

1979

# William D. Millet v. Industrial Commission of the State of Utah-Board of Review : Appellant's Brief on Appeal

Utah Supreme Court

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

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WILLIAM D. MILLETT,	)	
Plaintiff and Appellant,	)	
vs.	)	No. 16385
INDUSTRIAL COMMISSION OF THE	)	
STATE OF UTAH--BOARD OF REVIEW,	)	
Defendant and Respondent.	)	

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APPELLANT'S BRIEF ON APPEAL

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Appeal from The Industrial Commission of Utah  
Department of Employment Security.

---

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FILED

JUL 19 1979

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Clerk, Supreme Court Utah

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WILLIAM D. MILLETT,	)	
Plaintiff and Appellant,	)	
vs.	)	No. 16385
INDUSTRIAL COMMISSION OF THE	)	
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IN THE SUPREME COURT OF THE STATE OF UTAH

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WILLIAM D. MILLETT,	)	
Plaintiff and Appellant,	)	
vs.	)	BRIEF OF APPELLANT
INDUSTRIAL COMMISSION OF THE	)	No. 16385
STATE OF UTAH--BOARD OF REVIEW,	)	
Defendant and Respondent.	)	

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STATEMENT OF THE CASE

This is an action to review a final order of the Industrial Commission of Utah--Board of Review, denying plaintiff benefits for a period of fifty-two weeks under U.C.A. 35-4-5(e) and 35-4-6(d) and assessing the plaintiff with the liability to repay \$1,785.00 received by plaintiff during such period of disqualification, and declaring him ineligible to receive future benefits until full payment is made by plaintiff to The Department of Employment Security.

DISPOSITION BELOW

The plaintiff initiated his claim for unemployment compensation effective January 22, 1978 and was determined eligible to receive \$119.00 a week for 30 weeks. On November 1, 1978, a

letter was sent to the plaintiff by The Industrial Commission asking him to explain a discrepancy in his claim filings. The plaintiff requested a telephone hearing be scheduled so he could make his explanations.

On November 14, 1978, a telephone hearing was conducted, and the conclusion of The Department of Employment Security representative was that the plaintiff knowingly withheld information from the Department to receive benefits. The plaintiff then requested that his case be heard by an Appeals Referee and on November 30, 1978, filed an appeal.

The Appeals Referee heard the case on December 19, 1978, and affirmed the prior decision. Plaintiff then appealed to the Board of Review wherein the prior decisions were affirmed in an opinion rendered on the 8th day of March, 1979. This appeal is taken from that final decision of The Board of Review of The Industrial Commission for the State of Utah.

#### RELIEF SOUGHT ON APPEAL

Plaintiff filed this Writ of Review seeking reversal of the order of the Commission and a ruling and determination by this Court that plaintiff shall be eligible to receive future benefits during such times as he may be unemployed and eligible to receive benefits; that plaintiff shall be declared not



ineligible to receive benefits for the period beginning February 12, 1978, for fifty-two weeks thereafter and that the decision assessing a liability for overpayment in the amount of \$1,785.00 be reversed and otherwise set aside.

#### STATEMENT OF FACTS

Plaintiff was employed as a general laborer during all times material to this appeal and worked at various types of jobs. The plaintiff had worked the required amount of time, and on January 22, 1978, was determined eligible by The Department of Employment Security to receive \$119.00 a week for 30 weeks. The plaintiff started to receive benefits from the Department in January, 1978.

On February 12th, the plaintiff started working for Rhead Realty Construction on a trial basis for which it was his understanding he would not be paid. The plaintiff associates payment with working; and, therefore, reported on his claim for unemployment compensation that he was not employed. The plaintiff filed his last claim on February 28, 1978, and in fact received his first check from Rhead Realty Construction on February 24, 1978.

Plaintiff was paid for working at Rhead Realty Construction from February 24, 1978, until the last part of June, 1978.

Plaintiff was on the payroll at Rhead Realty Construction during July, 1978, but in fact, received no compensation during July, and was laid off on August 11th, 1978, because there was no work available. During July, 1978, the plaintiff reinstated his claim for unemployment benefits and drew benefits until September, 1978, at which time plaintiff resumed employment in the construction trades. While plaintiff was receiving unemployment benefits in August, 1978, Rhead Realty Construction again sent him a check that was late and which he was not expecting to receive. This check was sent out August 12, 1978. This check, mailed August 12, 1978, creates a second period of time from which the fifty-two week period could have been calculated, had The Employment Security Division had the best interests and equity of justice in mind.

On November 1st, 1978, plaintiff was mailed a notice asking him to explain the checks received by him in February, 1978. Plaintiff was given a telephone hearing on November 14, 1978, in order to determine whether he had violated provision of Section 35-4-5(e) and 35-4-6(d) U.C.A., 1953. As a consequence, plaintiff was disqualified from receiving benefits for the fifty-two week period beginning February 12, 1978. A consequence of this disqualification was that the benefits paid

to plaintiff during various periods of unemployment after that date, were considered "overpayments" received by plaintiff's "fraud" and plaintiff was held to be liable for the immediate repayment of those amounts.

During this telephone hearing, plaintiff maintained he was not intending to commit a fraud on the Department, but due to his misunderstanding of the rules he had made a mistake.

On December 19, 1978, this case was heard in person by an Appeals Referee, and plaintiff testified concerning the dates of employment and his intentions. Plaintiff maintained he had merely misunderstood the rules and in no case did he intend to commit a fraud or withhold material information to receive benefits. Plaintiff maintained throughout this hearing that his intentions were to receive benefits that he considered he was justly deserving. Also, during this hearing, the plaintiff explained the receipt of these benefits so as to show no more than three checks that were received in such a way as to be considered not deserved, and these were not received with any intention to commit fraud. The Appeals Referee found that the plaintiff "knowingly withheld the material facts of his work and earnings to receive benefits to which he was not entitled and the provisions of Section

35-4-5 (e) of the act apply," however, the Appeals Referee makes no mention of 35-4-6 (d) and how it should be applied.

The Plaintiff appealed the decision of the Appeals Referee to the Board of Review and the prior decisions were affirmed.

#### POINT I

THE DECISION BY THE REVIEW BOARD IN THE PRESENT CASE IS ARBITRARY, CAPRICIOUS, AND UNREASONABLE IN THAT THE REVIEW BOARD HAD ALTERNATE METHODS OF APPLICATION AVAILABLE.

The plaintiff would like to draw the Court's attention to certain Review Board decisions that would support the argument that the present Utah Employment Security Act also known as Utah Code Annotated Chapter 35-4 (hereafter referred to as Utah Code Annotated 35-4) has been interpreted in an arbitrary, capricious, and unreasonable manner. It has been the Court's decision in the past that this chapter, especially Utah Code Annotated 35-4-5 (e) is clear and unambiguous and not open to interpretation. The Court has held that neither the Commission nor this Court can change a statute that is clear and unambiguous as is the one cited above. In fact, this Court has already passed upon this point by a unanimous decision wherein it said:

"Plaintiff also complains that the deprivation of 52 weeks of benefits is a severe penalty. With this we are inclined to agree. However, under the statute it does not appear that the fact finder or this Court has the discretion to reduce or forgive any part of the penalty." (1)

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(1) Diprizio vs Industrial Commission of Board of Review 572, P 14 679-681.

In 1965 The Board of Review heard a case #65-BR-395, Don Waterson vs Department of Employment Security (See Exhibit "A").

In that case, the Board of Review held that the Departments' Hearings Representative was without authority to increase the initial overpayment assessed attendant to a determination under Section 35-4-5 (e), even though such additional overpayment would have fallen within the 52 weeks disqualification period. This shows that not all monies received during such 52 week disqualification period are required to be repaid in all cases. In this particular case, the statute was open to interpretation.

To further illustrate this point, Board of Review case number 75-BR-90, dated February, 1976, PABLO M. PAUL (see Exhibit "B" attached) the Board held that benefits received during the 52 week disqualification period could be offset by future claims filed after such period. This represented an interpretation of statute which this Court had maintained in Decker vs Industrial Commission, Utah, 533, P 2d 898 (1975).

"...it does not appear that the fact finder or this Court has the discretion to reduce or forgive any part of the penalty.."

In which case, the Court did not allow for any interpre-

tation of the aforementioned statute.

It must be concluded by the above argument that the statute is not clear and ambiguous and is in fact, open for interpretation especially if that interpretation is to be made by the Industrial Commission. It appears that the Industrial Commission does interpret this statute when such interpretation is to the benefit of the Commission. However, the plaintiff feels that interpretations should work both ways and where doubt exists, the benefit of the doubt should be given to the claimant. As Justice Crockett so ably brings forward in his dissent in DIPRIZIO (P 682),

"... The commission should have the power to modify or suspend the imposition of such penalties, or the time and manner of reimbursement required, on the purposes of the Act and the interests of Justice may require."

## POINT II

THE DECISION OF THE REVIEW BOARD TO DENY BENEFITS TO PLAINTIFF AND TO REQUIRE REPAYMENT OF AMOUNTS RECEIVED, WAS NOT BASED UPON ENOUGH SUBSTANTIAL EVIDENCE TO SUSTAIN THE DETERMINATION.

The decision of the Industrial Commission is based primarily upon 35-4-5 (e) Utah Codes Annotated 1953, Stating:

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

- (e) For the week with respect to which he had willfully made a false statement or representation or knowingly failed to report a material fact to obtain any benefit under the provisions of this Act, ..."

It is clear that this statute is primarily concerned with two words, "willfully" and "knowingly" and without those two words, the statute has no meaning. The plaintiff contends that for the Commission to show substantial evidence to sustain its determination it must prove the allegations found in "willfully" and "knowingly". This Court has held that to prove a case of fraud, the evidence must be clear and convincing. Perry vs McConkie, 1 Utah 2d 189, 264 P 2d 852, (1953). Further, this Court has held that when one is charged with a falsehood or misrepresentation, in order for it to be actionable or to deprive him of a right, it must be done willfully and knowingly. Mark vs Continental Casualty Company, 19 Utah 2d 119, 427 P 2d 387 (1967). Utah criminal law under U.C.A. 76-2-103, deals with criminal culpability and defines "willfully" and "knowingly."

76-2-103 "A person engages in conduct:

- (1) Intentionally or with intent or willfully with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
- (2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances, to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

The plaintiff contends there is no evidence to show that it was his "conscious objective or desire to engage in the conduct or cause the result" that resulted in his being found in violation of 35-4-5 (e) Utah Code Annotated. Plaintiff never intentionally or willfully perpetrated a fraud on the Industrial Commission. The plaintiff further contends that he was never "aware that his conduct is (was) reasonably certain to cause the result", that is a fraud on the Industrial Commission.

### POINT III

THE DECISION OF THE REVIEW BOARD TO DENY BENEFITS TO PLAINTIFF AND TO REQUIRE REPAYMENT OF AMOUNTS RECEIVED WAS IN ERROR IN THAT IT FAILED TO CONSIDER ALL THE APPLICATIONS OF 35-4-6 (d) and (e) UTAH CODE ANNOTATED IN THE INSTANT CASE.

The code specifically denotes three types of overpayment and sets forth how and if such overpayments are to be recouped by the Department for the Unemployment Compensation Fund.

1. Section 35-4-6 (d) indicates one type of overpayment. These are benefits received by reason of fraud and the code specifies that such benefits must be repaid.
2. Section 35-4-6 (d) further states that another type of overpayment occurs through claimant fault and specifies that such benefits must either be repaid or offset by future claims at the discretion of the Commission.
3. Section 35-4-6 (e) specifies that sums in the receipt of which the claimant is not at fault, are sums which the claimant is not liable to repay, but are to be recouped by offset from claims filed in the benefit year current at the time of receipt.



These three types of overpayment are best defined as follows:

1. Benefits received by reason of fraud are sums received with respect to which all of the elements of fraud are present, including material infraction. Those benefits to which no material infraction attaches, cannot be said to have been received by reason of fraud.
2. Benefits received by claimant fault are sums received to which a material infraction attaches, but with respect to which not all of the other elements of fraud are present. Such sums are to be repaid by the claimant or offset by future claims filed at the discretion of the Commission.
3. Benefits received with respect to which no material infraction attaches are benefits received neither by fraud nor fault. Such benefits are recouped by offset of future claims filed only within the benefit year current at the time of the receipt of the sum of the overpayment.

In summary, the statute demands that all sums received by reason of fraud be repaid and that all sums received by reason of claimant fault be repaid or offset by future claims filed, and that sums received neither by fraud nor fault be offset only in the benefit year current when such benefits were received.

It is clear that the statute meant to level a severe penalty against the perpetrator of fraud and that claimants obtaining benefits by fraud or fault must restore such sums to the fund. It is also clear that sums received to which

neither fraud nor fault attaches, are not to be repaid, but are to be offset within the time limited by statute.

Section 35-4-5 (e), is a section of the act which is not operable alone. It is a disqualifying section which is dependent upon the material infraction of some other section of the act, i e: 35-4-5 (a) Voluntarily Leaving Work; 35-4-22 (m) (1) which states the claimant must be unemployed or working less than full time and earning less than his weekly benefit amount; 35-4-3 (c) which defines in part, what is material in terms of the earnings of the Part-Total claimant. One of the above mentioned sections or another section of the Act, must supply materiality for the fraud statute to be applied.

After the fraud statute is applied, then three areas must be examined:

1. It must be determined what benefits were received by reason of the fraud,
2. What benefits, if any, were received by claimant fault and
3. What benefits were received without fault.

The Referee and the Board of Review erred in the instant case by failing to cite that part of the statute which supplied the material infraction. It appears their conclusion was that the plaintiff was not unemployed as required for eligibility under Section 35-4-22 (m) (1) for the weeks at issue. Neither of their determinations cite material infraction. Only the

Notice of Hearing sent by the Referee bothered to refer to any overpayment section and neither decision has denoted an overpayment section nor made explanation of any kind.

It appears the Referee and the Board of Review have relied on Section 35-4-5 (e) to be both a disqualifying section and an overpayment section, and this it clearly is not.

#### POINT IV

THE DECISIONS OF THE BOARD OF REVIEW AND THE UTAH SUPREME COURT IN THE PAST, HAVE CONSIDERED UTAH CODE ANNOTATED 35-4-5 (e) WITHOUT ENFORCING THE INTENT OF THE LEGISLATURE AND/OR THE EQUITIES INVOLVED. THE BOARD OF REVIEW AND THE DEPARTMENT OF EMPLOYMENT SECURITY HAVE FAILED IN THE PAST TO USE ALTERNATE METHODS OF COLLECTION THAT WOULD BE MORE EQUITABLE AND IN LINE WITH THE INTENT OF THE LEGISLATURE.

Prior to July 1, 1949, the penalty for fraud under the act (Employment Security Act, Chapter 42-2a-5 (e), as amended in 1947), was 2 to 10 weeks, which conformed with the most stringent penalty for material infraction and was reserved for the claimant who was discharged for misconduct connected with work. (Utah Code Annotated 42-2a-5 (e), as amended in 1949).

Thus, a claimant who had been discharged for dishonesty constituting a crime, but who fraudulently initiated a claim and drew benefits throughout the benefit year, was held to have perpetrated a material infraction with respect to the entire period. Accordingly, since a material infraction

attached to every week of such benefits received by the perpetrator, the overpayment would include all the benefits received during the disqualification period.

For the sake of definition, fraud against the Unemployment Compensation Fund may be said to be of two types:

1. Type 1 is Simple Fraud which is made with respect to a single week and involves a material infraction. Simple Fraud affects only a single week (35-4-4 as defined in 35-4-22 (m) (1) or only part of the benefits due for a given week (35-4-3 (c));

2. Type 2 is Compound fraud. Compound Fraud, like Simple Fraud, requires only one false statement or representation. This statement or misrepresentation results in the payment of benefits for more than just one week. Example: Leaving work voluntarily without good cause (possible 6 weeks) or being discharged for dishonesty, constituting a crime, (possible 52 weeks).

Attention is called to that part of the statute which states that the claimant who has perpetrated a fraud is disqualified "...until he has repaid to the fund all monies he received by reason of his fraud and which he received during such following 51 week disqualification period..." The part which reads "... and which he received during such following 51 week disqualification period..." must relate to the definition of Compound Fraud.

If this is not so, then the claimant who obtains \$1.00 by reason of material infraction of Section 35-4-3 (c), is penalized the same way a claimant whose material infraction was under Section 35-4-5 (b) (2). Example, a claimant who

conceals \$13.00 in earnings on his claim form once and only once, has fraudulently obtained \$1.00 by Simple Fraud penalty as the claimant who conceals the fact that he was discharged for dishonesty constituting a crime when he initiated his claim. The second claimant has committed a material infraction under 35-4-5 (b) (2).

If each claimant had a gross payable of \$4,284.00 and each false statement was made with respect to the first compensable week each would be disqualified for 52 weeks and each required to repay \$4,284.00 to the fund.

In our example, the claimant who obtained benefits by means of his compound fraud obtained the entire \$4,284.00 by such means and in contrast the claimant who knowingly failed to report \$13.00 in earnings on his first compensable week obtained \$1.00 by reason of his fraud (the first \$12.00 excluded by statute from being material), but both required to repay \$4,284.00 just as though they had committed the same act.

A further example, claimants A and B who have weekly benefit amounts of \$1.00 each and who each perpetrate simple fraud with respect to the first compensable week. Claimant A perpetrates no further material infractions for the next 35 weeks, but continues to draw unemployment compensation. Claimant B perpetrates a fraud with respect to each of the

following 35 weeks. Both claimant A and B are required to repay the entire 36 weeks of benefits received (\$3,600.00).

Plaintiff could cite endless examples of the possible inequities under the misapplication of the fraud and overpayment sections, of which we are sure the Court is aware.

The determination in the instant case should have shown that the conclusion of the Referee and of the Board of Review was that the plaintiff was in material violation under Section 35-4-4 as defined in 35-4-22 (m) (1) for each of the weeks as he was not "unemployed" during the time he received benefits. Their conclusion of fraud should reflect the application of Section 35-4-5 (e) for each of those weeks and for the 51-week period immediately following.

The overpayment should be written in the following way: The claimant received a total of \$1,785.00 during the disqualification period to which it has been determined he was not entitled. \$238.00 was received by reason of his fraud and that amount in overpayment is assessed under the fraud provision of Section 35-4-6 (d) and must be repaid. \$1,547.00 was received to which no material infraction attaches and with respect to the receipt of which the claimant was not at fault. That amount will be deducted from future claims filed within the benefit

year current at the time of such receipt.

#### POINT V

1953, AS AMENDED, IS APPLIED AS DEFENDANT PROPOSES, PLAINTIFFS ARE DENIED EQUAL PROTECTION OF THE LAW UNDER THE CONSTITUTIONS OF UTAH AND THE UNITED STATES.

Defendant's application of U.C.A. 35-4-5 (e), Utah Code Annotated 1953, as amended, creates two classes of persons subject to a penalty period:

1. Those individuals who were otherwise eligible and received unemployment compensation during the retroactively imposed penalty period and

2. Those individuals who received no unemployment compensation during the penalty period. The first class, which includes Plaintiffs, is subject not only to the penalty period but also to assessment of an overpayment that must be repaid before future benefits can be paid. The second class, in fact, incurs no penalty at all because those individuals are simply told that they were not eligible to receive benefits during a past period when there were presumably already ineligible or they would have been receiving benefits. Both classes of individuals have committed the same violation of the Employment Security Act and deserve the same penalty. No rational basis exists for the present discriminatory treatment which bases the severity of the penalty purely on chance.

The test of equal protection is whether the legislative line is drawn bears some rational relationship to a legitimate governmental purpose. *Dandridge vs Williams*, 397 U.S. 471 (1971). In the context of the Employment Security Act, the objective is to penalize persons who violate the Act and deter such violations. Since the severity of the penalty now depends on whether the indivi-

dual happened to have received additional unemployment compensation during the disqualification period, it bears no rational relationship to a legitimate governmental purpose. Therefore, it conflicts with the equal protection clause of the Constitution of Utah, Article 1, Section 2, and of the Fourteenth Amendment of the Constitution of the United States.

#### CONCLUSION

For the reasons cited above, plaintiffs request the Court to reverse defendant's findings that plaintiff knowingly withheld material facts of work and earnings, reverse defendant's assessment of 52 week disqualification periods, and reverse defendant's assessment of overpayments.

For the reasons cited above, plaintiff requests that the Court reverse the findings of the Board of Review of the Industrial Commission. Plaintiff further requests that the Court find that the Department of Employment Security and its Board of Review have improperly construed and misapplied 35-4-5 (c), 35-4-6 (d), and 35-4-6 (e) and these statutes have not been properly applied and requests that the Court overturn the decision of the Board of Review.

Plaintiff shows that the intent of the legislature and the rules of equity could be better applied and that there are alternate methods of collection that could be used by the Depart-



ment of Employment Security. The plaintiff requests that the Court overturn the decision of the Board of Review and instruct the Department of Employment Security to use the alternate methods available by statute.

Plaintiff further requests that the Court find that the application of U.C.A. 35-4-5 (e), in the instant case, violates petitioners rights under the Constitutions of the United States and the State of Utah.

The Industrial Commission of Utah  
Unemployment Compensation Appeals

APPEALS SECTION

DECISION OF APPEALS REFEREE

Don Watterson  
S.S.A. No. 529 26 9200

vs.

Department of Employment Security

65-A-35

On April 12, 1965, the claimant's attorney filed a letter which was construed as appeal from a determination of a Department Hearing Representative dated February 1965, which denied unemployment benefits for the 52-week period beginning with the week ended October 24, 1964, and until the claimant repays the amount of \$460.00 for benefits received during the disqualification period. The determination was made on the grounds that when filing a claim effective October 19, 1964, the claimant knowingly withheld the material fact that on September 25, 1964, he had been discharged from his employment.

The appeal was received by the Appeals Section on April 19, 1965.

Based on the record pertinent to this matter, the Appeals Referee makes the following

FINDINGS OF FACT:

1. That on October 21, 1964, the claimant filed an additional claim for unemployment benefits effective October 19, 1964, with subsequent weekly claims thereafter until an amount of \$460.00 was received in benefit payments. Thereafter it was determined, after a recorded hearing, that when filing the additional claim effective October 19, 1964, the claimant withheld the material fact that he had, on September 25, 1964, been discharged from employment.

2. That such determination was issued on February 23, 1965, and consistent with the requirements of Section 35-4-5(e) and Section 35-4-6(c) of the Utah Employment Security Act contained the notice, "Any appeal from this decision must be made within ten days after the date of this decision."

No appeal from the claimant appears of record until the letter of April 12, 1965, from the claimant's attorney, Ted S. Parry, of Logan, Utah. The Department, by letter of April 20, 1965, rejected a request for redetermination pursuant to Section 35-4-5(b) of the Act.

COMMENTS:

Section 35-4-5(e) of the Utah Employment Security Act provides:

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

(e) . . . and provided further that such determination shall be appealable in the manner provided by this act for appeals from other benefit determinations.

Section 35-4-6(c) of the Utah Employment Security Act provides:

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

**CONCLUSION OF LAW:**

The Appeals Referee, therefore, finds:

That the claimant did not file a timely appeal from the determination of the Department's Hearing Representative and the Appeals Referee, therefore, lacks jurisdiction for further consideration of the matter.

**DECISION:**

Jurisdiction is denied.

Dated this 22nd day of April, 1965.

Edgar M. Denny  
Edgar M. Denny  
Appeals Referee  
DEPARTMENT OF EMPLOYMENT SECURITY

ENC

BOARD OF REVIEW  
The Industrial Commission of Utah  
Department of Employment Security

DOM WATTERSON  
SS# 529/26 9200

vs.

DECISION

Case No. 65-BR-395

DEPARTMENT OF EMPLOYMENT SECURITY

The appeal in the above-entitled matter is before this Board on the issue of whether or not the Appeal Referee was correct in his findings that the decision of the Hearing Representative disqualifying the claimant, Watterson, had become final prior to the filing of any appeal therefrom as provided by the statute. The decision of the Hearing Representative became final on March 5, 1965, which date was ten days after the mailing of the decision on February 23, 1965. No appeal was filed from this decision until April 12, 1965, far beyond the ten-day statutory period.

An examination of the record shows that the Hearing Representative on March 8, 1965, attempted to amend the decision of February 23, 1965, by increasing the overpayment from \$60.00 to \$460.00. Inasmuch as the February 23 decision had become final on March 5, the Hearing Representative no longer had any authority to change the initial decision. The overpayment of \$60.00 established by the February 23, 1965, decision is the amount which the claimant must repay to the Unemployment Compensation Fund.

You are advised that this decision will become final ten days after the date of mailing hereof, and that any appeal to the Supreme Court of the State of Utah must be made within ten days after this decision becomes final.

BOARD OF REVIEW

/s/ Otto A. Wiesley

Elliot Y. Gates

Daniel A. Elton

Dated this 20th day of May, 1965.

The Industrial Commission of Utah  
Unemployment Compensation Appeals

APPEALS SECTION

DECISION OF APPEALS REFEREE

vs.

Department of Employment Security

75-A-1320

On May 5, 1975, the claimant, \_\_\_\_\_, through his attorney, Mr. Michael Shepherd, filed a timely appeal from a decision of a Department Representative dated April 28, 1975, which denied benefits under Section 35-4-5(e) of the Utah Employment Security Act for the 52-week period beginning January 5, 1974, and until he had repaid to the Utah Unemployment Compensation Fund the amount of \$1,392.00, on the grounds the claimant had knowingly withheld material facts with respect to his employment and earnings from M. H. Cook Pipeline Construction Company when filing claims for unemployment compensation for the calendar weeks ended January 5, 1974, and February 16, 1974.

The matter was received by the Appeals Section on May 14, 1975, and on June 15, 1975, notices of the time and place of hearing were directed to the parties. The hearing was held in the office of the Appeals Referee, 1234 South Main, Salt Lake City, Utah, on June 23, 1975, at the hour of 1:30 p.m. Present at the hearing was Mr. Michael Shepherd, Attorney at Law. The claimant was not present.

The appeal filed on May 5, 1975, had been based on three issues: (1) there was inadequate evidence that Mr. Paul worked during the time period specified; (2) there was no evidence to support the finding of fraud; and (3) if a fraudulent overpayment is established, \_\_\_\_\_ should be allowed to use current valid claims for unemployment compensation as offsets against the overpayment established.

It was specified by Mr. Shepherd that subsequent to filing of the appeal it had been determined that there was sufficient evidence to support the findings that the claimant was in violation of provisions of Section 35-4-5(e) of the Act and the first two issues enumerated in the appeal were being withdrawn. The only issue being pursued was the issue of the overpayment and the Department's holding that the overpayment must be repaid to the Utah Unemployment Compensation Fund before the claimant could again be eligible to receive benefits and that the overpayment will not be offset by claims filed by the claimant subsequent to the period of disqualification.

Sections 35-4-5(e) and 35-4-6(d) of the Utah Employment Security Act provide as shown on the attachment.

In accordance with the language of Section 35-4-5(c), the claimant is disqualified for the week in which the violation has occurred and for the 51 additional weeks and until he has repaid to the Fund all monies he received by reason of

his fraud and which he received during the subsequent 51-week disqualification period. It would appear that the language, "and until he has repaid to the Fund," was added to the Employment Security Act to provide a means of compelling claimants who had committed fraud to actually make a refund as a condition of continuing eligibility. Section 35-4-6(d) of the Act makes similar provisions, and there are no provisions of offsetting payments of benefits received as a result of violation of Section 35-4-5(e) of the Act.

The appellant argues that such interpretation of the law prohibiting offsets is unconstitutional. However, the matter of constitutionality of the law should not be determined here.

**CONCLUSION AND DECISION:**

That the claimant when filing claims for unemployment compensation for the calendar weeks ended January 5, 1974, and February 16, 1974, did knowingly withhold material information with respect to employment and earnings for the purpose of receiving unemployment compensation to which he was not entitled, and therefore was in violation of Section 35-4-5(e) of the Act. The decision of the Department Representative is affirmed and benefits are denied for the 52-week period commencing with the calendar week ended January 5, 1974, and until he has repaid to the Utah Unemployment Compensation Fund the amount of \$1,392.00.

Dated this 9th day of July, 1975.



A. U. Pardini  
Appeals Referee

UTAH DEPARTMENT OF EMPLOYMENT SECURITY

plb

BOARD OF REVIEW  
The Industrial Commission of Utah  
Unemployment Compensation Appeals

vs.

Case No. 75-A-1320

DECISION

Case No. 75-BR-90

DEPARTMENT OF EMPLOYMENT SECURITY

The Board of Review, after careful consideration of the record and testimony in the above-entitled matter, hereby affirms the decision of the Appeals Referee which denied unemployment benefits under Section 35-4-5(e) of the Employment Security Act for the 52-week period of December 30, 1973 to December 28, 1974, and thereafter until the claimant repays \$1,392 which he received in unemployment benefits during that disqualification year. Such decision was based upon the determination, conceded by the claimant through Counsel, that in filing a claim for unemployment benefits for the week ended January 5, 1974, the claimant did knowingly withhold the material facts that he worked and had earnings in the amount of \$83.55 during such week and that by reason of his fraud he was paid \$1,392 in weekly benefits to which he was not entitled.

Counsel for the claimant contends, however, that the language of Sections 35-4-4, 35-4-5 and 5(e), and 35-4-6(d) permit an interpretation of the Employment Security Act by which the claimant could be found eligible for benefits upon his subsequent new claim filed January 5, 1975, and thereupon file eligible weekly claims to offset against the overpayment until the payment is satisfied. Further, Counsel contends that failure of the Referee to make such interpretation amounts to an unconstitutional denial of the claimant's rights of Equal Protection.

The Board is unable to concur in either contention but holds, as appears necessary, that:

- (1) The language of the above-cited sections, particularly 35-4-4 and 35-4-5, does not permit the subsequent attainment of eligibility for benefits during a continuing period of disqualification, consequently, there are no new benefits to offset against the overpayment; and

BOARD OF REVIEW  
The Industrial Commission of Utah  
Unemployment Compensation Appeals

vs.

Case No. 75-A-1320

DECISION

Case No. 75-BR-90

DEPARTMENT OF EMPLOYMENT SECURITY

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- (2) The requirements of Equal Protection do not preclude the legislative imposition, upon proper grounds, of a benefit disqualification continuing until monies wrongly received have been repaid to the Unemployment Insurance Fund.

This decision will become final ten days after the date of mailing hereof, and any appeal to the Supreme Court of the State of Utah must be made within ten days after this decision becomes final.

BOARD OF REVIEW

*Carlyle J. Harrison*  
*William C. Haddock*  
*James H. Harrison*

Dated this 29th day of October, 1975.

Date Mailed: November 4, 1975.



BOARD OF REVIEW  
The Industrial Commission of Utah  
Unemployment Compensation Appeals

vs.

DEPARTMENT OF EMPLOYMENT SECURITY

Case No. 75-A-1320

DECISION

Case No. 75-BR-90  
AMENDED

Due to the serious nature and consequences of the problem presented in this case, the Board of Review has reconsidered the matter and the decision issued on October 29, 1975.

After careful review of the wording of Section 35-4-5(e) of the Employment Security Act, it is concluded there is an ambiguity concerning the duration of the disqualification and the requirements of the repayment of the monies received as a result of the fraud. Because of the ambiguity, this part of the section of the law is subject to interpretation.

It is concluded at this point that the disqualification for fraudulently obtaining benefits is interpreted to be no longer than the 52 weeks. It is further interpreted that after the 52-week disqualification period a claimant who is otherwise eligible for benefits may file for such benefits but may not receive them until all the monies he received by reason of his fraud have been repaid, either by cash payment or offset of subsequent valid claims. However, this should not deter any reasonable collection actions by the Department for monies owed subsequent to a fraud hearing and decision.

It should be noted that if such interpretation should result in a material increase in fraud among those claimants offsetting their overpayment so as to lessen effectiveness of this section then some other reasonable interpretation of this section should be considered.

The application of this interpretation results in an amendment of the decision issued by the Board on October 29, 1975. In this case, it was conceded by the claimant, through his counsel, that when filing his claim for unemployment benefits for the week ended January 5, 1974, the claimant did knowingly withhold the material facts that he worked and had earnings in the amount of \$83.55 during such week and that by reason of his fraud he was paid \$1,392.00 in weekly benefits to which he was not entitled.

BOARD OF REVIEW  
The Industrial Commission of Utah  
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It is, therefore, the decision of the Board that the \$1,392.00 is immediately due and owing; but as the claimant is unemployed and otherwise eligible for benefits, he can use subsequent valid claims to offset the overpayment.

This decision will become final ten days after the date of mailing hereof, and any appeal to the Supreme Court of the State of Utah must be made within ten days after this decision becomes final.

BOARD OF REVIEW

*Carlisle J. Thomas*  
*W. Allen C. Little*  
*Thomas J. Brown*

Dated this 11th day of February, 1976.

Date Mailed: February 20, 1976

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