STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

PACKERLAND PACKING CO., INC.,

Plaintiff,

vs.

Case No. 141-497

STATE OF WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS and RICHARD A. MONROE,

MEMORANDUM DECISION

Defendants.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is an action to review a decision of the defendant department dated November 23, 1973 in an unemployment compensation proceeding which determined that the appeal tribunal's findings of fact were supported by the applicable records and evidence and affirmed the appeal tribunal's decision which allowed benefits to the defendant employee Monroe (hereafter the employee).

The plaintiff employer had failed to appear at the scheduled hearing before the appeal tribunal, and the circumstances which resulted in such failure to appear are fully set forth in the Court's prior Memorandum Decision of August 6, 1974, on the employer's motion for permission to submit interrogatories to the department for answer. The employee appeared and was asked these questions by the examiner sitting as the appeal tribunal and gave these answers:

"Q Throughout the course of your work with Packerland through the time you last worked for the company on May 5, 1973, are you aware of any reason why you should be discharged?

A No. Now may I clarify that?

Q Just a moment. And I take it that after May 5, 1973, the company terminated your employment or discharged you?

A Yes.

Q And during the course of your employment, did you do your work to the best of your ability?

A Yes, I was told I was probably their best all-around boner they had. I trained the new people; a good share of the new people that came in, also." (Tr. 5).

In the department file at the time of the hearing before the appeal tribunal was the UC-203 form which had been submitted to the employer by the department on May 9, 1973, and which the employer had completed under date of May 10, 1973 and returned

to the department. Item 3 of this form asks, "If there is a legal reason why you question benefits, what is it?" and the employer answered this question by stating, "Punched out card walked off job." There also was in the file statements of the employee and the employer giving the details of the employee having walked off the job on May 5, 1973, which the department's deputy had made during the investigation of the employee's claims, which investigation resulted in the deputy making an initial determination that the employee was ineligible for benefits because of having been discharged for misconduct connected with his employment. In spite of this material in the file, no question was asked the employee at the hearing before the appeal tribunal about the walking off the job incident of May 5, 1973.

The appeal tribunal's findings of fact read as follows:

> "The employe worked seven and one-half years as a beef boner for the employer, a meat packing company. He was paid $4.74 an hour base pay, plus incentive earnings. His last day of work for the employer was May 5, 1973 (week 18), when he was discharged.
>
> "The employer did not appear at the hearing and no competent evidence was offered on its behalf. The employe was unaware of any reason which might warrant his discharge. Under these circumstances, and since he performed his work for the employer to the best of his ability, there is no basis for finding that his discharge was for any misconduct connected with his employment.
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> "The appeal tribunal therefore finds that the employe was discharged but not for misconduct connected with his employment, within the meaning of section 108.04(5) of the statutes.
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> "The appeal tribunal further finds that the employer respondent, which failed to appear at the hearing, has not shown good cause for such failure to appear, within the meaning of section 108.09(3) of the statutes."

The Issues

The employer has raised these issues:
(1) The agency, by adopting the findings of fact of the appeal tribunal and not making its own findings of fact, failed to comply with the law.

(2) The findings of fact of the appeal tribunal are not grounded on credible evidence and are in complete disregard of evidence in the department file establishing that the employee was discharged for misconduct connected with his employment.

(3) The appeal tribunal did not state reasons for its decision.

(4) The Wisconsin Unemployment Compensation Act (Ch. 108, Stats.) is unconstitutional in that it denies due process in these respects:

(a) Does not provide for an independent hearing examiner sitting as an appeal tribunal.
(b) There is no provision for protecting the rights of parties in the event

of default at the hearing before the appeal tribunal.

(c) No hearing procedure is provided for the review by the commission of the appeal tribunal's decision nor is there any provision for making a record of what transpires in this review.

(d) No provision made for challenging arbitrary or capricious conduct on the part of the commission.

(e) No provision made for challenging findings of fact on court review on ground they are not supported by credible evidence.

FAILURE OF COMMISSION TO MAKE INDEPENDENT FINDINGS OF FACT

There is no express provision in ch. 108, Stats., for the commission to make findings of fact when it acts on a petition for review of the decision of an appeal tribunal. The statute governing such review is sec. 108.09(6)(b) which provides:

> "Either party may petition the commission for review of an appeal tribunal decision, pursuant to general department rules, within 10 days after it was mailed to his last known address. Promptly after the filing of such a petition, the commission may either dismiss it as not timely at any level or may affirm, reverse, change, or set aside such decision, on the basis of the evidence previously submitted in such case, or direct the taking of additional testimony."

The appeal tribunal's findings of fact constitute part of its "decision" within the meaning of that word as used in the above statute as the department has interpreted the statute. It has long been the practice of the department for the commission to adopt the appeal tribunal's findings of fact as its own where it perceives no reason for modifying or changing the same by simply stating in the commission's decision that the appeal tribunal's findings of fact are supported by the applicable records and evidence. This practice constitutes an interpretation of the statute by the administrative agency charged by the legislature with its administration. Therefore, this interpretation should be deferred to by the courts unless determined to be irrational. See Chevrolet Division, G.M.C. v. Industrial Comm. (1966), 31 Wis. 2d 481, 488, and cases cited in footnote 7; and Wisconsin Southern Gas Co. v. Public Service Comm. (1973), 57 Wis. 2d 643, 652. The Court deems the department's interpretation to be a reasonable one and consequently the Court finds no requirement in sec. 108.09(6) that the commission should have made its own independent findings of fact in this case.

The employer's brief cites Ace Refrigeration & H. Co. v. Industrial Comm. (1966), 32 Wis. 2d 311, 315, to the effect that the ultimate responsibility for findings of fact are upon the commission and it is the commission's findings and not those of the examiner which are scrutinized by the Court on review to determine if they are supported by credible evidence. This was stated in the context of a situation where the commission has set aside the examiner's findings of fact and made its own. It had no application to a situation such as the instant one where the commission adopts the findings of an examiner sitting as an appeal tribunal. By such adoption the commission makes the appeal tribunal's findings of fact its own.

CLAIM THAT FINDINGS OF FACT ARE NOT SUPPORTED BY CREDIBLE EVIDENCE AND MADE IN DISREGARD OF FACTS IN RECORD ESTABLISHING EMPLOYEE'S MISCONDUCT

The department's brief takes the position that the burden of proof to establish misconduct of the employee connected with his employment for which he was discharged is on the employer. Therefore, in the absence of proof of such misconduct getting into the record before the appeal tribunal, the ultimate finding of fact that the employee was not discharged for misconduct connected with his employment within the meaning of sec. 108.04(5), Stats., is supported by credible evidence.

If the burden of proof on this issue is on the employer, then on the record made before the appeal tribunal there was no credible evidence upon which a finding of misconduct could have been grounded, if the UC-203 form completed by employer and the statement taken from the employer by the department's deputy were not part of the evidence in the hearing before the appeal tribunal, and the challenged finding was the only one which the evidence would support.

The Court is satisfied that the burden of proof on the issue of misconduct is on the employer. Boynton Cab Co. v. Giese & Industrial Comm. (1941), 237 Wis. 237, held that a hearing before an appeal tribunal is a trial do novo and that under the applicable statutes an unemployed worker who is otherwise eligible for benefits shall be deemed eligible unless the employer in rejecting his claim asserts some valid reason because of which the employe must be considered disqualified.

> "Inasmuch as the employe is otherwise to be deemed eligible (sec. 108.02(10)) and it was recognized that there existed a prima facie case, which entitled him to prevail in the absence of evidence introduced to establish the employer's assertion as the grounds for discharge, it follows that the burden of proof was upon the employer at the hearing before the appeal tribunal to establish the matters so asserted in its rejection of the claim."

The principle from the Giese case, supra, was reaffirmed in as recent a case as Kansas City Star v. ILHR Department (1973), 60 Wis. 2d 591, where the Court said at p. 601:

> "A benefit claimant is presumed eligible for benefits and the party (the employer here) resisting payment of benefits has the burden of proving that the case comes within the disqualifying provision of the law. . . ."

It is the Court's understanding that the policy established in Boynton Cab Co. v. Giese & Industrial Comm., supra, has been consistently applied administratively with the effect that employers failing to appear at hearings and presenting no evidence are held not to have met their burden of proof. A representative case is digested at Wis. U. C. Digest, 1966 Supplement, MS-640, "Burden of Proof", p. 126, 60-A-998(C):

> "On claimant's appeal from a determination disallowing benefits on the ground that his unemployment was caused by a strike or other labor dispute, he appeared by counsel and the employer did not appear. The appeal tribunal found no facts in its decision, but merely recited that in the absence of the employer from the hearing no evidence was adduced as to the reason for separation from employment, and that claimant was therefore eligible. The employer petitioned for review by the commission.

"HELD affirmed (citing Boynton Cab Co. v. Giese, 237 Wis. 237)."

The employer contends, however, that the completed UC-203 form and the employer's statement secured by the department's deputy during his investigation did constitute evidence before the appeal tribunal within the meaning of sec. 108.09 (6)(b), Stats., and therefore, the evidence did establish that the employee was discharged for misconduct connected with his employment. However, the department has administratively interpreted the statutory words "the evidence previously submitted in such case" to exclude material in its files not received into the record at the hearing before the appeal tribunal.

The Court deems this to be a reasonable interpretation of the statute to which the courts should defer. In fact the Court is of the opinion that the opposite interpretation contended for by the employer might well be held to be an irrational one. If the shoe were on the other foot and the commission on review had resorted to facts in its file, but not adduced in evidence before the appeal tribunal, in order to make a finding to which employer's counsel took exception, the Court is reasonably certain that the employer's counsel would challenge such action as a denial of due process because of the lack afforded to cross-examine the author of such documents.

Before passing on to the next issue the Court has a serious reservation with respect to the department policy of not having its examiners sitting as appeal tribunal's in default situations question the employee discharged for misconduct with respect to items of misconduct shown in the UC-203 form or the deputy's notes of his investigation. This could be easily done without the examiner taking on the role of an advocate.

The reason for the Court questioning the present policy is that unemployment compensation, unlike workmen's compensation, is paid from funds collected as a tax, and the rights of other employees might be adversely affected in event claims without merit are allowed in default situations which might well be disallowed if a few simple questions were directed to the employee.

ALLEGED FAILURE OF APPEAL TRIBUNAL TO STATE REASON FOR ITS DECISION

The employer's brief asserts that the appeal tribunal did not state the reasons for its decision as required by Transport Oil, Inc., v. Cummings (1972), 54 Wis. 2d 256. The Court deems that the reason why the appeal tribunal made the determination that the employee was not discharged for misconduct connected with his employment within the meaning of sec. 108.04(5), Stats., clearly appears in the second paragraph of the findings of fact which states:

> "The employer did not appear at the hearing and no competent evidence was offered on its behalf. The employe was unaware of any reason which might warrant his discharge. Under these circumstances, and since he performed his work for the employer to the best of his ability, there is no basis for finding that his discharge was for any misconduct connected with his employment."

While the above quoted paragraph does not expressly state that the burden of proof to establish misconduct was on the employer and this burden had not been met, this

is clearly the reason being advanced for the determination of no misconduct. The Court is of the opinion that a sufficient reason was thus articulated for the ultimate determination made that the employee had not been discharged for misconduct connected with his employment. While this ultimate determination is labeled a finding of fact, it is in reality, a conclusion of law. Milwaukee Transformer Co. v. Industrial Comm. (1964), 22 Wis. 2d 502, 510.

Ordinarily, where the findings of fact of an administrative agency support the conclusion or conclusions of law upon which an order or decision is grounded, the court does not deem any further reason for the order or decision made need be articulated.

CONSTITUTIONALITY ISSUE

(a) No Statutory Provision for Independent Hearing Examiner

Sec. 108.09(4), Stats., specifies the composition of appeal tribunals. Under this statute the appeal tribunal may consist of one or three of the department's full-time salaried examiners, or of a tripartite body consisting of such examiner as chairman and an employer representative and an employee representative appointed by the department.

The employer contends that a salaried employee of the department acting as the appeal tribunal does not meet the constitutional test of an independent hearing examiner. This Court recently passed on this identical issue in Palmer v. Verona Redi Mix and the ILHR Department, Case No. 141-489, decided August 23, 1974. It was the Court's conclusion in that case after examination of authorities that sec. 108.09(4), Stats., does not deny due process because it fails to provide for a hearing officer from outside the department. The employer's brief has cited no authority to the contrary.

(b) No Provision for Protecting the Rights of the Parties in Event of Default

The only statutory provision with respect to defaults before the appeal tribunal is sec. 108.09(3), Stats., which provides:

> ". . . If the other party fails to appear at the hearing, the appeal tribunal shall proceed with the hearing, provided that due notice of the hearing was mailed to said party's last known address, and may issue its decision without further hearing, provided that good cause for his failure to appear has not been shown said examiner within 10 days after the hearing date."

The brief of the employer fails to cite any authority why this provision is not constitutionally adequate to protect the rights of the employer who fails to appear at the hearing before the appeal tribunal. "Due notice of the hearing" in the statute means reasonable notice which is constitutionally adequate. A party is given ten days after the hearing in which to establish his absence therefrom was due to good cause. The provision permitting the hearing to proceed in the event of a party not appearing necessarily implies that the hearing will be conducted in accordance with the demands of due process.

The Court is satisfied that ch. 108. Stats., is not unconstitutional because of failure to include any additional provisions with respect to defaults beyond that contained in sec. 108.09(3).

(c) Failure to Provide Hearing Procedure for the Review by the Commission of the Appeal Tribunal's Decision.

The statute which covers the subject of review by the commission is sec. 108.09(6) previously set forth herein. This statute restricts the materials which may be utilized by the commission in conducting its review to the evidence "previously submitted" in the case. This means, as previously determined herein, the evidence submitted before the appeal tribunal.

By court decision the Supreme Court has spelled out certain requirements that must be met when the commission reviews the awards and orders of examiners in workmen's compensation cases to insure due process. Transamerica Ins. Co. v. ILHR Department (1972), 54 Wis. 2d 272; Braun v. Industrial Comm. (1967), 36 Wis. 48, 56-58; Shawley v. Industrial Comm. (1962), 16 Wis. 2d 535, 541-543. See also Simonton v. ILHR Department (1972), 63 Wis. 2d 112. This court recently determined in Otto v. Department of Industry, Labor and Human Relations and The River Boat, Inc., Case No. 142-005, decided August 30, 1974, that these requirements are also applicable to review by the commission of decisions of appeal tribunals in unemployment compensation cases.

The employer particularly objects to the failure to provide how the commissioners conduct their review procedure and the failure to require that any record be kept of their actions in conducting the review that results in the commission decision on review apart from their memorandum opinions and decisions. The employer has cited no authority to the Court that the keeping of such type of record by administrative agencies is a requirement of due process, nor has the Court been able to find any such authority.

The employer contends that the keeping of such a record is necessary in order that the unsuccessful party to an agency decision may have judicial review of arbitrary and capricious action amounting to a denial of due process. This argument is answered by the Supreme Court's decision in State ex rel. Madison Airport Co. v. Wrabetz (1939), 231 Wis. 147, wherein that court after citing and quoting from Ducat v. Industrial Comm., 219 Wis. 231; Hackly-Phelps-Bounell Co. v. Cooley, 173 Wis. 128; and International H. Co. v. Industrial Comm., 157 Wis. 167, stated (p. 155):

> "Thus this court has recognized that when an order or award of the commission is challenged in an action to vacate it because of alleged illegal acts or conduct on the part of the commission, subsequent to the taking of the testimony upon which it should have based its order or award, then the circuit court may take evidence in that action in relation to such acts or conduct. An order or award made in a proceeding conducted in disregard of the procedural safeguards prescribed by the statute authorizing the exercise of authority by the commission, or in disregard of the rudiments of fair play required by the federal and state constitutions, is certainly without and in excess of the commission's powers; and under the power vested in the circuit court by sec. 102.23, Stats., in an action brought to set an order or award aside on that ground, it is within the jurisdiction of the court to receive evidence to establish such disregard or noncompliance on the part of the commission. If the courts did not have the power to take evidence in relation to such defects in procedure leading up to the entry of an order by an administrative body, the statutory safeguards and constitutional guaranties of due process would be meaningless. . . ."

The Court concludes that ch. 108, Stats., is not unconstitutional for failure to require the commission to keep the type of records demanded by the employer.

(d) Failure to Provide a Procedure for Challenging Arbitrary or Capricious Conduct by the Commission

Sec. 108.09(7), Stats., provides:

> "Any judicial review hereunder shall be confined to questions of law, and the other provisions of ch. 102, 1959 statutes, with respect to judicial review of orders and awards shall likewise apply to any decision of the commission reviewed under this section. . . ."

Section 102.23, Stats., is the statute covering the matter of judicial review of orders and awards of the commission in workmen's compensation proceedings and this statute by the above quoted provision of sec. 108.09(7) is made applicable to judicial review of commission decisions in unemployment compensation proceedings. Sub. (1) of sec. 102.23 provides that the order or award in a workmen's compensation proceeding "shall be set aside only upon the following grounds:

> "(a) That the commission acted in excess of its powers.
> (b) That the order or award was procured by fraud.
> (c) That the findings of fact by the commission do not support the order or award."

Thus that the commission in making its decision on review of the decision of the appeal tribunal acted arbitrarily or capriciously is not spelled out in ch. 108 as a specific ground for setting aside the commission's decision on judicial review as is the case in the Administrative Procedure Act by sec. 227.20(1)(e). The provisions of sec. 227.20, Stats., are by sec. 227.22(2), Stats., made inapplicable to matters arising out of the Workmen's Compensation Act and the Unemployment Compensation Act.

However, a decision of the commission in an unemployment compensation proceeding of such character as to constitute a denial of due process is reviewable as an act "in excess of its powers" within the meaning of sec. 102.23(1)(a), Stats. The constitutionality of the Workmen's Compensation Act was upheld by the Supreme Court in the famous case of Borgnis v. Falk (1911), 147 Wis. 327, and during the course of its decision therein that Court stated (p. 361):

> "We regard the expression 'without or in excess of its powers' as substantially the equivalent, or at least as inclusive, of the expression 'without or in excess of its jurisdiction,' as those words are used in certiorari actions to review the decisions of administrative officers and bodies. We know of no other construction that can be logically given to them, and it seems to us that they were designedly and advisedly inserted by the framers of the bill to meet the very objection which is now made. With this construction, it is certain that the constitutional powers of the courts have not been invaded, and that no man without his consent can be brought under the law or is deprived of his right to 'due process of law' thereby."

In State ex rel. Progreso Development Co. v. Wisconsin R. E. Brokers' Board (1930), 202 Wis. 155, 168, the Supreme Court held that a reviewing court in certiorari will inquire "to ascertain not only whether the subordinate officer or board kept within its jurisdiction but also to see whether or not he or it acted according to law (emphasis added)."

State ex rel. Ball v. McPhee (1959), 6 Wis. 2d 190, after quoting the above extract from State ex rel. Progreso Development Co. v. Wisconsin R. E. Brokers' Board, declared (p. 199):

> "Construing the phrase 'acted according to law', we deem the word 'law' means not only applicable statutes but also the common-law concepts of due process and fair play and avoidance of arbitrary action."

Therefore, inasmuch as the scope of review under the "excess of its powers" provision of sec. 102.23(1)(a), Stats., is as inclusive as the review of agency or board action in certiorari, arbitrary or capricious action of the commission in unemployment compensation proceedings amounting to a denial of due process is reviewable. Thus the Court finds no merit in the employer's contention that ch. 108 is constitutionally defective because it contains no express provision for judicial review of arbitrary or capricious action.

The Court deems it advisable to note that merely because an administrative agency does not act consistently in all of its decisions does not necessarily mean that its action is arbitrary or capricious. Robertson Transport Co. v. Public Serv. Comm. (1968), 39 Wis. 2d 653, 661.

(e) Failure to Provide for Challenging on Court Review Findings of Fact on the Ground of Not Being Supported by Credible Evidence

Sec. 102.23(1), Stats., provides in part:

> "The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. . . ."

The employer contends that in view of this provision which by sec. 108.09(7)(b), Stats., is made applicable to judicial review of the commission's unemployment compensation proceeding decisions, ch. 108, Stats., is unconstitutional because of failure to provide a challenge to such decisions on the ground of not being supported by the credible evidence.

This contention is also answered by the Supreme Court's decision in Borgnis v. Falk, supra. At page 360 of that decision is cited the holding in State ex rel. Augusta v. Losby, 115 Wis. 57, that the making of a decision by a board which is contrary to all evidence constitutes jurisdictional error which is reviewable by certiorari. Then the Supreme Court went on to make the declaration at p. 361 previously quoted herein that the review under the expression "without or in excess of its powers" now found in sec. 102.23(1)(a), Stats., "is substantially the equivalent, or at least as inclusive, of the expression 'without or in excess of its jurisdiction' as those words are used in certiorari actions to review the decisions of administrative officers and bodies."

Ever since Borgnis v. Falk orders and awards of the commission in workmen's compensation cases have been subject to judicial review to ascertain if they are supported by credible evidence.

At oral argument in this court counsel for the employer contended that the constitutionality of ch. 108, Stats., could not be saved by judicial decision interpreting the provisions of sec. 102.23(1)(a), Stats. This is contrary to the law as this Court understands the law to be, and no authority to the contrary has been cited by counsel. It has long been the rule in Wisconsin that a construction given a statute by the Supreme Court becomes part of the statute unless the legislature subsequently amends the statute to effect a change. Moran v. Quality Aluminum Casting Co. (1967), 34 Wis. 2d 542, 556, and cases cited in footnote 28.

Thus sec. 102.23(1)(a) and sec. 108.09(7)(b) do provide for review of commission unemployment compensation decisions to ascertain whether the same are supported by credible evidence.

ALLEGED ARBITRARY AND CAPRICIOUS CONDUCT OF COMMISSION IN DENYING EMPLOYER'S REQUEST FOR A FURTHER HEARING

The Court had assumed that this issue had been put to rest by its memorandum decision of August 6, 1974, because on the basis of the record as it stands without supplementation by additional evidence there exists no basis for holding that the commission acted aribtrarily or capriciously in denying the request for further hearing.

Inasmuch as the employer failed to take advantage of the provision of sec. 108.09 (3), Stats., to make a timely showing of good cause for its failure to appear at the appeal tribunal hearing, it was solely a matter of discretion with the commission under sec. 108.09(6)(b), Stats., whether to grant a further hearing to the employer. A court review of such exercise of discretion is not provided by sec. 102.23(1), Stats., unless there has been such an abuse of discretion as to be tantamount to a denial of due process so as to be reviewable under paragraph (a) of that statute.

Here due notice by mail was received by the employer of the original hearing and it mailed a request for an adjournment to the department and then let the scheduled hearing date slip by without attending although it had received no acknowledgment, or granting, of its request for adjournment. Another ten days elapsed after the hearing without attempting to take advantage of the provisions of sec. 108.09(3), Stats. Under these circumstances there was no denial of a hearing that would qualify as a denial of due process. Thus the Court is of the opinion that it lacks jurisdiction to review the denial of the employer's request for a further hearing.

Let judgment be entered confirming the department's decision here under review.

Dated this 18th day of September, 1974.

By the Court:

/s/ George R. Currie
Reserve Circuit Judge