BEFORE THE

STATE OF WISCONSIN

LABOR AND INDUSTRY REVIEW COMMISSION

In the matter of the
unemployment benefit claim of

PAUL T. THORPE, Employe

Hearing No. 90-004663 MD

SEE ENCLOSURE AS TO TIME
LIMIT ON FURTHER APPEAL.

Involving the account of

COUNTY OF FOND DU LAC, Employer
c/o Personnel Department

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A Department Deputy's Initial Determination held that in weeks 39 through 41 of 1990 the employe's work with the employing unit was suspended for misconduct or other good cause connected with his work. As a result, the employe was ineligible for unemployment benefits for those weeks.

The employe timely appealed the Initial Determination, and a hearing was held on November 7, 1990, before Administrative Law Judge Carol R. Ottenstein, acting as an Appeal Tribunal of the Wisconsin Department of Industry, Labor and Human Relations. The Appeal Tribunal Decision, issued on November 9, 1990, reversed the Initial Determination and found the employe eligible for benefits.

The employer timely petitioned for review by the Wisconsin Labor and Industry Review Commission. Based on the evidence and applicable law, and having considered the arguments presented by the employer in its petition, the Commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The employe has worked for about 12 years for the employer, a county government. For the last year, he has worked as a highway maintenance worker.

His last day of work prior to the disciplinary suspension at issue herein was September 25, 1990 (week 39). He returned to work on October 10, 1990 (week 41).

On August 6, 1990, the employe sustained a work-related injury to his left foot, suffering a tear in the muscle in the bottom of the foot. He was treated by a doctor that evening. The doctor recommended that the employe stay off work for a week, wrap the foot, keep weight off the foot, and sit down when it began to hurt. Pursuant to these instructions, the employe, with notice to the employer, did not work for the following week, beginning on August 7, 1990.

On August 7, 1990, the employe attended a softball game with a softball team for which he was the coach. It developed that there were an inadequate number of players on the team for it to play, and the team thus risked forfeiting the game. The employe, concerned that the forfeit would affect the team's chances for first-place standing in its league, for which it was in contention, placed himself into the line-up so that the team would have enough players. He played in the position of catcher for the team that night, and when it was his turn at bat he simply stood at the plate conceding an out. Playing the catcher's position required him to kneel.

Sometime after the employe returned to work, the employer became aware of a rumor that the employe had participated in a softball game while on medical leave, and it investigated the rumor and confirmed it. On or about September 20, 1990, the employer confronted the employe with the information that he had played in a softball game while on medical leave. After initially denying it, the employe eventually conceded that he had played in the game, but only acting as a catcher, and not batting and running the bases.

The employer's initial response to its discovery and the employe's confirmation that he had participated in a softball game on August 7, 1990

while on medical leave, was to negotiate a proposed resolution of the matter with the employe's union which would have required the employe to give up one paid vacation day, one birthday holiday, to work without pay for one day during each of the next three successive pay periods, and to submit to a three-day unpaid disciplinary suspension. The employer proposed this arrangement to the employe, who indicated that he would discuss it with his attorney and consider it. When the employe had not responded to the proposal by September 26, 1990, the employer unilaterally imposed a two-week disciplinary suspension to begin on September 26, 1990, and to end with the employe's return to work on October 10, 1990 (weeks 39 through 41, respectively).

Section 108.04 (6) of the Wisconsin Statutes provides that an employe whose work is suspended by an employing unit for misconduct or other good cause connected with his work is ineligible to receive benefits until five weeks have elapsed since the end of the week in which the suspension occurs or until the suspension is terminated, whichever occurs first.

The issue to be decided is whether the suspension of the employe's employment during weeks 39 through 41 of 1990 was a disciplinary action for misconduct or for other good cause connected with his employment.

"Other good cause" is a lesser standard than "misconduct". It can be found in cases in which there has been a single instance of negligence or poor judgment, even though in such circumstances the "misconduct" standard might not be satisfied. Mitchell v. Milwaukee Public Schools, (LIRC, U.C. Hearing No. 90-604770, November 23, 1990). The Commission is satisfied that the employe was suspended for participating in a softball game on the evening of August 7, 1990 while he was on medical leave for a work-related injury, and

that this conduct by the employe provided "other good cause" for his suspension. The employe had, at the time he participated in the softball game, just sustained an injury in which he tore a muscle in the bottom of his left foot. He had been specifically instructed by his physician to stay off work, to wrap the foot, to keep the weight off it, and to sit down when it began to hurt. It would have been obvious to any reasonable person, that these instructions were not intended merely to alleviate discomfort, but also to assist in the healing of the foot. To disregard a physician's instructions for the care of an injury creates an easily recognizable risk of delaying recovery or, even worse, causing further injury. The activities which the employe engaged in when he acted as a catcher at the softball game on August 7, 1990 were completely inconsistent with his physician's instructions. Kneeling to catch in a softball game can reasonably be expected to put stresses on the feet that are inconsistent with those instructions. By engaging in this conduct, the employe ran the risk that his injury would not heal properly or would be aggravated, that his absence from work caused by the injury would thereby be extended, and that the employer's liability for worker's compensation benefits would thereby be unnecessarily increased, all to the distinct disadvantage of the interests of the employer. Whether or not this in fact eventually occurred is not considered significant in this case, since the proper focus of the inquiry is on the intent and conduct of the employe, and the reasonableness of his decision, at the time, to participate in a softball game contrary to the recommendations of his physician. The conduct risked harm to the employer's interests, and it was voluntarily engaged in. It was also unreasonable. Other options were open to the employe. The team could have accepted the forfeit. The lack of any compelling necessity for the employe to do what he did, makes his decision all the more unreasonable.

The Commission therefore finds that in weeks 39 through 41 of 1990, the employe's work was suspended as a disciplinary action for other good cause connected with his work, within the meaning of section 108.04 (6) of the Statutes.

The Commission further finds, that in weeks 39 through 41 of 1990, the employe received unemployment compensation benefits in the amount of $127.00 per week for week 39 of 1990 and $221.00 per week for weeks 40 and 41 of 1990, amounting to a total of $569.00, for which he was not eligible and to which he was not entitled, within the meaning of section 108.03 (1) of the Statutes, and pursuant to section 108.22 (8)(a) of the Statuten, he is required to repay such sum to the Unemployment Reserve Fund.

DECISION

The Appeal Tribunal Decision is reversed. Accordingly, the employe is ineligible for benefits in weeks 39 through 41 of 1990. The employe is required to repay the sum of $569.00 to the Unemployment Reserve Fund.

Dated and mailed

February 8, 1991

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MC-676

/s/
Kevin C. Potter, Chairman

Carl W. Thompson, Commissioner

/s/
Pamela I. Anderson, Commissioner

NOTE: The Commission has reversed the Appeal Tribunal as a matter of law. It concluded, contrary to the Appeal Tribunal, that the conduct of the employe in participating in a softball game on August 7, 1990 in contravention of his physician's orders was an act of such poor judgment on his part, presenting such reasonable likelihood of harm to the employer's interests, that it constituted "other good cause" for suspension within the meaning of section 108.04 (6) of the Statutes.