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IN THE SUPRE
OF THE STATE

ROBERT L. WOOD,

Plaintiff,

vs.

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

Defendant.

DEFENDA

Appeal from a decision of the D
State of Utah, as
and the Board of Review

ROBERT L. WOOD
Box 322
Auke Bay, Alaska 99821

Plaintiff, Pro Se

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ALBERT L. WOOD,

Plaintiff,

vs.

Case No. 19365

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

Defendant

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 held the claimant's appeal from the Department's decision was not timely made, pursuant to Section 35-4-6(c), Utah Code Annotated, 1953. The Referee concluded that he lacked jurisdiction to further consider the merits.

DISPOSITION BY LOWER AUTHORITY

Plaintiff filed his initial claim for unemployment compensation effective March 13, 1983. 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 to the Plaintiff's address of record on March 31, 1983.

Plaintiff filed an appeal to the Appeals Tribunal on May 5, 1983. The appeal was held to be untimely in accordance with Section 35-4-6(c) and was the basis for the decision of the Appeal Referee affirming the denial of benefits in Case No. 83-A-3340. A copy of this decision was mailed to the Plaintiff on June 3, 1983.

On June 10, 1983 the Plaintiff filed an appeal to the Board of Review of the Industrial Commission which concluded that the Appeal Referee's decision was without error in that the Referee lacked jurisdiction to consider the case on the merits due to the untimely appeal. The Board of Review affirmed the denial of benefits in Case Nos. 83-A-3340 and 83-BR-405.

RELIEF SOUGHT ON APPEAL

Plaintiff has failed to state the relief sought and it is assumed that he seeks reversal of the decision of the Defendant and that judgement be entered by the Court allowing benefits to the Plaintiff from March 13, 1983 until he is no longer eligible. Defendant seeks affirmance of the decision of the Board of Review.

STATEMENT OF FACTS

Prior to filing an application for unemployment benefits, the Plaintiff, hereinafter referred to as the claimant, was employed by the Seven-Up Bottling Company. He was discharged from that employment on or about January 10, 1983. R.0037 Claimant reported as the reason for discharge a "difference of opinion." R.0034 The employer reported that the claimant was discharged for selling products without reporting the sales. R.0033

Claimant first filed for unemployment benefits on March 15, 1983. R.0037 On March 31, 1983 a decision denying benefits was issued to the claimant at the address given on his initial claim: Box 322, Auke Bay, Juneau, Alaska, 99821. R.0037 The decision bore the date of April 13, 1983 as the last timely date upon which an appeal could be filed. R.0032

Claimant filed an appeal on May 5, 1983. An appeal hearing was held June 1, 1983 at which the claimant gave testimony by telephone. R.0029, R.0026-R.0028 He was asked by the Appeal Referee how much time had passed between his initial application for benefits and his receipt of the Notice of Denial of Benefits (R.0032), to which he replied, "I would say a month, because it took awhile, but, I think I turned in a couple of claims here [illegible] Let me see, I think I turned in about three claims here, so that would be at least three weeks. I would say a month." R.0027

He was asked by the Appeal Referee if there was any reason for a delay in receipt of the Notice of Denial of Benefits, the claimant replied, "I've had letters before that I've received in three days and I've had letters that I haven't received for two weeks up here... ." R.0026 Claimant gave

no other reason for the late filing of his appeal except that it might have been some problem with his mail box. R.0026

Since the appeal was filed twenty-two days after the last timely date for filing , thirty-five days after the date the decision was mailed, and upon a further finding of the absence of good cause for late filing, the Appeal Referee concluded that he lacked jurisdiction to consider the claim upon its merits and issued a decision to the claimant so stating his findings on June 3, 1983. R.0020,0021

Claimant filed an appeal to the Board of Review of the Industrial Commission of Utah on June 10, 1983. R.0019 On July 8, 1983 the Board of Review issued a decision affirming the decision of the Appeal Referee. R.0017

ARGUMENT

POINT I

IN REVIEWING THE 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.

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 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.

This Court has consistently held that where the findings of the Commission and the Board of Review are supported by evidence, they will not

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

... 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 APPEAL REFEREE WAS UNTIMELY AND THAT THE REFEREE 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 ... an adverse decision of the Industrial Commission or its representative ... ten (10) days. Section 35-4-6(c) of the Act provides in pertinent part:

> The claimant or any other party entitled to notice of a determination as herein 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... (Emphasis added)

... Court has held that in the absence of a timely filing of appeal under ... the Appeal Referee lacks jurisdiction to further hear the ... on its merits. Jones v. Department of Employment Security, ... Commission of Utah, 641 P. 2d 156 (1982).

Although Section 6(c) is express and does not grant the Referee 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 A71-07-1:4.f.(3) of the Department of Employment Security of the Industrial Commission Rules and Regulations 1974, which allows the claimant an opportunity to show "good cause" for late filing. If he fails to do so, the case shall be dismissed on such grounds; if he suceeds, it shall be further decided on its merits.

> (3) 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, A71-07-1:4.f.(3).

This rule was apparently promulgated by the Commission to provide a claimant an opportunity to have his or her case decided on its merits when an appeal is filed late, but for reasons beyond the claimant's control. Pursuant to this regulation the claimant was given an opportunity in a hearing to show good cause for the untimely appeal. It is the Defendant's contention that the Board's decision that the claimant failed to meet this burden is supported by competent evidence.

Claimant does not dispute that he received the Notice of Denial of Benefits. In his hearing before the Appeal Referee, he testified regarding the time lapse between filing for benefits on March 15, 1983 and receipt of the denial notice:

> I think it was, uh, a good month, if I remember right. I would say a month, because it took me awhile, but, I think I turned in a couple of claims here myself. Let me see, I think I turned in about three claims here, so that would be at least three weeks. I would say a month. R.0027

When asked by the Referee if he was having problems with his mail, he reported only that letters were taking from three days to two weeks to arrive. R.0026 Claimant and the Referee then discussed the fact that the exhibits mailed to the claimant for the appeal hearing were mailed from Salt Lake City on May 23, 1983 and were received by the claimant on the day before the hearing, eight days later. R.0026 Claimant's letter of appeal to the Appeals Tribunal was mailed on May 5, 1983 from Alaska and arrived in Salt Lake City on May 11, 1983, a traveling time of six days. R.0026

Two weeks lapsed between the filing for benefits and the mailing of the decision denying benefits. According to the claimant's testimony the decision was recieved within a month after filing. Since the decision was mailed from Salt Lake City two weeks after the claimant filed for benefits, this would agree with the outside limitation given by the claimant regarding the time required to receive mail at his Alaska address. By this analysis the claimant was in possession of the decision against him on or about April 14, or three weeks prior to the date of May 5, 1983 which was postmarked on the envelope containing the appeal letter received by the Appeals Tribunal. As a matter of Department policy, when an Appellant establishes that actual receipt of a decision occurred after the last day for filing a timely appeal, he is given an additional ten days from the date of receipt of the decision to file his/her appeal and have it considered as timely. In the instant

instant case, twenty-one days lapsed between April 14, 1983 and May 5, i more than twice the additional filing period.

Claimant testified that he did not mail the appeal letter himself, instead had given it to his mother to mail for him. He was of the opi that her participation in the appeal process had no adverse effect on t untimely mailing. His testimony was as follows:

> ...my mom's pretty accurate on this kind of stuff. She has me do it right away. She mails it for me. She does all my mailing. She...mails them right away. R.0027

Claimant raises no logical defense as to how the appeal came to be fi late. In a majority of jurisdictions, of which Utah is one, there is persumption that a notice properly mailed is sufficient to warrant t assumption that the addressee received the notice and was aware of its co tents. See 29 Am. Jur. 2d, pp. 246-252, Evidence, Sections 193 to 199, cases cited therein; Leight v. Commission, Unemployment Compensation Boa of Review, 410 A. 2d 1307 (Pa. Cmwlth, 1980); Johnson v. Commonwealth, employment Compensation Board of Review, 401 A. 2d. 4 (Pa. Cmwlth, 19 Devito v. Commonwealth, Unemployment Compensation Board of Review, 199 Super. 606, 186 A. 2d 639 (1962); Paul v. Dwyer, 410 Pa. 229, 188 A. 2d (1963); Garmond v. Kinney, 91 N.M. 646, 579 P. 2d 178 (1978); and Crisp State Highway Commission, 413 P. 2d 308 (Mont., 1966). In the Utah case it has been held that mailing to the proper address does not create a presumption that the document reached its destination, but does creat presumption or inference of fact. Campbell v. Gowans, 35 Ut. 268, 100 P. (1909)

Appellant's contention is that the Appeal Referee, as the trier of the facts, incorrectly weighed the evidence before him and the credibility of the witness in order to reach his decision regarding the timeliness issue. A presumption of fact that the claimant received the notice on or about April 14, 1983 was existant when the matter was brought before the Referee for hearing. Rather than being overcome during the course of the hearing, it was confirmed by the claimant's testimony. Inasmuch as the claimant failed to establish good cause for the late filing of the appeal, the decision of the Referee was without error in his finding that he lacked jurisdiction to consider the case upon the merits of the discharge issue.

POINT III

THE COURT LACKS JURISDICTION TO CONSIDER NEW EVIDENCE PRESENTED BY THE CLAIMANT WHICH WAS NEVER OFFERED INTO EVIDENCE AT THE APPEAL HEARING.

Claimant asserts that he was misled by a department representative who told him that if he was receiving claim cards he would soon be receiving unemployment benefit checks. R.0019 This information led him to ignore the Notice of Denial of Benefits according to the claimant's memorandum to the Court dated September 19, 1983:

> When told by telephone that once I receiving [sic] cards from their office, I would soon start receiving my unemployment. So therefore did not do anything with the appeal at the time... R.0002

This assertion was never raised at the appeal hearing. Furthermore the claimant has not asserted that he was instructed that it was not necessary to file an appeal. By not raising this as an issue at the appeal hearing,

the claimant precluded the taking of testimony from the department representative to ascertain what instruction had been given. This statement in the claimant's memorandum would lead the reader to believe that he was both aware of the decision denying benefits and that he chose not to act upon this information for some unspecified period of time which is contrary to his testimony at the hearing and gives further support to the Defendant's contention raised in Point II.

Consideration of this new complaint would be contrary to the holdings of this Court in Yost v. State, 640 P. 2d 1044 (Utah, 1981) which held that an appellant could not be heard to complain for the first time on appeal to issues which has not been presented to, nor considered by, the court below. The same principle of law has been followed in other jurisdictions with respect to unemployment matters. See Kellenberg v. Commonwealth, Unemployment Compensation Board of Review, 454 A. 2d 1202 (Pa. Cmwlth, 1983) and Petty v. University of Delaware, 450 A. 2d 392 (Del., 1982).

CONCLUSION

The determination of the Appeal Referee that he lacked jurisdiction to consider the claimant's case on its merits based upon the claimant's untimely appeal to the Appeals Tribunal is supported by competent evidence and should, therefore, be affirmed.

Respectfully submitted this____ day of December, 1983.

DAVID L. WILKINSON
Attorney General

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Special Asssistant Attorney General

By_____
K. Allan Zabel

CERTIFICATE OF MAILING

I HEREBY CERTIFY tnat I mailed two copies of the foregoing Defendant's brief to: Robert L. Wood, Plaintiff, Box 322, Auke Bay, Alaska 99821, this _____ day of December, 1983.

_____