STATE OF WISCONSIN | CIRCUIT COURT | DANE COUNTY

CENTURY HARDWARE CORP.,

Plaintiff,

vs.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS and MABEL E. SANNER.

Defendants.

Case No. 140-311

MEMORANDUM DECISION

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

This is an action to review a decision of the defendant department dated July 31, 1973 entered in an unemployment compensation proceeding which found that the appeal tribunal's findings of fact were supported by the applicable records and evidence, and affirmed the appeal tribunal's decision that defendant Mabel E. Sanner (hereafter the employee) was eligible for unemployment benefits beginning in 1973 week 8.

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

> "The employe worked for about four years in packing work for the employer, a wholesale hardware distributing company. She last worked on November 3, 1973 (week 45).
>
> "After November 3, the employe went on medical leave of absence which was extended to January 30, 1973 (week 5). After January 30, when the employe had not supplied a doctor's release to return to work, her employment was terminated by the employer effective February 1, 1973 (week 5).
>
> "In week 8 the calendar week ending February 24, 1973, the employe registered for work at a public employment office and filed claim for unemployment benefits. She filed a Physician's Report, from UC-474, with the unemployment compensation division indicating that she could do light work. It appears by the report that she would be unable to perform the work that she had done for the employer since it involved bending and heavy lifting. However, the report indicated that she could perform other types of light work, and she would have been available for a substantial amount of the work on the general labor market.

"The employer alleged that the employe was unavailable for work and a physician's report submitted to them in January of 1972 indicated that she had not been released for work and would not be available for work for some time in the future. The employer further alleged that the employe was unable to perform her work for the employer and that she had not received a medical release to perform any work. It appears that the information that the employer received from one of the doctors that had treated the employe was based on information available in December of 1972. She had been continually taking treatments and the subsequent report as filed with the unemployment compensation division indicated that although she may not have been able to perform her work for the employer, she was available to perform other types of work on the general labor market.

"The appeal tribunal therefore finds that in 1973 week 5 the employe's employment was terminated by the employer because the employe was physically unable to do her work, but that beginning in week 8 of 1973, the employe was physically able to work and substantially available for work on the general labor market, within the meaning of section 108.04 (1)(b)1 of the statutes."

The Issues

The brief filed in behalf of the plaintiff employer advances these two contentions:

(1) The employee is ineligible for benefits because she voluntarily terminated her employment within the meaning of sec. 108.04(7), Stats., because of her failure to present to the employer a work release from a physician after termination of her medical leave of absence on January 30, 1973, inasmuch as the employer's work rules required this furnishing of a work release.

(2) There is no credible evidence to sustain the finding of fact that the employee "would have been available for a substantial amount of the work on the general labor market."

The Voluntary Termination of Employment Issue

The issue was raised before the appeal tribunal that the employee's failure to submit to the employer a physician's work release after her medical leave of absence expired January 30, 1973 constituted a voluntary termination by her of her employment. However, this issue was not raised in the letter of the employee's counsel to the department dated May 17, 1973 whereby a review was sought of the appeal tribunal's decision. More importantly this issue has not been raised in plaintiff's complaint served and filed in this Circuit Court action.

The only paragraph of the complaint that purports to state the grounds of the employee's attack upon the department's decision here under review is paragraph 8 which reads as follows:

> "That the issue on said appeal was whether the employee was available for work, and that plaintiff is informed and believes that:
>
> "a) The decision was contrary to law in respect to the Commission's interpretation of availability for work within the meaning of sec. 108.04(1)(b)1.
>
> "b) That the decision of the Commission is unsupported by substantial evidence in view of the entire record as submitted.
>
> "c) That the decision of the Commission is arbitrary and capricious."

Because of the failure of the complaint to raise any issue of voluntary termination of employment within the meaning of sec. 108.04(7), Stats., that issue is not properly before the Court, and will not be considered by it.

Findding Relating to Availability for Work on General Labor Market

As is apparent from the above quoted wording of paragraph 8 of the complaint, the grounds of attack upon the availability for work finding of fact are stated in terms of subs. (b), (d) and (e) of sec. 227.20, Stats. However, sec. 108.09(7)(b), Stats., provides:

> "JUDICIAL REVIEW. . . . (b) 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. . . ."

Furthermore, sec. 227.22(2), Stats., provides, "Only the provisions of ss. 221.01 to 227.21 relative to rules are applicable to matters arising out of the workmen's compensation act or the unemployment compensation act." Thus sec. 227.20 has no application to the instant review action.

However, paragraph 8(b) of the complaint is deemed by the Court to be sufficient to raise the issue of whether the finding of fact relating to the employee's availability for work on the general labor market is supported by credible evidence. The reason why the employee is eligible for benefits if available for a substantial amount of the work on the general labor market is because of the wording of sec. 108.04(1)(b)1, Stats., which provides as follows:

"ELIGIBILITY FOR BENEFITS. (1) AVAILABILITY FOR WORK. . . .
(b) An employe shall be ineligible for benefits from an employer's account:

"1. While he is physically unable to work, or substantially unavailable for work, if his employment with such employer was suspended by the employe or by the employer or was terminated by such employer because the employe was physically unable to do, or unavailable for, his work; or . . . ."
(Emphasis supplied.)

Under this wording of sec. 108.04(1)(b)1, the department has consistently held that an employee must be found physically unable to work or substantially unavailable for work (other than his or her work for the employer) to deny benefits. (See Wis. U.C. Digest 1960, AA-105, Ability to Work - Physical Condition, pp. 6-9; Wis. U.C. Digest, 1966 Suppl, AA-105, pp. 1-2; and Wis. U.C. Digest, 1970 Supp., AA-105, pp. 3-4.

Although the appeal tribunal and commission found that the employe was physically able to work and substantially available for work on the general labor market, whereas the more precisely correct wording for the finding, under the statutes, would have been that she was not physically unable to, or (substantially) unavailable for, work on the general labor market, this is merely a matter of semantics.

As to the employee's physical ability to do other work on the general labor market, the medical opinion of Dr. Goldman (Exhibit 7), was that as of the end of January, 1973, she would be unable to engage in employment which involved proplonged standing or lifting. The reasonable inference to be drawn from this was that she would be able to engage in employment which did not involve lifting or prolonged standing. Her family physician, Dr. Eisenberger, was of the opinion that she should avoid climbing, standing. lifting, carrying, pushing, pulling and heavy or outside work (Exhibit 2), but that she could do some stooping and bending, walking and sitting, high speed work, desk work and cataloging.

Matakovic, a manpower supervisor employed by the Wisconsin State Employment Service who is familiar with employment conditions in the Milwaukee area, testified the employee would be available for about 70 per cent of the jobs in the general labor market although unable to do work that required continuous standing or in cool places (Tr. 45). On cross examination he was asked what affect the employee's restriction as to bending, stooping and filing would affect her availability, and he said those restrictions would lower the availability but he was not prepared to say what per cent (Tr. 45). Neither Dr. Goldman nor Dr. Eisenberg stated she would be unable to do work requiring bending, stooping, and filing. The employee testified she could do filing (Tr. 12). Dr. Eisenberg

stated in his report (Exhibit 2) that she could engage in work which required stooping or bending 50 per cent of the time. Nevertheless, the failure to include the restriction of carrying and lifting by Matakovic when he gave his 70 per cent estimate, renders his testimony of very little materiality.

The Court, however, determines the reports of Drs. Goldman and Eisenberg are sufficient credible evidence to sustain the questioned finding. It is either a matter of common knowledge that there are many jobs on the general labor market which do not require continuous standing nor lifting and carrying, or it is something the department had the right to take judicial notice of in performing its quasi-judicial functions in rendering decisions such as the one here under review.

Let judgment be entered confirming the decision here under review.

Dated this 18th day of March, 1974.

By the Court:

/s/ George R. Currie
Reserve Circuit Judge