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PROCEDURAL ISSUES

Many of the decisions reported this past year concern procedural problems.

Warren Sanitary Milk Co. v. Board of Review[1] involved an interesting question as to when an employer is entitled to notice of an appeal on a claim for unemployment benefits. Due to a strike six claimants applied for unemployment compensation for the week ending December 26, 1959. The application for determination of benefit rights was allowed on January 13, 1960, but the claim itself was disallowed on the basis that the unemployment was due to a labor dispute then in progress. There was no application for reconsideration of this determination, but the claimants continued to file claims for benefits at weekly intervals which were disallowed on the basis that the labor dispute had continued through February 19, 1960. On March 3, however, the claimants filed a request for reconsideration of the subsequent claims, and the administrator affirmed his earlier determination that the claimants were disqualified. On March 21 they filed notice of appeal and a hearing was thereafter scheduled before a referee of the Board of Review, Bureau of Unemployment Compensation, on May 2, 1960.

The employer was notified of the determinations of the administrator, with the possible exception of the decision on reconsideration, but he received no notice of the referee's hearing. The referee found that the claimants were not disqualified under the facts and reversed the administrator's redetermination. The first the employer learned of this action was through his next monthly notice of benefits charged to his account in accordance with the experience rating provisions of the Ohio law.[2]

When the employer filed exceptions to the charge to his account, he was furnished with a copy of the referee's ruling, from which he then sought to institute further appeal. The Board of Review, however, ruled that the employer was not an "interested party" within the meaning of the act and, therefore, not entitled to notice or to institute further appeal.

The term "interested party," with respect to the determination of any "claim for benefits," is defined to mean the claimant and the administrator, but if such determination is with respect to the "first claim" for benefits or an "additional claim," then it also includes the claimant's most recent employer.[3]

The Board of Review took the position that "first claim" meant the first claim to arise, and since the claimants had failed to apply for recon-

1. 179 N.E.2d 385 (Ohio C.P. 1961).
2. OHIO REV. CODE § 4141.24 (Supp. 1962).
3. OHIO REV. CODE § 4141.01(I) (Supp. 1962).

sideration of their initial claim for the week ending December 26, the referee's ruling had no application. The court took the position, however, that this interpretation would render the statute unconstitutional[4] and held that by the elimination of other choices, on constitutional grounds, or those of administrative complexity, or both, the term "first claim" meant the first claim actually allowed by determination within the structure of the unemployment compensation administration, including the Board of Review. If this construction be considered strained, the court said, it was the only construction that would save constitutionality.

The court then ruled that the refusal of the Board of Review to receive and act upon the employer's application to institute further appeal was unreasonable and unlawful. The cause was remanded to the board with direction to vacate any and all findings and decisions based upon the report of its referee and to proceed to hear the merits of the claimants' appeals from the decision of the administrator on reconsideration, affording notice of hearing and full opportunity to participate to the employer-appellant.

With reference to the court's order in the foregoing case, the decision of the court of appeals in *Winski v. Board of Review*[5] should be of interest. In this case the claimant contended that he had deposited a letter addressed to the Board of Review in the mailbox in front of the post office in Yorkville on January 18, 1960. The letter was received by the board in due course but was postmarked January 19, 1960, at 7 a.m., twenty-four hours beyond the ten-day statutory limit for filing notice of appeal.[6] The Board of Review dismissed the appeal as being untimely, but the common pleas court remanded the cause to the board for further consideration as to whether notice of appeal was timely filed.

The court of appeals pointed out that the Unemployment Compensation Act provides what decision a common pleas court may make in such instances, *i.e.*, the court is limited to affirming, reversing, or modifying the board and nothing more. Since there is nothing in the statute authoriz-

4. Amicus curiae had argued that the employer could challenge his liability to a higher contribution rate under § 4141.26 and be afforded a hearing on this challenge. On this point, however, the court said: "Human nature and the desire for consistency being what it is, the Court cannot conceive of even an administrative agency which would not desire, for the record, to have the two determinations consistent with each other. Thus the employer, in the second hearing, confronts a tribunal which has, in fact, prejudged the ultimate fact in issue, and is thus predisposed to disallow his contention. This is not a fair hearing by any standard of due process. . . . And since it is not a fair hearing it is not the adequate substitute for notice and opportunity to be heard in the first proceeding, as claimed. Therefore any interpretation of R.C. § 4141.28 (D & J) which deprives the employer of notice and opportunity to be heard on the employee's claim for benefits would render the act unconstitutional." Warren Sanitary Milk Co. v. Board of Review, 179 N.E.2d 385, 389 (Ohio C.P. 1961).

5. 179 N.E.2d 159 (Ohio Ct. App. 1961).

6. OHIO REV. CODE § 4141.28(G) (Supp. 1962).

ing a court to remand a case for further consideration, the court's attempt to do so was clearly reversible error. It was also pointed out that if the appeal to the board was beyond the statutory limit, the board had no jurisdiction and neither did the court of common pleas.

In *United Fireworks Mfg. Co. v. Tichenor*[7] the Board of Review had found that the employee claiming benefits was entitled to them. The employer appealed to the common pleas court and the decision of the board was affirmed on April 22, 1959. On May 1 the employer filed a motion for a rehearing and reconsideration of the court's decision. On October 10 the administrator filed a motion in opposition and on October 28 a journal entry was filed again affirming the decision of the Board of Review without reference to either the employer's motion or the administrator's motion in opposition. The employer then filed a notice of appeal on November 12, 1959.

The court held that the filing of the notice of appeal within the twenty-day period prescribed by section 2505.07 of the Ohio Revised Code is jurisdictional. The filing of a motion for rehearing and reconsideration, the equivalent of a motion for a new trial, it was ruled, will not extend the time within which an appeal can be perfected. The entry of April 22, 1959, the court said, was a final order which had never been vacated and, therefore, was unaffected by the subsequent similar entry of October 28. The filing of the latter did not extend the time for appeal from the earlier judgment.

In *Dewine v. Bureau of Unemployment Compensation*[8] it was held that a notice of appeal to the common pleas court, stating that the decision of the Board of Review was unlawful, unreasonable, and against the weight of the evidence, did not set forth the decision appealed from and the errors complained of, and was, therefore, insufficient under the terms of section 4141.28 of the Ohio Revised Code.

With reference to the 1959 amendments, it was held in *Howell v. Bureau of Unemployment Compensation*[9] that the appeal provisions of the amended statute were not applicable to a claim for unemployment benefits filed before the effective date of the amendment. The court further held that the provisions of the statute prior to amendment were applicable to an appeal to a common pleas court from a decision on a

7. 178 N.E.2d 626 (Ohio Ct. App. 1960).

8. 178 N.E.2d 260 (Ohio C.P. 1961).

9. 115 Ohio App. 506, 185 N.E.2d 765 (1961). As a result, the old provision, so often stumbled over, that appeal to the common pleas court could only be made from a decision of the Board of Review on rehearing, was applicable. Thus, it was held that an appeal could not be taken from an order of the board disallowing the claimant's application to institute further appeal. For a discussion of cases arising under the former provision, see Teple, *Survey of Ohio Law — Social Security and Public Welfare,* 11 W. RES. L. REV. 420, 425-26 (1960).

claim for benefits filed during the time such prior statute was still in effect.

SUBSTANTIVE ISSUES

The decisions on substantive issues were no less interesting.

In *Albaugh v. Alsco, Inc.*[10] the court held that the payment on December 15 of a bonus to employees who were laid off at the time was not compensation for services rendered during the week of payment and, thus, did not affect the eligibility of persons otherwise entitled to unemployment benefits for that week. The payment was made under a provision of a collective bargaining agreement providing for the accumulation of two cents for each hour worked to be paid as a Christmas bonus between December 1 and December 15. The court made appropriate reference to the provision in section 4141.46, too often overlooked, that the Unemployment Compensation Act is to be liberally construed.

Another case[11] in which the right to benefits was upheld, although the claim had been denied by the administrator and his determination had been affirmed by a common pleas court, involved an interesting determination of fact. The claimant had been discharged for allegedly returning to the plant from lunch in an intoxicated condition. The court of appeals held that the provision in a collective bargaining agreement which permitted discharge for reporting to work in an intoxicated condition was applicable to an employee returning from lunch. But where, upon a hearing before the referee, the employee denied the charge of intoxication, and where there was credible and overwhelming evidence that the employee was not intoxicated, the court held it to be reversible error for the Board of Review as well as the common pleas court to set aside the determination of the referee allowing the claim for benefits.

In its opinion the court stressed the fact that in over twenty-two pages of the record the company witness had nowhere testified that the claimant was drunk or intoxicated or under the influence of alcohol. Although the foreman thought the claimant had staggered as he turned toward the clock, stepping out around a table, he also said that a normal person might have been unsteady turning the same corner. Although there was some evidence of improper conduct in other respects, the court also held that the existence of grounds upon which the employee might have been discharged is immaterial if such grounds were not in fact the basis for the discharge action taken.

There was also an important decision[12] involving the application of the labor dispute disqualification. The claimants were laid off at the

10. 179 N.E.2d 562 (Ohio C.P. 1961).

11. Hawkins v. Leach, 115 Ohio App. 259, 185 N.E.2d 36 (1961).

12. Baumgarte v. Board of Review, 186 N.E.2d 146 (Ohio C.P. 1961). The court dis-

Delphos plant of the Fruehauf Trailer Company. According to them, the layoff was due to a shortage of steel at the Delphos plant occasioned by the steel strike of 1959. The referee, however, found that the layoff was the result of a labor dispute at the company's Avon Lake plant, approximately 180 miles away, and on the basis that these two plants constituted the same "establishment," disqualified the claimants. This finding was affirmed by the Board of Review.

The court held that these determinations were against the manifest weight of the evidence. It was pointed out that the record was replete with testimony which the referee seemed to completely ignore, that the layoff was due to the shortage of steel. However, the court also found that only twenty per cent of the production at the Delphos plant could possibly be affected by the work stoppage at the Avon Lake plant, and that any employees so affected could have been utilized on other production lines at the Delphos plant. On the basis of this evidence, as well as the distance separating the two plants, the court held that they did not constitute the same "establishment." This is a heartening indication that a more realistic approach to the "establishment" test may yet be adopted by the Ohio courts.

In *Charles Livingston & Sons, Inc. v. Constance*[13] the employer found that it was suffering serious inventory shortages. Thefts by employees were suspected and, after numerous efforts to reduce the shortages, the employer finally insisted that all employees take lie detector tests. Forty-four employees refused and either quit or were fired. The Board of Review found that the resignations were forced and held that these separations as a result of the refusal of the claimants to take lie detector tests were not for good cause within the meaning of the Unemployment Compensation Act. This decision allowing benefits was reversed by the common pleas court. The court of appeals upheld the board, reversing the lower court, on the basis that the board might reasonably have decided either way and that on such close questions, the courts have no authority to upset the board's decision.[14]

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tinguished the decisions in McGee v. Timken Roller Bearing Co., 161 N.E.2d 905 (Ohio Ct. App. 1956), and Adamski v. Bureau of Unemployment Compensation, 108 Ohio App. 198, 161 N.E.2d 907 (1959), on the basis of the difference in the facts in those two cases. For an earlier discussion of this subject and the decisions referred to, see Teple, *Survey of Ohio Law — Social Security and Public Welfare,* 11 W. RES. L. REV. 420 (1960).

13. 115 Ohio App. 437, 185 N.E.2d 655 (1961).

14. In its opinion the court pointed out that the Board of Review had decided there was not just cause for firing an employee who refused to take his chances on a machine which had not been proved accurate enough for court use and from which the courts universally protect the worst and most hardened criminal. One judge dissented, feeling that the employees who refused to comply with uniformly applied and reasonable conditions of continued employment and who chose to quit rather than comply, or be discharged by reason of their noncompliance, were ineligible for benefits.