STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

EVINRUDE MOTORS DIVISION OF
OUTBOARD MARINE CORPORATION,

Plaintiff,

MEMORANDUM DECISION

vs.

DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS
AND FRANK P. TUREK,

Case No. 158-172

Defendants.

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

This is an action by the plaintiff employer to review a decision of the Industry, Labor and Human Relations Commission dated June 23, 1977, entered in an unemployment compensation proceeding initiated by the defendant employee Turek. This decision reversed the appeal tribunal's decision of September 29, 1976, which had determined that the employee had been discharged for misconduct connected with his employment and therefore was ineligible for benefits, and reinstated and affirmed the appeal tribunal's earlier decision of August 4, 1976, which had determined the employee had not been discharged for misconduct connected with his employment and was eligible for benefits.

STATEMENT OF FACTS

The department's deputy on June 11, 1976, mailed to the employer and the employee his initial determination that the employee had been discharged for misconduct connected with his employment and that all benefits based on his employment with the employer for the period ending May 1, 1976, were cancelled. The employee timely appealed from this initial determination.

Thereafter on July 12, 1976, the Milwaukee Hearing Office Job Service Division of the Department of Industry, Labor and

Human Relations mailed written notice to the employee and the employer of a hearing to be held in Milwaukee July 28, 1976, at 8:30 a.m. on the employee's unemployment benefit claim and that the issue appealed from was "misconduct". The employee appeared at such scheduled hearing but the employer did not.

On August 4, 1976, the appeal tribunal issued its decision reversing the deputy's initial decision and allowing benefits to the employee. The appeal tribunal's findings of fact portion of the decision read:

> "The employe worked for eight years as a laborer for the employer, a manufacturer of outboard motors and lawnmowers. His last day of work was April 26, 1976 (week 18), when he was discharged.
>
> In denying benefit eligibility, the employer alleged that the employe had excessive absences. However, the burden of establishing that an employe was discharged for misconduct connected with his employment is upon the employer. The employer failed to appear at the hearing and no evidence was adduced on its behalf to show a discharge for misconduct connected with his employment. He was not aware as to the reson for his discharge.
>
> Although some of the employe's actions may have appeared unsatisfactory to the employer, it was not established that his conduct evinced a wilful, intentional or substantial disregard of the employer's interests as to constitute misconduct connected with his employment.
>
> The appeal tribunal therefore finds that in week 18 of 1976, the employe was discharged, but not for misconduct connected with his employment, within the meaning of section 108.04(5) of the statutes."

Thereafter the employer sent this letter to the Department:

> "August 4, 1976; Department of Industry, Labor and Human Relations; Job Service Division; Unemployment Compensation; 819 North 6th Street; Milwaukee, Wisconsin 53203.
>
> RE: Frank P. Turek 15C/387-20-3106
>
> TO WHOM IT MAY CONCERN: This letter is in answer to your 'Notice of Hearing' in the above captioned matter.
>
> Due to the fact that the notice was received during our vacation shutdown (July 19 through July 31, 1976) and not received by our office until August 3, 1976, we were not aware of the Hearing date of July 28, 1976. Mr. Wayne Hill normally takes care of these matters but was on vacation and the mail remained unopened.
>
> We respectfully request that a new Hearing date be set in the above captioned matter.

Very truly yours, EVINRUDE MOTORS; Wayne E. Hill, Asst. Industrial Relations Dir."

This letter was stamped as having been received August 5, 1976. Thereafter a document entitled "Appeal Tribunal Set Aside Order" was issued and mailed to the parties August 9, 1976, by the appeal tribunal reading:

> "The appeal tribunal decision issued and mailed on August 4, 1976, is hereby set aside for the purpose of taking testimony because the party who did not appear at the hearing has shown probable good cause for such nonappearance. A hearing will be rescheduled promptly to determine the rights of the parties."

A new notice of hearing issued by the Department's Job Service Division's Milwaukee hearing office was mailed to the parties September 7, 1976, notifying them that a hearing would be had in the matter of the employee's unemployment benefit claim in Milwaukee on September 20, 1976, at 10 o'clock a.m. on the issue of "Misconduct". The original notice in the Department's file returned to this court has written in red ink in longhand after the word "Misconduct" the words "Failure to Appear". However, counsel for the Department and the employer stipulated on oral argument before the Court that those words written in red ink did not appear on the copy of this notice mailed to the employer.

At the hearing held September 20, 1976, the employee appeared in person and by Paul Gordon, agent, and the employer appeared by Wayne Hill, its Assistant Industrial Relations Director. The examiner sitting as an appeal tribunal first took the testimony of Hill on the issue of probable good cause for the employer not appearing at the first hearing and then took testimony of Hill and the employee on the misconduct issue. Thereafter on September 29, 1976, the appeal tribunal issued and mailed its decision which affirmed the deputy's initial determination and held the employee ineligible for benefits. The findings of fact portion of this decision read:

> "The employe worked for seven and one-half years as a degreaser for the employer, a manufacturer of outboard motors and lawnmowers. His last day of work was April 27, 1976 (week 18).

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During the course of his employment, the employe had an attendance record that was unsatisfactory to the employer. He had received warnings concerning his attendance. When on April 28, 1976 (week 18), he was again absent and failed to give the required notification to the employer, his employment was suspended pending a review of his record. Following a review of his record the suspension was converted to a discharge.

Under the circumstances, the actions of the employe in being absent without notice, together with his entire attendance record, amounted to conduct which evinced a wilful, intentional and substantial disregard for the employer's interests and of the standards of behavior that the employer had a right to expect of him.

The appeal tribunal therefore finds that in week 18 of 1976, the employe was discharged for misconduct connected with his employment, within the meaning of section 108.04(5) of the statutes."

Thereafter, the employee through counsel filed with the Department's Job Service office at 819 North 6th Street in Milwaukee his petition for the review of the appeal tribunal's decision dated September 29, 1976. The back of this petition bears a stamped statement that it was received at Milwaukee on October 13, 1976.

On June 23, 1977, the Commission issued its decision which is the subject of this review. The findings of fact portion thereof read:

"I. DID THE EMPLOYER HAVE PROBABLE GOOD CAUSE FOR ITS FAILURE TO APPEAR AT THE HEARING ON JULY 28, 1976?

The employer asserted that it failed to appear at the hearing scheduled on July 28, 1976 because the employer's plant was on a shutdown from July 19, 1976 to August 3, 1976 and the employer representative who handles such matters for the employer did not receive the hearing notice until August 3, 1976. The hearing notice was mailed to the employer's correct address on Monday, July 12, 1976 (week 29) and the employer conceded that such notice could have reached the employer's office in that week, but asserted that the person who handles such matters was on vacation from July 12 (week 29) to August 3, 1976 (week 32), and that his mail remained unopened until his return on August 3, 1976. Other supervisory personnel worked during week 29 and the employer's administrative office was open during that week. Under the circumstances, the Commission considers that the employer did not have probable good cause for its failure to appear at the hearing on July 28, 1976, within the meaning of section 108.09(3) of the statutes, and that it was not entitled to further hearing in this matter.

II. WAS THE EMPLOYE DISCHARGED BY THE

EMPLOYER FOR MISCONDUCT CONNECTED
WITH HIS EMPLOYMENT?

> The testimony taken at the first hearing on July 28, 1976 supports the appeal tribunal's findings set forth in his decision of August 4, 1976, and the Commission therefore finds that it was not established that the employe was discharged for misconduct connected with his employment, within the meaning of section 108.04(5) of the statutes."

At the bottom of the decision immediately below the signature of the two commissioners who signed the decision appears this:

> "NOTE: In reversing the appeal tribunal, the Commission considers that the appeal tribunal erred in accepting the employer's reasons for failing to appear at the hearing on July 28, 1976, as constituting good cause for such failure to appear."

Further facts will be stated in connection with the Court's resolution of the issues raised by the employer.

THE ISSUES

On the basis of the employer's briefs the Court deems these are the issues it is required to resolve:

(1) Whether the employee's failure to seek Commission review of the appeal tribunal's "Set Aside Order" of August 9, 1976, precluded the Commission from passing on that issue on its review of the appeal tribunal's decision of September 29, 1976.

(2) Whether the employee's petition for review filed October 13, 1976, sufficiently raised the issue of whether the appeal tribunal committed error in issuing its "Set Aside Order" so as to permit the Commission in its review to pass on that issue.

(3) Whether the notice of hearing for the September 20, 1976, hearing was so defective as to preclude the appeal tribunal taking testimony on the probable good cause issue.

(4) Whether the Commission's determination that the employer did not have probable good cause for its failure to appear at the hearing on July 28, 1976, is erroneous as a matter of law and should be reversed by

the Court.

(5) Whether this Court is bound to accept the findings of fact made by the appeal tribunal in its decision of September 29, 1976.

Neither the employer's original brief nor its reply brief raises any issue with respect to whether the findings of fact contained in the appeal tribunal's decision of August 4, 1976, are supported by credible evidence. Therefore, the Court determines that issue is not one it is required to, or should, resolve.

The employer's original brief raised an additional issue that the employee's petition for review of the appeal tribunal's decision of September 29, 1976, was not timely filed. However, when employer's counsel on oral argument was shown the stamped receipt date of October 13, 1976, appearing on the back of the original petition for review, counsel agreed to abandon that issue.

APPLICABLE STATUTES AND DEPARTMENT RULES

Section 108.09(7), Stats., provides in part:

"Judicial review. (a) Either party may commence judicial action for the review of a decision of the commission under this chapter if the party after exhausting the remedies provided under this section has commenced such judicial action in accordance with s. 102.23, within 30 days after a decision of the commission was mailed to his last-known address.

(b) Any judicial review under this chapter shall be confined to questions of law, and the provisions of ch. 102, 1971 stats., with respect to judicial review of orders and awards shall likewise apply to any decision of the commission reviewed under this section . . . ."

Section 108.09(3) APPEALS provides in part:

"(e) If a party, having failed to appear at a hearing, shows probable good cause for such failure to the appeal tribunal within 7 days after the decision was mailed to such party's last-known address the appeal tribunal may set aside its decision and afford further opportunity to be heard, either before the same or another appeal tribunal."

Section 108.09(6) COMMISSION REVIEW provides in part:

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"(b) Any party may petition the commission for review of an appeal tribunal decision, pursuant to general department rules, if such petition is received by the department within 14 days after the appeal tribunal decision was mailed to the party's last-known address. Promptly after the receipt of a petition, the commission shall dismiss it if not timely at any level or, if timely, may affirm, reverse, change, or set aside the appeal tribunal decision, on the basis of evidence previously submitted in such case or it may order the taking of additional evidence as to such matters as it may direct and thereafter make its findings and decision."

Section Ind-UC 140.05, 5 Wis. Adm. Code, provides in part:

(2) "A notice of hearing shall be mailed to each of the parties at least 5 days in advance of the hearing, giving the time and place of the hearing."

* * *

"(8) The decision shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence. Insofar as possible, the decision shall be dated and mailed within 10 days following the hearing."

THE COURT'S DECISION

A. Failure of Employee to Seek Commission Review of Set Aside Order

Whether the employee was required to seek commission review of the appeal tribunal's Set Aside Order under peril of having waived that issue by not seeking such review is dependent upon whether such order constituted a "decision" within the meaning of sec. 108.09(6)(b), Stats.

Counsel for the employer has argued that the provision in sec. 102.23(1), Stats., for court review of interlocutory orders in worker's compensation cases make this order one which is reviewable by the Commission under sec. 108.09(6), Stats. However, the Supreme Court has long held that only orders granting or denying compensation are reviewable under sec. 102.23(1), Stats. Schneider Fuel & Supply Co. v. Industrial Comm., 224 Wis. 298, 301-302, 272 N.W. 25 (1937); Harrison v. Industrial Comm., 246 Wis. 106, 107-108, 16 N.W. 2d 303 (1944); and Moore v. Industrial Comm., 4 Wis. 2d 208, 216, 89 N.W. 2d 788 (1958). While these decisions deal with the interpretation of the word "order"

in sec. 102.23(1) for purposes of judicial review, this interpretation would also be applicable in construing the word order in subsections (2) and (3) of sec. 102.18, Stats., fixing a 20 day period for petitioning the Commission for review of the findings and order of the examiner.

The Supreme Court in Universal Org. of M.F.S. & A. P. v. WERC, 42 Wis. 2d 315, 166 N.W. 2d 239 (1969), had before it the issue of what constituted a decision of an administrative agency for purposes of review under sec. 227.15, Stats., and declared (p. 320):

> "In Frankenthal v. Wisconsin Real Estate Brokers' Board (1958), 3 Wis. 2d 249, 88 N.W. 2d 352, 89 N.W. 2d 825, a real estate broker attacked the validity of of an instruction of the Real Estate Brokers' Board embodied in a mimeographed letter relating to renewal of brokers' licenses. Frankenthal brought an action for declaratory judgment. The attorney general argued that the matter appealed from was a 'decision' reviewable only under sec. 227.15, Stats., and, hence, was not properly brought by an action for declaratory judgment. This court disagreed with the attorney general and concluded that the matter appealed from was a rule and not a decision. In order to reach that conclusion, it restated and clarified the test that qualified a determination as a 'decision' entitled to judicial review. The court therein said, at page 253:
>
> 'The Wisconsin Telephone Co. Case held that it was the legislative intent that administrative agency decisions which are reviewable under sec. 227.15, Stats., be final orders entered at the end of contested proceedings which are based on findings of fact required under sec. 227.13. In the instant case there was no contested proceeding in which the plaintiffs were accorded a hearing, and no findings of fact whatever were attempted to be entered.'"

While ch. 227, Stats., with the exception of provisions with respect to rules, is not applicable to worker's compensation and unemployment compensation proceedings, it should be noted that sec. Ind-UC 140.05(8), 5 Wis. Adm. Code, has the same provision as does present sec. 227.10, Stats., that decisions must be accompanied by findings of fact, and conclusions of law. The "Set Aside Order" did not purport to state any findings of fact.

The Court is satisfied that only Commission decisions which grant or deny unemployment compensation, that is hold the

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claimant employee is either eligible or ineligible for such benefits, are subject to court review under sec. 108.08(7), Stats., and the Supreme Court's decisions of what are reviewable orders under sec. 102.23(1), Stats. It would be an unreasonable statutory interpretation to accord the word "decision" in sec. 108.09(6), Stats., as encompassing interlocutory procedural orders not granting or denying unemployment compensation. Therefore, the Court determines that the procedure set forth in sec. 108.09(6) for seeking commission review ~~of the~~ "~~Set Aside Order~~" was not available to the employee, and he did not waive any right to attack ~~such~~ the "Set Aside Order" ~~order~~ by his failure to seek commission review thereof under that statute. Being an intermediate order which neither granted nor denied unemployment compensation, the employee was entitled to seek review of it by the Commission in connection with his review of the appeal tribunal's decision of September 29, 1976, which did deny unemployment compensation.

B. Sufficiency of Employee's Petition to Review to Attack Set Aside Order

The employee's petition for review dated and filed October 13, 1976, reads:

> "The above named employee, Frank P. Turek, hereby petitions the Industry, Labor and Human Relations Commission for a Review of Hearing No. 76-A-3433MC, which was held in Milwaukee, Wisconsin, September 20, 1976, and the Decision based on said Hearing, dated September 29, 1976, upon grounds that:
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> 1. The decision is not supported by the Law or facts.
>
> 2. That the company was given an unreasonable and uncalled for adjournment without notice to the employee, without just cause.
>
> 3. In the interest of justice and fair play."

The Court determines that the wording of paragraph 2 of the above quoted petition for review was adequate to make the "Set Aside Order" reviewable by the Commission with respect to whether probable good cause existed for the employer to fail

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to appear at the July 20, 1976, hearing so as to authorize the setting aside the original appeal tribunal decision of August 4, 1976, and granting a new hearing to the employer. While the setting aside of the first appeal tribunal decision is not mentioned, and the granting of the new hearing is referred to as an adjournment, the Commission could reasonably interpret the language as raising the probable good cause issue which was the basis for granting the new hearing which resulted in the appeal tribunal decision of September 29, 1976. The "Set Aside Order" was merely the mechanism which resulted in the further hearing being held.

C. The Notice for the September 20, 1976, Hearing

The employer contends that, because the copy of notice of the September 20, 1976, hearing received by the employer stated the issues to be heard at this hearing to be "Misconduct", this did not give the appeal tribunal jurisdiction to take evidence on the probable good cause issue.

The Court is satisfied that this contention does not raise an issue of subject matter jurisdiction. It is an issue more akin to that presented where a party in a civil court action objects to the presentation of evidence on the ground that the evidence sought to be presented is without the scope of the pleadings. Here Hill was present at the hearing and raised no objection to being questioned on the probable good cause issue. Being a layman, it would probably be requiring too much to hold that this constituted a waiver. Rather, the better approach would be to consider this taking of evidence on an issue not stated in the notice was a procedural error which did not rise to the denial of due process.

The employer has not pointed out any prejudice that occurred to it as a result of taking of such testimony with respect to the probable just cause issue.

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D. The Commission's Determination that Employer Did Not Have Probable Good Cause for Its Failure to Appear at First Hearing

At the time the "Set Aside Order" was issued on August 9, 1976, the only showing which the employer had made with respect to the cause for it not appearing at the July 28, 1976, hearing was the letter by Hill dated August 4, 1976, set forth verbatim in the STATEMENT OF FACTS above. The notice of this hearing states it was being mailed at Milwaukee on July 12, 1976. The employer's address appearing on the notice is "P.O. Box 663 Milwaukee, Wisconsin 53201." However, Hill's letter states it was received during the employer's plant shutdown from July 19 through July 31, 1976, but not received by "our office" until August 3, 1976. Just what is embraced in the term "our office" is not clear, except that it reasonably can be inferred it at least included the office occupied by Hill as Assistant Industrial Relations ~~office~~ Director. The letter further stated that Hill who normally took care of "these matters" was on vacation and the mail remained unopened. This gives rise to the further reasonable inference that the unopened envelope containing the notice probably had been in the employer's possession for some period of time extending back well before the hearing date of July 28th.

However, probably because somebody had written in red ink on the file original of the notice of hearing given with respect the September 20, 1976, hearing that the issues appealed from included "Failure to Appear", the Appeal Tribunal took testimony on the probable good cause issue at that hearing. The department's brief as well as that of the employer cites evidence presented at this September 20th hearing in arguing the probable good cause issue, and the Commission's decision makes clear it considered such evidence.

Hill testified: He had advised "your department" that the employer would be closed "administratively" during its vacation

period of July 19th through August 2nd. The person he so contacted was the manager of the Job Service office at 42nd Street and Capitol Drive in Milwaukee. Hill was gone on vacation for three weeks from July 12th through August 2nd. He could not fix the time he so contacted this manager of the Department's north side Job Service office except it was before he went on his vacation. During the employer's vacation period of July 19th through August 2nd the office as well as the plant was shut down, but an "insurance girl" was employed during that time for handling insurance matters and mailing out checks to employees who were on disability "and that sort of thing." It is possible the employer received the notice of hearing prior to the end of the week before July 19, but he had no way of knowing that.

However, Hill also gave this significant testimony (Tr., Second Hearing, pp. 12-13):

"Q Was there anyone else at the place of employment between July 11 and July 19 that--
A Oh yes.
Q It was administratively open during that week?
A Yes it was.
Q And was your supervisor working that week?
A Yes he was. That would be the director of industrial relations."

The employer's brief in citing the evidence relied upon to establish probable good cause states "that the employer had notified the Department prior to the notice of the July 28 meeting, the employer representative handling the matter would be on vacation from July 12 to August 3, 1976." This implies that Hill had made reference to his handling of this particular unemployment compensation matter when he contacted the manager of the Department's northside Job Service office. Hill nowhere in his testimony claimed that he ever mentioned the instant matter in such conversation. Furthermore, the deputy's initial determination mailed to the employer bore on its face a statement that the Department's "Investigating Office" was "819 N. Sixth Street, Milwaukee, WI 53203," so it is entirely unlikely Hill

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would have contacted the northside Job Service office about the pending unemployment compensation matter. There was nothing in the information that Hill testified he gave to the northside Job Service office manager which should have caused the latter to contact the Department's office at 819 North Sixth Street about. The Court is of the opinion that in determining the probable good cause issue the Commission was entitled to entirely disregard Hill's testimony regarding the information about the closing of the employer's plant for vacation he gave to the manager of the northside Job Service office.

It is apparent from the findings made by the Commission in Part I of its findings of fact that it relied on the following evidence in reaching its conclusion that the employer did not have probable good cause for not appearing at the July 28, 1976 hearing:

(1) Hill's admission that it was possible the notice of hearing was received by the employer prior to the end of the week before July 19, 1976.

(2) Hill handled such matters as unemployment compensation claims and was on vacation between July 12 and August 3, 1976.

(3) His mail remained unopened until his return on August 3, 1976.

(4) Hill's supervisor worked during the period of the vacation shutdown.

(5) The employer's administrative office was open during this shutdown to the extent that there was a girl present who attended to insurance mail matters.

The Court determines that on this evidence the Commission could reasonably conclude that the employer did not have probable good cause for not attending the July 28th hearing. Such determination is ordinarily a mixed finding of fact and law. Even where the evidence is undisputed, as it is here, it does not become a sole question of law where different reasonable

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inferences may be drawn from such undisputed evidence.

When a party's failure to appear is due to neglect on its part there is not good cause for not appearing. The Commission had the right to conclude that Hill, who had charge of such matters as unemployment compensation hearings, ~~went~~ ongoing on vacation on July 12, 1976, without making any provision for opening mail that might be a notice of an unemployment compensation hearing, and for taking appropriate action with respect to such a notice, did not exercise due care. The plant continued to operate during the first of such three weeks of his vacation. In all likelihood the notice of hearing was received during that week. The burden of proof to establish probable good cause for its failure to appear at the July 28th hearing was on the employer, not upon the Department to prove that such probable good cause did not exist.

E. The Findings of Fact in the Appeal Tribunal's Decision of September 29, 1976.

The employer's brief contends that the court is bound to accept the findings of fact made by the appeal tribunal on the misconduct issue in its decision of September 29, 1976, because there is credible evidence to support such findings.

In view of the Court's determinations that the Commission properly determined that the "Set Aside Order" was erroneously entered, and of the Commission's reversal of such order, the only findings of fact on the misconduct issue which are before this court for review are the appeal tribunal's findings of fact that were included in its decision of August 4, 1976, which were reinstated and affirmed by the Commission's decision of June 23, 1977. It is therefore wholly immaterial whether the appeal tribunal's findings of fact included in its September 29, 1976, decision may have been supported by credible evidence.

Let judgment be entered confirming the Commission's decision which is the subject of this review.

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Dated this 20th day of March, 1978.

By the Court:

Reserve Circuit Judge

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