1984

Baltazar Antillon v. The Board of Review of The Industrial Commission of Utah, Supreme Court Department of Employment Security : Plaintiff-Appellant's Brief in Opposition To Defendant-Respondent's Petition For Rehearing

IN THE SUPREME COURT
OF THE STATE OF UTAH

BALTAZAR ANTILLON,

Plaintiff-Appellant,

vs.

Case No. 19338

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

Defendant-Respondent.

PLAINTIFF-APPELLANT'S BRIEF IN OPPOSITION TO DEFENDANT-RESPONDENT'S PETITION FOR REHEARING

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STATEMENT OF THE NATURE OF THE CASE

Respondent petitions for rehearing from a unanimous decision of this Court rendered June 6, 1984. Baltazar Antillon v. Department of Employment Security, No. 19338. The Court reversed the decision of the Industrial Commission after reviewing the entire record of the case, reading the briefs of the parties and hearing oral argument on the issues.

STATEMENT OF FACTS

The Respondent in its Petition for Rehearing at p. 3 asserts that the Court erred in its Findings of Fact on two issues:

1. On page 3 of its decision the Court made the following finding:

> No hearing date was ever set, no hearing has yet been held, and no further action has been taken by the INS on Antillon's application for permanent residency.

2. On page 2 of its decision the Court stated:

> In July, 1980, on a brief vacation to Mexico, Antillon filed papers to become a permanent resident of the United States with the American consul in Chilaualua [sic], Mexico. That application and accompanying records were later transferred to Salt Lake City, Utah, the closest Immigration and Naturalization Service (INS) office to Antillon's home address.

Appellant submits that these Findings of Facts were not incorrect but were based upon the record transmitted by the Respondent to this Court and certified pursuant to Rule 75(g) of the Utah Rules of Civil Procedure.

In its petition for rehearing Respondent also attempts to introduce new evidence into this case via an affidavit attached to the brief. Appellant contends that this evidence cannot be introduced at this late date and requests that the facts as presented on appeal are complete, accurate and the only basis upon which the review of the petition for rehearing can take place.

ARGUMENT

POINT I.

RESPONDENT'S PETITION FOR REHEARING SHOULD BE DENIED.

A. Rehearing is Granted in Rare Instances.

The general rule in petitions for rehearing is that they should not be granted. In Brown v. Pickard, 4 Utah 272, 11 P. 512 (1886) the Court noted:

> [T]o justify a rehearing, a strong case must be made. We must be convinced that the Court failed to consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time of hearing.

Respondent has failed to meet this burden and is simply attempting to reargue his case in this petition.

Respondent's contention that the Findings of Fact relied on by the Court were in error and justifies granting his petition for rehearing is without merit. The first alleged factual error was made, if at all, by the Respondent below. It was one of the facts relied upon by Respondent to deny Appellant benefits. (R.0025). Respondent, pursuant to Rule 75(g), transmitted the transcript and record and certified that it was accurate and complete. The only problem with the record ever claimed by the Respondent was that it was incomplete and Respondent subsequently transmitted a supplemental record. No other objections to the record were made and Respondent cannot now argue that the facts below were incorrect. Respondent's contention is not timely and in any event, fails to demonstrate a strong case justifying rehearing.

The second point of error alleged by Respondent also fails to meet the standards required to justify a rehearing. The fact that the U.S. Immigration and Naturalization Service re-initiated proceedings subsequent to a completion of the administrative hearings held in determining Appellant Antillon's eligibility for unemployment benefits does not affect the Court's decision or require the decision to be changed or modified. The finding of the Court was that, at the time Appellant Antillon applied for and received benefits he was eligible for those benefits as an alien "permanently residing in the United States under color of law" within the meaning of 35-4-5-(k)(i) Utah Code Annotated (1953 as amended).

B. Respondent's Petition Cannot be Granted Since it is Based Upon Points Not Previously Raised.

A petition for rehearing cannot be granted based upon points or evidence which has not previously been raised. Harrison v. Harker, 44 Utah

541, 142 P. 716 (1914); Swanson v. Sims, 51 Utah 334, 170 P. 778 (1918); re Lowes Estate, 68 Utah 49, 249 P. 128 (1926).

Respondent attempts to introduce new evidence, in the form of an affidavit appended to its Brief in Support of Petition for Rehearing. Respondent's reliance on Flick v. Van Tassel, 547 P.2d 201 (1976) does not support its attempt to introduce this new evidence. Respondent relies on dicta in Flick which indicates that there may be a case where evidence not introduced below might be considered by the Court. However, in this case as in Flick, there is no reason to allow new evidence. Respondent has not discovered new evidence which was not previously available. The rule of the Court is to examine cases on appeal based on the record. It must not "examine things dehors the record" where as here no "misunderstanding or fraud, reflecting unconscionability" exists [Flick, supra].

Allowing the affidavit at this late date also has the effect of forcing the Court to "believe and accept anything which a losing litigant might subscribe to without benefit of reply or cross examination" Flick at 205. This is not the purpose of rehearings. The Court must rely on the record created by the parties.

Appellant raised the collateral effect of attempts at non-present hearsay evidence in his brief on appeal (See Point II). For reasons raised therein, evidence of a hearsay nature such as this affidavit not subject to examination must be carefully examined and suspect.

The long standing principle is that when, as here, the Court has evaluated and considered points raised by the Respondent in the original hearing, a petition for rehearing should not be granted. Brown v. Pickett, supra; People v. Rogerson, 4 Utah 483, 11 P. 618 (1886); Jones v. House, 4 Utah 483, 11 P. 619 (1886).

POINT II.

THE DECISION OF THE COURT IS NOT IN ERROR.

A. The Discussion in the Congressional Record Supports The Decision of the Court.

Respondent has mustered language of the Congressional debate surrounding the adoption of an amendment to the unemployment compensation statute. However, the discussion does not affect the decision of this Court. As noted in Respondent's petition at page 10 the Sisk Amendment provided:

> (14) compensation shall not be payable on the basis of services performed by an alien who was not lawfully admitted to the United States;

This provision does not include the category of aliens who are "permanently residing in the United States under color of law."

The issues raised by the Appellant and determined by the Court were whether (1) Congress created three exceptions to the general rule denying benefits, and (2) whether Appellant was a member of that class of aliens "permanently residing in the United States under color of law". Statutory construction applied by the Court is bolstered by the Congressional Record debates relied on by the Respondent. The Sisk Amendment was modified to reflect three exceptions to those aliens "not lawfully admitted to the United States;". The semicolon after this phrase bolsters the Court's interpretation of §35-5-4(k)(i) since it suggests that exceptions will follow.

Adoption of the position urged by Respondent in its position for rehearing would have the effect of judicially implementing the language of the Sisk Amendment which was modified by the three exceptions to the general rule.

B. The Court Evaluated the Cases Raised by Respondent in Making Its Decision.

Respondent's argument and reliance on Duenas-Rodriguez v. Industrial Commission, 199 Colo. 95, 606 P.2d 437 (1980) was [illegible] and considered by the Court. The case is distinguishable since it addresses the "availability" provision of the unemployment statute and not the "alien disqualification" provision.

The Court properly relied upon Rubio v. Employment Division, 67 Ore. App. 525, 674 P.2d 1201 (1984), the only other case which specifically reviewed the eligibility provisions within the general exclusion of aliens receiving benefits. Applying the facts of the present case to the statute, the Court correctly determined that both Antillon and Rubio were residing in the United States under color of law as provided for within the meaning of the unemployment statute.

Respondent raises no new concerns regarding the application of the statute, therefore, the decision of the Court in its statutory construction should stand.

C. The Court's Finding That Appellant's Presence was Known was Based on the Uncontroverted Record Below.

As noted above, the evidence attempted to be introduced by the Respondent at this late date is not timely or properly before this Court. However, even if this Court should consider the concerns raised by Respondent they do not effect the decision of the Court. The Court found and the record supported a finding that Appellant was under docket control of the INS as of January 30, 1984 when he was issued an I-94 arrival-departure document. (R.0029, 0057). The Appellant testified that as of that date he continued to notify INS of his presence and changes of address. There is nothing in the record to the contrary.

Appellant has consistently argued that he is "under color of law" because he has a procedural right to remain in the United States until action on his request for discretionary relief is taken. (See Appellant's Brief at Point I). The Court had sufficient evidence to justify its decision that INS knew of Appellant's presence.

Events subsequent to the time he applied for and received benefits (October, 1983, see Respondent's brief at 23), do not affect the decision of this Court. As defined in Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977) and argued by Appellant in his brief, an individual may be "permanently residing in the U.S." even though it is a relationship which "may be dissolved eventually at the instance of either the United States or of the individual", Holley at 850, Appellant's brief at 10. Therefore, even if the action taken by INS subsequent to the application for benefits eventually results in a dissolution of his permanent residence under color of law, that will not occur until action on his applications are completed. The Court's decision recognizes Appellant's argument that no action to remove Appellant from the United States can occur until his case is adjudicated by an immigration judge. Until that point, Mr. Antillon will not be required to leave the country and there will be no determination of the veracity of the charges in the Order to Show Cause. For these reasons the decision of the Court is correct and rehearing should not be granted.

POINT III.

APPELLANT WAS ENTITLED TO ALL THE BENEFITS HE RECEIVED AND OTHER BENEFITS HE HAS BEEN DENIED.

The final argument raised by Respondent is that under the Court's decision Appellant was not entitled to benefits for his January 5, 1981 claim because he was not in the United States under color of law during the whole

of his base year. The facts, as supported by the record, indicate th... Appellant was in the United States from July of 1980 when he voluntar... made known his presence to officials in Mexico (R.0033). The period of ti... essential to determine Mr. Antillon's right to receive benefits is 29 weeks, t... time period in which the Appellant was "permanently residing in the Unit... States under color of law". Therefore, the decision of the Court, althou... technically mistaken was correct. The point raised by Respondent does n... give rise to fraud or unconscionability, therefore, its petition for rehear... should be denied and Appellant's benefits should be reinstated immediately.

CONCLUSION

The Respondent's attempt to raise new evidence to secure ... rehearing is not properly before this Court and does not support its petit... for rehearing. The Respondent's arguments were fully evaluated by t... Court before but found not to be persuasive in determining whether ... Appellant was entitled to unemployment benefits. Action taken by INS at... the time that Appellant applied for and received benefits does n... retroactively negate Appellant's presence "under color of law". The Cou... correctly determined that once Appellant made himself and his presence kn... to officials he was residing in the United States under color of law. Fina... the base period relied upon by the Court was correct and entitles Appell... to the benefits he received and additional weeks of benefits. For t... foregoing reasons the Respondent's petition for rehearing should be denie...

Respectfully Submitted,
UTAH LEGAL SERVICES, INC.

By: CECELIA M. ESPENOZA

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing PLAINTIFF-APPELLANT'S BRIEF IN OPPOSITION TO DEFENDANT-RESPONDENT'S PETITION FOR REHEARING, was mailed first-class, postage prepaid, to Bruce A. Horstmanshoff, Attorney for Respondent, 1234 South Main Street, Salt Lake City, Utah 84147, and K. Allan Zabel, Special Assistant to Attorney General, 1234 South Main Street, Salt Lake City, Utah 84147, this 15th day of AUGUST, 1984.