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IN THE SUPREME [illegible]
OF THE STATE [illegible]

GUY L. KIRKWOOD,

Plaintiff-Appellant,

vs.

BOARD OF REVIEW OF THE [illegible]
COMMISSION OF UTAH, [illegible]
EMPLOYMENT SECURITY,

Defendant-Respondent.

DEFEND[illegible]

Appeal from a decision [illegible]
Commission, State of [illegible]
of the Department of [illegible]
and [illegible]

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TABLE OF CONTENTS

PAGE

NATURE OF THE CASE.. 1

DISPOSITION BY LOWER AUTHORITY.................................... 2

RELIEF SOUGHT ON APPEAL.. 2

STATEMENT OF FACTS.. 2

ARGUMENT.. 4

POINT I.. 4
IN REVIEWING DETERMINATIONS OF THE INDUSTRIAL COMMISSION UNDER THE UTAH EMPLOYMENT SECURITY ACT THE COURT WILL AFFIRM THE FINDINGS OF THE BOARD OF REVIEW IF SUCH FINDINGS ARE SUSTAINED BY SUBSTANTIAL COMPETENT EVIDENCE.

POINT II... 5
THE DECISION OF THE BOARD OF REVIEW THAT THE CLAIMANT'S APPEAL TO THE BOARD WAS UNTIMELY AND THAT THE BOARD THEREFORE LACKED JURISDICTION TO FURTHER CONSIDER THE CASE ON ITS MERITS IS SUPPORTED BY COMPETENT EVIDENCE AND SHOULD BE AFFIRMED.

POINT III.. 8
THE APPEAL REFEREE WAS NOT IN ERROR IN DETERMINING FROM THE TESTIMONY OF THE EMPLOYER'S WITNESSES AND THE WRITTEN INFORMATION GIVEN BY THE PLAINTIFF IN THE RECORD THAT THE PLAINTIFF WAS DISCHARGED FROM HIS EMPLOYMENT FOR DELIBERATE, WILLFUL ACTION ADVERSE TO HIS EMPLOYER'S INTEREST, GIVEN THE PLAINTIFF'S FAILURE TO ATTEND THE HEARING AND ABSENT ANY REQUEST FOR POSTPONEMENT OF THIS HEARING ON THE PLAINTIFF'S PART.

CONCLUSION 11

CASES CITED

Continental Oil Company v. Board of Review of the Industrial Commission of Utah, Utah, 568 P. 2d 727,729 (1977)... 5

TABLE OF CONTENTS (Continued)

CASES CITED (Continued)

PAGE

Gocke v. Weisley, 18 Ut. 2d 245, 420 P. 2d 44 (1966)............ 8

Isaacson v. Dorius, Utah, 669 P. 2d 849 (1983).................. 7

Martinez v. Board of Review, 25 Utah 2d 131, 477 P. 2d 587 (1970).. 4

Richardson v. Commonwealth, Unemployment Compensation Board of Review, Pennsylvania Commonweath, 427 A. 2d 734 (1981).. 10

Salt Lake City Corporation v. Department of Employment Security and Marion Lynch, Utah, 657 P. 2d 1312 (1982)..... 10

Salt Lake County v. Industrial Commission, 101 Ut. 167, 120 P. 2d 321, (1941).................................... 8

Theissens v. Department of Employment Security, Board of Review of the Industrial Commission, Utah, 663 P. 2d 72 (1983).. 7

Urso v. Commonwealth, Unemployment Compensation Board of Review, Pennsylvania Commonwealth, 396 A. 2d 70 (1979)..... 10

OTHER AUTHORITIES CITED

Rules and Regulations of the Department of Employment Security of the Industrial Commission, Section A71-01-1:4.f.(3)................6

Rules and Regulations of the Department of Employment Security of the Industrial Commission, Section A71-01-1:5.e....................6

18 ALR 3rd 1333 (1979) and Supplement, 1983, "Insubordination"............10

TABLE OF CONTENTS (Continued)

STATUTES CITED

PAGE

Utah Code Annotated 1953, Section 35-4-5(a)..............................10

Utah Code Annotated 1953, Section 35-4-5(b)(1).....................1,2,9,10

Utah Code Annotated 1953, Section 35-4-6(c)..............................5,6

Utah Code Annotated 1953, Section 35-4-10..................................5

Utah Code Annotated 1953, Section 35-4-10(b)...............................5

Utah Code Annotated 1953, Section 35-4-10(i)..........................1,4,5

Utah Code Annotated 1953, Section 35-4-11(a)(1)...........................6

IN THE SUPREME COURT OF THE STATE OF UTAH

GUY L. KIRKWOOD,

Plaintiff-Appellant,

vs

Case No. 19177

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

Defendant-Respondent.

DEFENDANT'S BRIEF

NATURE OF THE CASE

This is an appeal pursuant to Section 35-4-10(i), Utah Code Annotated 1953, from a decision by the Board of Review, Industrial Commission of Utah, affirming the decision of the Appeal Referee which denied unemployment compensation to the Plaintiff, pursuant to Section 35-4-5(b)(1), Utah Code Annotated, 1953, as amended, on the grounds that the Plaintiff had been discharged from his employment for actions connected with his work which were disqualifying.

DISPOSITION BY LOWER AUTHORITY

Plaintiff filed an initial claim for unemployment compensation effective July 4, 1982. After consideration of the reasons for the Plaintiff's discharge, a local office representative denied benefits to the Plaintiff and issued a written decision pursuant to this determination on July 28, 1982.

Plaintiff filed a timely appeal to the Appeals Tribunal on August 9, 1982. The Appeal Referee affirmed the denial of benefits to the Plaintiff pursuant to Section 35-4-5(b)(1) in Case No. 82-A-3482. A copy of this decision was mailed to Plaintiff at his last-known address on September 2, 1982.

On March 29, 1983 Plaintiff appealed to the Board of Review of the Industrial Commission, which concluded that Plaintiff's appeal was not timely made and affirmed the denial of benefits in Case No. 82-A-3482, 83-BR-215.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the decision of the Defendant and asks that judgement be entered by the Court allowing benefits to the Plaintiff from July 4, 1982 until he is no longer otherwise eligible or, in the alternative, that the matter be remanded for a hearing on the merits of the case. Defendant seeks affirmance of the decision of the Board of Review.

STATEMENT OF FACTS

Defendant is in substantial agreement with the history of the Plaintiff's employment with Helper City; however, the events that occurred on

1982 and thereafter as reported in the Plantiff's Brief vary slightly from the information recorded in the Department records.

Specifically, the Plaintiff, hereinafter referred to as claimant, reported that he told the men who worked for him that he would not be in for work on July 2. R.0041 He did not attempt to contact his supervisor because he "could never find him." R.0041 There is no information regarding the claimant's having made arrangements for a substitute to cover his job. When he was asked by the City Council member to attend the meeting on July 2, the claimant refused, but stated that he would go to work. R.0041 He refused to return the city truck when asked to do so. R.0041 There is nothing in the record to indicate that the claimant explained his personal difficulties to his employer. All of the information contained in this paragraph is recorded on a "Statement of Reason for Quit or Discharge," Form 680, taken by a Department representative on July 6, 1982 and signed by the claimant. R.0041 Information supplied by the employer was not received until after July 8, 1982, and therefore, was not available to the Department representative or the claimant at the time of his interview. R.0040

The claimant filed a timely appeal to the Appeals Tribunal on August 9, 1982. R.0036-0038 An appeal hearing was scheduled for August 30, 1982 in the Price Job Service Office. R.0035 Claimant was informed on the notice of hearing issued by the Appeals Tribunal that he could request rescheduling of the hearing if he had good cause for so doing. He was further placed on notice that his failure to attend the hearing would result in a decision being issued based upon the information available. See Addendum 1, herein.

On August 25, 1982 the Appeals Tribunal received an attendance card upon which the claimant had marked that he would be in attendance at the hearing. R.0034 He failed to appear. The employer was present at the hearing and gave testimony in the case.

The decision of the Appeal Referee was issued on September 2, 1982. R.0028 Claimant made no other contact with the Appeals Tribunal, the Board of Review or any other department within the agency prior to the receipt of his appeal to the Board on March 30, 1983. R.0027

ARGUMENT

POINT I

IN REVIEWING DETERMINATIONS OF THE INDUSTRIAL COMMISSION UNDER THE UTAH EMPLOYMENT SECURITY ACT THE COURT WILL AFFIRM THE FINDINGS OF THE BOARD OF REVIEW IF SUCH FINDINGS ARE SUSTAINED BY SUBTANTIAL COMPETENT EVIDENCE.

The standard of review in unemployment insurance cases is well established. Section 35-4-10(i), Utah Code Annotated 1953, provides in part:

> In any judicial proceedings 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.

This Court has consistently held that where the findings of the Commission and the Board of review are supported by evidence, they will not be disturbed. Martinez v. Board of Review, 25 U. 2d 131, 477 P. 2d 587 (1970). In analyzing the above-referenced review provisions, this Court has stated:

Under Section 35-4-10(i) the role of this Court is to sustain the determinations of the Board of Review unless the record clearly and persuasively proves the action of the Board of Review was arbitrary, capricious, and unreasonable. Specifically, as a matter of law, the determination was wrong; because only the opposite conclusion could be drawn from the facts. Continental Oil Company v. Board of Review of the Industrial Commission of Utah, Utah, 568 P. 2d 727,729 (1977).

POINT II

THE DECISION OF THE BOARD OF REVIEW THAT THE CLAIMANT'S APPEAL TO THE BOARD WAS UNTIMELY AND THAT THE BOARD THEREFORE LACKED JURISDICTION TO FURTHER CONSIDER THE CASE ON ITS MERITS IS SUPPORTED BY COMPETENT EVIDENCE AND SHOULD BE AFFIRMED.

The time period provided by statute within which a claimant may appeal from an adverse decision of an Appeal Referee to the Board of Review is ten (10) days. Section 35-4-6(c) of the Act provides in pertinent part:

> The parties shall be promptly notified of such referee's decision and shall be furnished with a copy of the decision and the findings and conclusions in support thereof and such decision shall be deemed to be final unless, within ten days after the date of mailing of notice thereof to the party's last known address, or in the absence of such mailing, within ten days after the delivery of such notice, further appeal is initiated pursuant to the provisions of Section 35-4-10.

Section 35-4-10(b) in referring to the decision of the Appeal Referee states as follows:

> ... and the decision is the final decision of the commission unless within ten days after the mailing of notice to the party's last known address 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.

Although Sections 6(c) and 10(b) are express and do not grant the Board discretion to extend the ten day time limit, the Commission, pursuant to authority granted it under Section 35-4-11(a)(1) of the Act, has adopted Section A71-07-1:5.e. of the Department of Employment Security of the Industrial Commission Rules and Regulations which allows the claimant the opportunity to show "good cause" for late filing. If he fails to do so, his case shall be dismissed on such grounds; if he suceeds it shall be further decided on its merits.

Section A71-07-1:5.e. provides for the handling of untimely appeals to the Board in the same manner as late appeals to the Appeals Tribunal by reference to Section A71-07-1:4.f.(3), which states in part:

> Where it appears that any appeal...may not have been filed within the time allowed by law... the appellant...shall be notified and be given an opportunity to show that such appeal...was timely or was delayed for good cause. If it is found that such appeal... was not filed within the applicable time limit and the delay was without good cause, it shall be dismissed on such ground. If it is found that such appeal...was timely or was delayed for good cause, the matter shall be decided on the merits. Rules and Regulations

This rule was apparently promulgated by the Commission to provide a claimant an opportunity to have his case decided on its merits when an appeal is filed late, but for reasons beyond the claimant's control. Pursuant to these regulations the record in the claimant's case was reviewed by the Board before issuance of its decision on the timeliness issue. It is the Defendant's contention that the Board's decision that the claimant failed to meet this burden of proof is supported by competent evidence.

In determining that the claimant failed to show good cause for his untimely appeal, the Board was told only that the claimant "was in a mental stress due to family problems (divorce)." R.0027 It is noted that even in the claimant's Brief to the Court no additional information is given with regard to what specific problems prevented the claimant from appealing the Appeal Referee's decision for more than six months. The record clearly supports a finding that pendance of a divorce was the sole reason for the claimant's failure to avail himself of his appeal rights in timely fashion. As the Defendant pointed out in its earlier motion the claimant was able to file a timely appeal to the Appeals Tribunal at the end of July despite the fact that he had lost his job and his family within the preceeding month. Of controlling import in this case becomes the question of establishing good cause for the claimant's delay.

Defendant draws the attention of the Court to their recent decision in the civil action of Isaacson v. Dorius, Utah, 669 P. 2d 849 (1983), which supports the Defendant's assertion that the limitations established for the purposes of complying with filing requirments control the very functioning of the judiciary in determining the jurisdiction necessary to grant the right to appeal. In regard to unemployment compensation issues, this Court has previously held that the failure to show good cause for the late filing of an appeal divests the Industrial Commission, as well as the Court, of jurisdiction to hear the case on its merits. Theissens v. Department of Employment Security, Board of Review of the Industrial Commission, Utah, 663 P. 2d 72 (1983).

A decision based upon such information as provided by the claimant to the Board is not an abuse of discretion. This position is supported in the case of Gocke v. Wiesley, 18 Ut. 2d 245, 420 P. 2d 44 (1966), where this Court stated that the Commission has the usual prerogatives as the trier of the facts including the authority to draw any reasonable inferences as long as they are supported in the record. The Gocke case cites Salt Lake County v. Industrial Commission, 101 Ut. 167, 120 P. 2d 321 (1941) in further stating that it is the duty of the Court to examine the record and to affirm the decision unless it can be said as a matter of law that the conclusion drawn from the facts was wrong because only the opposite conclusion could be drawn. Defendant asserts that the conclusion drawn is most reasonable in light of the facts presented and thereby remains outside the jurisdictional authority of this Court.

POINT III

THE APPEAL REFEREE WAS NOT IN ERROR IN DETERMINING FROM THE TESTIMONY OF THE EMPLOYER'S WITNESSES AND THE WRITTEN INFORMATION GIVEN BY THE PLAINTIFF IN THE RECORD THAT THE PLAINTIFF WAS DISCHARGED FROM HIS EMPLOYMENT FOR DELIBERATE, WILLFUL ACTION ADVERSE TO HIS EMPLOYER'S INTEREST, GIVEN THE PLAINTIFF'S FAILURE TO ATTEND THE HEARING AND ABSENT ANY REQUEST FOR POSTPONEMENT OF THIS HEARING ON THE PLAINTIFF'S PART.

The alternative relief sought by the claimant of granting a new evidentiary hearing is not properly before this Court since the decision of the Appeal Referee included evidentiary findings taken in the proper course of hearing procedure, the Referee's decision is without error, and further since the lack of jurisdiction by the Court precludes further review absent any

owever, to evidence the absence of any mistake, a review of the ... included for the benefit of Court.

When a separation issue is the basis for a decision denying unemployment compensation, the decision must be predicated upon a finding that the claimant seeking to collect these benefits was discharged from his employment for disqualifying reasons as defined in Section 35-4-5(b)(1) of the Act.

Section 35-4-5(b)(1) of the Utah Employment Security Act provides as follows:

> 5. An individual shall be ineligible for benefits or for purposes of establishing a waiting period:
>
> (b)(1) For the week in which the claimant was discharged for an act or omission in connection with employment... which is deliberate, willful, or wanton and adverse to the employer's interest...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.

The Appeal Referee had sufficient evidence before her to support a finding that the claimant's actions were in willful disregard of the employer's rightful interest. The facts reveal that the claimant was given a clear alternative to return to work for the meeting or be fired. In choosing not to comply with the reasonable request of his supervisor, the deliberateness of his actions are manifest. The adverse affect to the employer was in having no supervisor available to direct the waiting work crew, a responsibility which belonged solely to the claimant. These elements satisfy the ... establishing a disqualification for benefits as provided in Section ... of the Act and are supported in the case law. Richardson v.

v. Commonwealth, Unemployment Compensation Board of Review, Pennsylvania Commonwealth, 427 A. 2d 734 (1981); Urso v. Commonwealth, Unemployment Compensation Board of Review, Pennsylvania Commonwealth, 396 A. 2d 70 (1979). Also see 26 ALR 3rd 1333 (1979) and Supplement, 1983.

Plaintiff has asserted that both the Appeal Referee and the Board of Review erred in failing to apply the equity and good conscience standard set out in the Act and in not considering the reasonableness of the Plaintiff's actions. This standard is established in Section 35-4-5(a) which has application only in cases involving the voluntary termination of employment. No consideration of equity and good conscience is prescribed in the language of Section 35-4-5(b)(1) which governs the payment of benefits subsequent to a discharge from employment. Salt Lake City Corporation v. Department of Employment Security and Marion Lynch, Utah, 657 P. 2d 1312 (1982) was cited as precedent for the claimant's contention. However, the issue in that case was whether a former employee was entitled to unemployment compensation after quitting her job with Salt Lake City. Defendant can determine no reasonable application of equity and good conscience as presented by the facts of this case since no issue of voluntary termination is present.

On Page 9 of the claimant's Brief the following statement appears:

> In this case, the Appeal's Referee refused to allow the Plaintiff-Appellant to read and review the stated grounds for termination submitted by Helper City...

Defendant's response is that the Appeal Referee did not have an occassion to meet with the claimant since the claimant did not appear for the hearing and, therefore, the Referee had no opportunity to allow or deny the claimant

the record. Defendant again asserts there is no evidence of error in the facts of this case so as to require the Court to exercise [illegible] jurisdiction over this matter.

CONCLUSION

The determination of the Board of Review, that it lacked jurisdiction to further consider the claimant's case on its merits based upon the claimant's untimely appeal to the Board from the decision of the Appeal Referee, is supported by competent evidence and should, therefore, be affirmed.

Respectfully submitted this 22nd day of November, 1983.

DAVID L. WILKINSON
Attorney General of Utah

K. ALLAN ZABEL
Special Assistant Attorney General

By____________________________
K. Allan Zabel
Special Assistant Attorney General

CERTIFICATE OF MAILING

I do hereby certify that I mailed two copies of the foregoing Defendant's Brief, postage prepaid, to the following this 22nd day of November, 1983: Brian C. Harrison, Attorney for Plaintiff, 290 West Center, Provo, [illegible].

____

THE INDUSTRIAL COMMISSION OF UTAH
DEPARTMENT OF EMPLOYMENT SECURITY
APPEALS SECTION

P.O. Box 11600
Salt Lake City, Utah 84147

PLEASE BE PROMPT

EMPLOYER:

SECURITY NO. DOCKET NO.

YOU ARE NOTIFIED TO APPEAR ON ______________________ at ________

AT ______________________________________.

TO GIVE EVIDENCE AT A HEARING ON AN APPEAL FILED ______________________, by the

☐ CLAIMANT ☐ EMPLOYER FROM A DECISION DATED ______________________.

SPECIAL INSTRUCTIONS:

THE ISSUES ARE: (Section references are to the Utah Employment Security Act 35-4, Utah Code Annotated 1953)

4(a) Whether the claimant has made a claim for benefits in accordance with regulations;

4(c) Whether the claimant is able and available for and actively seeking work;

SEPARATION ISSUE:

5(a) Whether the claimant voluntarily left work without good cause; left work to accompany or join his/her spouse in a new locality; a denial of benefits would be contrary to equity and good conscience, and the claimant has demonstrated a continuing attachment to the labor market;

5(b)(1) Whether the claimant was discharged for an act or omission in connection with employment which was deliberate, willful or wanton and adverse to the employer's rightful interests;

5(b)(2) Whether the claimant was discharged for dishonesty constituting a crime in connection with employment;

5(c) Whether the claimant has failed without good cause to properly apply for or accept available, suitable work, and claimant's demonstration of a continuing attachment to the labor market;

5(e) Whether the claimant willfully made a false statement or failed to report a material fact to obtain benefits.

5(g) Whether the claimant is registered at and attending an established school or is on vacation during or between successive quarters or semesters;

6(c) Whether the appeal was filed within 13 days; if not, be prepared to give reasons for delay;

6(d) Whether the claimant by reason of his/her fault received any sum of benefits to which he/she was not entitled and must repay ______________

Mailed

IMPORTANT—CONTINUED ON REVERSE SIDE

[illegible] failure to appear [illegible] Appeals [illegible]

[illegible] determined [illegible] by a lawyer or other person as you have been [illegible]

If you [illegible] please contact this office immediately.

In the event of your failure to appear, the decision in the matter will be issued on the basis of the [illegible] available to the Utah Appeals Section. If your failure to appear is deemed to be due to good cause preventing your appearance, you may, [illegible] within seven days after the original date of hearing, request in writing that a hearing be rescheduled. Your request should set forth your reason for not appearing at the original hearing and should be directed to the nearest Job Service Center or the Appeals Referee, Box 11600, Salt Lake City, Utah 84147. If good cause for not appearing is found to exist, a new hearing date will be set and written notices will be mailed to your last known address.