. Appellant (1) had made claims in accordance with all regulations, (2) had registered for work, (3) was able to work, (4) was unemployed for a one week waiting period, (5) had furnished a separation sheet, and (6) had worked a cumulative 19 weeks during the base period, earning at least $20.00 each week. Appellant was properly unemployed during the weeks he claimed benefits.

ARGUMENT

ISSUE NO. II

THE BOARD OF REVIEW ERRED IN NOT REVERSING THE APPEAL REFEREE'S DECISION BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUSTAIN IT AND THERE WAS PROOF OF FACTS TO SHOW CLAIMANT'S RIGHT TO COMPENSATION.

While the Supreme Court of Utah has established

that a "decision by the Commission will not be disturbed if reasonably supported by the evidence" (emphasis added) Child v Board of Review of Industrial Commission of State of Utah, 8 U 2d 239, 332 P. 2d 928 (1958), see also Johnson v Board of Review of Industrial Commission Department of Employment Security, 7 U. 2d 113, 320 P. 2d 315 (1958), the Court in a later case, restated its established rule of review regarding Review Board decisions. Significantly, a "reversal and the compelling of such an award of benefits could be justified only if there is no substantial evidence to sustain the determination and there was proof of facts giving rise to the right of compensation so clear and persuasive that the Commission's refusal to accept and make an award was clearly capricious, arbitrary and unreasonable." Kennecott Copper Corp. Employees v Dept. of Employment Security, 13 U. 2d 262, 372 P. 2d 987 (1962).

Appellant is charged with knowingly withholding material facts of work and earnings in order to receive benefits to which he is not entitled. The evidence does not show any work which Appellant can be charged with doing during the weeks in question. Further, a determination that he had earnings of $184.61 for each of those weeks is clearly contrary to the evidence.

The Board accepted April 1, 1975 as the true date on which employment began for Appellant, Barry Baker and David Whitcome. However, that date is inaccurate.

REFEREE: Do you have a copy of that separation notice?

MR. WHITCOME: No.

REFEREE: Do you know what the dates are on that notice?

MR. WHITCOME: He was laid off about the 1st or 2nd week in November.

REFEREE: Did you have a starting date on that notice?

MR. WHITCOME: Yeah, I did.

REFEREE: What date was that?

MR. WHITCOME: 4/1/75

REFEREE: How did you arrive at that date?

MR. WHITCOME: I guessed. I figured the unemployment office had the records -- I didn't need to be that accurate. I didn't have the information available to me at the time when I filled them out.

REFEREE: I'm curious as to how you always arrived at the figure of 4/1/75.

MR. WHITCOME: Well, its the beginning of the quarter -- I knew he didn't work the quarter before but I knew he had worked in that quarter so I just did it like that. If you will look back, all the employees I did the same thing to. I realize I filled the forms out wrong but after they were sent in, then there's nothing you can do.

By his own admission, Mr. Archibald, auditor for the Department said that new employers are given the benefit of the doubt when records are lacking.

> MR. ARCHIBALD: For the year 1975. And seeing that there was no way of knowing if these wages were actually paid or not, and Valley Roofing being a new employer, we gave them the benefit of the doubt. We will work with new employers and this is one of our reasonings behind when we did this audit. (Tr. 10-11).

Additional facts surrounding the weeks in question are germane. Mr. Warner, Department investigator stated that the date of April 1, 1975 had nothing to do with the commencement of work by Appellant. However, in his testimony just prior to that comment, he recognized the seasonal nature of the roofing business.

> MR. ANDERSON: Then you knew this when you filled out this form? The one I'm referring to is 630 (b) excuse me 603 (b) -- you knew they were roofers?
>
> MR. WARNER: Right
>
> MR. ANDERSON: Are you at all familiar -- or were you familiar at that time with the seasonal nature of this work?
>
> MR. WARNER: I understand it's seasonal.
>
> MR. ANDERSON: Didn't you, in fact, then, when you went through all these dates when they all said April 1st, didn't you tend to wonder

that there might be some leeway as related to the seasonal nature of this work?

MR. WARNER: No, I don't see what April 1st would have to do with it. I feel -- my understanding is that roofing can be done in January, February, April, May -- any good day or good week -- a person could go out and put a roof on any time of the year. (Tr. 15-16).

Mr. Warner chose to ignore the fact that roofing is done piece-work whenever the weather is suitable, but generally during the spring and summer months. In particular, the spring of 1975 was riddled with harsh weather well into April, May and June; it is totally consistent with Appellant's statement that he began working after April 1, 1975. In fact, the referee himself stated that he would "concede that we had bad weather in the spring of '75". (Tr. 29).

In support thereof, signed written statements were admitted to the effect that Valley Roofing did not begin work for its customers until at least May 12, 1975. Marlin C. Hoth Construction (Exhibit 8), Aaron Tracy Builders (Exhibit 9), and Miller and Sons Packing (Exhibit 10) submitted statements that work by Valley Roofing had commenced on May 15, May 12 and the end of May consecutively. All cited bad weather conditions as the reason for the late date of construction work. (see point I). Thus, there is no substantial evidence to support the Board's

Decision.

Appellant's testimony that his use of April lst as the date of employment was mistaken is consistent with the evidence notwithstanding any statements he made in error under pressure from Department representatives.

In particular, the statement taken by Gerald Warner and signed by Appellant on December 4, 1976 is not reliable regarding the dates and admissions therein. First, the investigator had questioned him from 5:30 until at least 9:00 p.m. (Tr. 17) and both were apparently tired at the close of the session. In reference to the December 4th stateent, the Referee clarified the alleged essence of the statement.

> REFEREE: What it was saying is that you worked during the month of April and May and did not report the information because you needed the unemployment benefits.
> MR. WHITCHOME: Yeah, but that is not the case because when we worked, we wrote it on the cards and sent it back in and when we didn't work we just put zero and sent it back in.
> REFEREE: How would Mr. Warner have gotten the information that you worked during April if you hadn't told him?

MR. WHITCOME: A lot of this, when he wrote it out he said what about this and this I said yeah, I don't know. And so he wrote it down and I signed it. (Tr. 17).

To capitalize on Mr. Whitcome's confusion as to what wages were, Mr. Warner even wrote part of the document and dictated the remainder.

MR. WHITCOME: Yeah, in fact he was the one telling me almost word for word what to write. He had written it down once and it didn't sound right so I just continued on from what he started. He'd been there quite awhile -- by then I think he had writer's cramp. (Tr. 23).

The evidence points not to a shrewd, deceptive claimant, but to a man unfamiliar with statutorily defined terms, such as wages, vainly attempting to justify his unintentional errors more than seven months later. When Mr. Warner confronted him with a check for $100.00 and dated April 11th, he apparently thought he needed to justify the check in some manner. This attempt at accountability is reiterated in the hearing testimony regarding the reporting of the $100.00 advance. (Tr. 18-19).

Had Appellant intended to falsify his reports in order to defraud the Commission, he would certainly not have written the same date on all the employee's claims, including his own. That would only draw attention to such a scheme. Indeed attention was focused on the pattern and illuminated not a

fraud but to an admitted mistake.

Secondly, there are facts which tend to show that the Board's Decision to deny compensation was unreasonable and, in fact, arbitrary and capricious based on the evidence. Appellant John Whitcome testified to the reasons for putting April 1st on the employee separation sheets. See Point I. The investigator's method of calculating the amount allegedly earned by Appellant based on the incorrect date is totally unacceptable as not reflective of the facts. Appellant could and did earn $1,250.00 in only part of the second quarter due to the weather and nature of the roofing business.

Also a function of the seasonal nature of the work is the fact that employees are paid for their work when the company is paid. (Tr. 30). None of the claimants receive a calculable weekly wage or salary, including Appellant. Since the busiest part of the season is in May and June, then in September and October (Tr. 27), it is completely consistent, in retrospect, that Appellant earned $1,250.00 in the last part of the quarter. (Tr. 35). To take this amount and divide it by the number of weeks in the quarter is an arbitrary exercise of power by the Department. The true employment picture is drastically altered by the Department's method of assessing earnings for each quarter. The Board's acceptance of this averaging of total pay has no relation to reality and does not provide substantial, if any, support for the Board's Decision.

The Decision is also unreasonable in light of other

assumptions implicit in the Findings of Fact and Comments. No mention is made of either the adverse weather conditions during the spring of 1975 or of the seasonal nature of the roofing business in the Decision. Yet, these factors were clearly identified and, in fact, conceded to by the Referee and Mr. Warner consecutively. See point I.

The adverse weather conditions of Spring, 1975, were repeatedly mentioned in reference to the actual starting date of employment for Appellant, Barry Baker and David Whitcome. Appellant identified to precise reasons that Valley Roofing's work began well into May.

> MR. ANDERSON: After that time do you have any recollection as to why you didn't get to working until the middle of May.
>
> MR. WHITCOME: Yeah, it was because of the weather -- last year the weather was really bad because at the same time the other roofers in the valley were crying they had work they couldn't get done.
>
> REFEREE: I will concede that we had bad weather in spring of '75". (Tr. 29).

The statements of three of Valley Roofing's first customers are in support of this fact. Also see point I, Exhibits 8, 9, 10.)

The seasonal nature of the roofing business is also ignored by the Board in the very face of testimony to that effect. The following is consistent with the information provided by Valley Roofing's customers marked Exhibits 8-10:

> REFEREE: During January, February and March, were you trying to time up any jobs for the spring?
> MR. WHITCOME: Yeah, in fact, we had some jobs lined up from the previous year we could have done if the weather would have broke a little earlier but it snowed all the way into the first week in June it snowed. Basically, I do hot work. That's a little different than shingling -- maybe it's nice today but if it rained yesterday I wouldn't be able to work today -- you have to work 2-3 days consecutively to be warm and dry before you can do a hot roof. It's a little different.
> REFEREE: Do you do any other types of roofs? Asphalt shingles -- cedar shingles?
> MR. WHITCOME: yes.
> REFEREE : You don't have to wait on those jobs?
> MR. WHITCOME: You have to wait until they're ready.

> Generally builders here only pour foundations twice a year. They pour them come spring along about May or June -- the job's ready to roof and usually that's our biggest boom because the contractors have been sitting almost all winter. Then comes about September and October and they dig holes like crazy and try to get the roofs on them and then they let them sit so their men can work inside all winter. So those are our two biggest times. (Tr. 26-27).

The seasonal nature of the work was even admitted by Mr. Warner earlier in the proceedings. (Tr. 15-16).

Further substantiation of the irregular work schedule of roofers is evident from a careful examination of the checks in Exhibit 8. There were no large checks written for supplies or labor until May 14 when a check for $1,285.90 was written to Cantwell Brothers Supply and one for $188.00 was written to David Whitcome on May 16, 1975. It is significant that none of the above information was gleaned from the hearing and used in the determination by the Board.

To deny Appellant relief is not consistent with the purpose of the Employment Security Act. The act should be "liberally construed to best effectuate its purpose. It is directed to meeting those needs of unemployment workers. First, it is to enable them to find suitable work; second it is to provide cash benefits during periods of unemployment."

Gocke v Wiesley, 18 U. 2d 245, 420 P. 2d 44, 46 (1966), See also, Townsend v Board of Review of Industrial Commission, 27, U 2d 94, 453 P. 2d 614 (1972). If the goal is to provide cash benefits to eligible unemployed, this purpose is not well served by the Decision. A liberal construction would not tolerate a penalty for claimant's error when part of the Department's supervisory role is to aid new employers in establishing good business accounting procedures.

The Honorable Stanley G. Griffin apparently failed to consider any testimony concerning the weather conditions and nature of the roofing business in Appellant's particular case, choosing instead to base his decision on only part of the evidence presented. The hearing reflected the weaknesses of nonadversary proceedings with the hearing officer from the Department of Employment Security relying totally on the evidence presented by the Department's own investigators.

CONCLUSION

The Decision of the Board of Review does not reflect an accurate consideration of all evidence presented. There is, in fact, no substantial evidence on which the Board can rely to prove its allegation that Appellant withheld any material facts. The only evidence presented by the Department showed a claimant confounded by the requirements of the Employment Security Act implementation procedures.

This evidence is more than offset, however, by the

Board's acceptance and reliance on a totally unacceptable method for assessing weekly income. Taking the quarter earnings and dividing arbitrarily by the number of weeks in that quarter does not necessarily demonstrate how much a claimant made for each week. This method should be eschewed on appeal in favor of a more rational approach to determination based on all evidence presented. In the instant case, the seasonal nature of the work should have been considered. The inclement weather of spring, 1975 should also enter into a determination especially since it was conceded by the Referee. Together, these neglected elements support the testimony of Barry Baker, David Whitcome and John Whitcome that they began work after April 1st.

Since there is no substantial evidence to support the Decision while there is proof of facts giving rise to the right to compensation, the decision may be reversed. Here, where Appellant provided information to the best of his ability as a roofer, he should not be denied the benefits of the Employment Security Act which purpose is to provide cash benefits to the unemployed.

Since he did meet the eligibility requirements of Sec. 35-4-4 U. C. A. and for the reasons stated above, Appellant prays the Court to reverse the Decision of the Board of Review and to award Appellant his due benefits.

Respectfully Submitted,

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