BEFORE THE

STATE OF WISCONSIN

LABOR AND INDUSTRY REVIEW COMMISSION

In the matter of the
unemployment benefit claim of

JOHN E MCMULLEN, EMPLOYE

Hearing No. 91608191RC

SEE ENCLOSURE AS TO TIME
LIMIT ON FURTHER APPEAL.

Involving the account of

VEND-1 INC, EMPLOYER

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On September 11, 1991, the Department of Industry, Labor and Human Relations (the Department) held that the employe quit his work and not for a reason that would allow the immediate payment of benefits. As a result, benefits were denied. The employe appealed and a hearing was held before an Appeal Tribunal on October 21, 1991. The Appeal Tribunal reversed the Initial Determination and, on October 30, 1991, issued a decision which held that the employe did not voluntarily terminate his employment in week 32 of 1991. Consequently, the Appeal Tribunal Decision allowed benefits. The Department timely petitioned the Commission for review of the Appeal Tribunal Decision under sec. 108.09 (6)(a), Stats, on November 20, 1991.

Based on the applicable law, records and evidence in this case, the Commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The employe worked for the employer, a food and beverage vending business, for two years ending on August 9, 1991 (week 32). He owned 50 percent of the

employer's stock and was its president. The employer's business closed on August 9 because of economic problems, which the employe described as beyond his control, including a strike involving a major account, the war in Kuwait and the recent recession. As corporate president, the employe took steps to prevent closing down. The steps included reducing the employer's work force and attempting to renegotiate debt with the bank, the suppliers and the individual from whom the employe had purchased the business.

Eventually, however, his creditors refused to forbear and the bank stopped honoring his checks. The Coca-Cola Company, from whom the employer leased vending machines, stated it would remove all its vending machines on August 22 if the employer's bill was not paid in full. The employer was unable to make that payment. Further, that the employe contended he no longer had product to put in his vending machines. The employe claims that the vending machines would have been empty by the day after he closed business, although he did not do an inventory to see what was left. He eventually leased his equipment to another vending company and closed the business, as noted above, on August 9. He filed for both corporate and personal bankruptcy a couple of months later.

The issue here is whether a principal owner of a corporation who makes the business decision to close down the corporation "voluntarily" terminates his own employment and thus is ineligible for benefits for quitting under sec. 108.04 (7)(a), Stats. In general, the Commission followed the principle that a decision to cease business operations (be it closing company doors, voluntarily filing bankruptcy or liquidating) is a voluntary quit which does not constitute

good cause attrributable to the employer under sec. 108.04 (7)(b), Stats. The principle was enunciated in Hanmer v. ILHR Dept., 92 Wis. 2d 90, 94-100 (1979). Hanmer involved a case where, in the opinion of the claimants' attorney, the claimants had no alternative but to declare bankruptcy on behalf of the corporation they owned and which employed them. Nonetheless, the Supreme Court in Hanmer concluded that the termination was voluntary and that the claimants did not have "good cause attributable" within the meaning of sec. 108.04 (7)(b), Stats.

Although the result in Hanmer seems harsh, the court noted:

> "Our decision in this case is consistent with the longstanding interpretation of the Department on this issue. With a few exceptions the Department has consistently denied unemployment compensation to claimants who terminated their own employment by discontinuing the operation of an unprofitable business. This policy is fully consistent with the purpose of the Unemployment Compensation Act which ' . . . is to stablize employment and to minimize the loss of income when an employe is involuntarily out of work through the fault or misfortune of his employer.' (Citations omitted.) This 'act was never intended to provide benefits to those individuals who become "unemployed" by reason of the failure of their own business ventures.'" See Hanmer, at 92 Wis. 2d 99.

Since Hanmer, the Commission has fairly consistently denied benefits in such cases. In the case of Fish v. White Equipment Sales and Service, 64 Wis. 2d 737 (1974), a truck sales dealer was held to have voluntarily terminated his employment even though he had lost his major dealer's franchise. See also Norberg v. LIRC & Brothers Two and Associates, Inc., Taylor County Cir. Ct., Case No. 81-CV-26 (October 20, 1982); Smith v. LIRC, Milwaukee Co. Cir. Ct., No. 579-84-A (December 21, 1982); Oechsner v. Snow Bird-Sea Bird, (LIRC 10/25/90); Marilyn E. Hohender v. Betty & Mike's Inc., (LIRC 6/13/91); Roach v. Roy's Inc., (LIRC 5/1/91); and Elinor Chesen v. Lake Lumber Co. Inc., (LIRC 3/27/91).

Most of the cases cited above involved decisions to close down a business rather than actually to declare bankruptcy. However, the employe's original decision here was merely to close down the business. He did not keep operating until he actually declared bankruptcy. Further, Hanmer itself involves a shutdown due to bankruptcy.

Every rule has its exception, however. In Paul L. Hamacheck v. Sturgeon Bay IGA Food Center , (LIRC 8/14/90), the corporation's creditor actually took control of business premises and locked out the employe-owners. In that case, the Commission affirmed an Appeal Tribunal Decision that concluded that the quit was involuntary. In a note to its decision the Commission pointed out that nearly all of the "corporate quit" precedent cases arose prior to the 1977 amendment of sec. 108.04 (1)(g), Stats., which limited the potential benefit rights of claimant-owners to ten times their weekly benefit rate. 1977 Wis. Laws, ch. 124. However, while the Hanmer fact situation arose before the amendment of sec. 108.04 (1)(g) Stats., the rest of the cases hereinabove, including Norberg and Smith, arose afterwards.

The Commission has generally held that the Hamacheck holding is confined to a "lockout" fact situation where an employe-owner has no say in the cessation of business operations. That did not happen in this case. While it probably would have been unprofitable and difficult for the employe to attempt to remain in busines if he had no product, he testified at the hearing that he did not take an inventory. The employe's decision to terminate the business was clearly his own, although prompted by economic conditions. The rationale for the strict rule set out in Hanmer seems applicable here; unemployment compensation is not meant to fund entrepreneurial ventures of owner-employes.

The Commission therefore finds that in week 32 of 1991, the employe voluntarily terminated his work with the employing unit, within the meaning of sec. 108.04 (7)(a), Stats., and that his quitting was not for any reason constituting an exception to that section.

The Commission further finds that the employe was paid benefits in the amount of $225 for weeks 35 through 38 of 1991, amounting to a total of $900 for which he was not eligible and to which he was not entitled, within the meaning of sec 108.03 (1), Stats. Pursuant to sec. 108.22 (8)(a), Stats., he is required to repay such sum to the Unemployemnt Reserve Fund.

DECISION

The Appeal Tribunal Decision is reversed. Accordingly, the employe is ineligible for benefits beginning in week 32 of 1991, and until four weeks have elapsed since the end of the week of quitting and he has earned wages in covered employment performed after the week of quitting equalling at least four times his weekly benefit rate which would have been paid had the quitting not occurred. He is required to repay the sum of $900 to the Unemployment Reserve Fund.

Dated and mailed

July 17, 1992

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VL 1054.09

/s/
Pamela I. Anderson, Chairman

/s/
Richard T. Kreul, Commissioner

/s/
James R. Meier, Commissioner

NOTE: The Department will withhold benefits due for future weeks of unemployment in order to offset overpayment of U.C. and other special benefits programs due to this state, another state, or to the federal government.

Contact the Unemployment Compensation Division, Collections Unit, Unit, P. O. Box 788, Madison WI 53507, to establish an agreement to repay the overpayment.

MEMORANDUM OPINION

The Commission did not confer with the Appeal Tribunal because it did not reverse on the basis of witness credibility or demeanor. Transamerica Ins. Co. v. ILHR Dept. , 54 Wis 2d 272,283-84 (1972). Rather, the Commission reached a different legal conclusion upon essentially the same set of facts as found by Appeal Tribunal. Specifically, the Appeal Tribunal concluded the reason for the employe's termination was not voluntary. However, the Commission disagrees for the reasons set out above.

cc: DIRECTOR GLENN KELLEY
BUREAU OF LEGAL AFFAIRS