
WILLIAM P. DONAHUE,

Plaintiff,

Case No. 111-269

vs.

DIRECTIONS FOR JUDGMENT

INDUSTRIAL COMMISSION
OF WISCONSIN,

Defendant.

Before Hon. Richard W. Bardwell, Judge.

This is an action to review an order of the industrial commission, dated May 18, 1962, ordering forfeited four weeks of plaintiff's unemployment compensation benefits which might otherwise have become due and payable prior to November 7, 1963.

FACTS

The plaintiff, William P. Donahue, hereafter referred to as the claimant, worked for the Jorgenson Clothing Company in Racine, Wisconsin. He became unemployed and initiated a claim for unemployment benefits from the Jorgenson Clothing Company account and his weekly benefit rate was established at \$50.00.

Thereafter claimant secured part-time work with a hardware store during April and May, 1961. Donahue personally filled out and filed claims for unemployment compensation benefits for weeks 16, 17 and 18 of 1961 (the weeks ending April 22nd, 29th and May 6th). On each of the claim forms claimant reported that the total he had earned in each of those three weeks was \$24 and that his employer in each instance was the Jorgenson Hardware Company. Since claimant's wages reported in weeks 16, 17 and 18 were in each instance less than one-half of his weekly benefit rate of \$50, claimant was paid his full benefit rate of \$50 per week.

The clothing company against whose account the weekly benefits were being charged notified the industrial commission that Donahue was working for a third employer, i.e., the Johnson Furniture Company. When claimant reported at the district unemployment office on May 9, 1961, to file his benefit claim for week 18 he was asked to explain his failure to report earnings from the furniture company. At that time claimant stated in a written statement (Ex.5) that he had failed to report his earnings with the furniture company because he did not know what they were.

On May 29, 1961, a report (Ex.1) was submitted by the furniture company indicating that Donahue had earned wages of \$20.40 in week 16 ending April 22nd which were paid to him on May 12th; \$17 in week 17 ending April 29th, which were paid to him on May 19th; and \$20.40 in week 18 ending May 6th which were paid to him on May 26th.

On November 7, 1961, the commission deputy issued an initial determination holding that claimant had earned wages in excess of one-half his weekly benefit rate of \$50 in each of weeks 16, 17 and 18 and was therefore partially unemployed in those weeks. No appeal was taken from this determination.

On the same day the commission deputy issued an additional initial determination wherein he held that claimant, when filing his benefit claims for weeks 16, 17 and 18 of 1961, had concealed wages earned by him in each of such weeks. The deputy then ordered, pursuant to Sec. 108.04(11)(b), that claimant forfeit such benefits as would otherwise become payable to him for six weeks of compensable unemployment completed not later than November 7, 1963. An appeal was taken from the deputy's determination and the appeal tribunal on March 7, 1962, confirmed the ruling of the deputy and added the finding that the claimant had been told at the end of week 17, ending April 29th, that he was to be compensated for his work at the furniture store.

Claimant duly appealed to the industrial commission for a review of the appeal tribunal decision. The commission amended the appeal tribunal ruling by ruling that when claimant filed his benefit claim for week 16 on April 25th he did not know that he was to receive compensation from the furniture store and therefore had not failed to disclose any wages earned from the furniture company in that week. However, the commission found that when Donahue filed his claim for week 17 on May 2nd and for week 18 on May 9th he knew that he was to be compensated for his work at the furniture store and therefore that his failure to report his employment with the furniture store in weeks 17 and 18, when he filed his claims for those two weeks, was a wilful failure to disclose wages earned in such weeks within the meaning of the statute. By its amendment the commission reduced the forfeiture penalty from six to four weeks. We are therefore actually concerned with the forfeiture of future partial unemployment benefits of \$25 per week for a period of four weeks, or \$100 in all.

The claimant sought review of the commission's findings and order in this court.

ISSUE INVOLVED

The sole issue in this review is whether or not the claimant concealed wages earned within the meaning of Sec. 108.04(11) of the Wisconsin Statutes. Sec. 108.04(11) of the statutes provides:

"Fraudulent Claims. In addition to any other provision, including penalties, which may apply under this chapter:

"(a) If a claimant, in filing his claim for any week, conceals any part of his wages earned in or paid for that week, or conceals his refusal (within that week) of a job offer, so much of any benefit payment as was paid because of such concealment shall be recovered as an overpayment.

"(b) Any such claimant may also, by a determination issued under s. 108.09, be required, as to each such act of concealment, to forfeit such benefits as would otherwise become payable to him for not more than 3 weeks of compensable unemployment completed not later than 2 years following the date of such determination. The benefits thus forfeited by a claimant shall be duly charged against his benefit credits and against the proper employer's account and shall be credited to the fund's balancing account."

Counsel for both parties advised the court that there has been no judicial interpretation of the above statute by any Wisconsin court. It should be noted that Sec. 108.04(11) provides the commission with a civil remedy as opposed to the criminal remedy found in Sec. 108.24(1) which makes it a misdemeanor punishable by fine and/or imprisonment for a claimant to knowingly make a false statement or representation in order to obtain a benefit payment.

As indicated, the commission found that Donahue, when he filed his claim for weeks 17 and 18 of 1961, concealed certain wages which were earned by him for each of those weeks. The commission in its past interpretation of this statute has determined that the action of the claimant must be a wilful act of concealment and one not due to lack of knowledge or ignorance. Also it is conceded that active concealment consists of a suppression of a fact and implies a purpose or design.

It is plaintiff's contention that his failure to report wages earned in weeks 17 and 18 was due to the fact that he did not know what his wages would be. Plaintiff's counsel argues further not only did claimant not know what his wages were to be, he did not even know what hours he was to work.

Despite plaintiff's protestations of innocence, the record is clear that by April 29, 1961, Mr. Donahue had been advised by the furniture store manager that he, Donahue, was to receive wages for his work. Consequently when claimant filed for unemployment compensation for weeks 17 and 18, on May 2nd and May 9th, respectively, he knew full well that he had earned wages in each of weeks 17 and 18. As noted, the statute requires the reporting of all "wages earned in or paid for that week". It might be argued that plaintiff's failure to report wages earned but not actually paid in weeks 17 and 18 of 1961 was an innocent omission on his part. Unfortunately from the plaintiff's standpoint this does not seem to be the case. We say this because claimant obviously was an old hand at filing for unemployment compensation benefits. The record indicates that between 1956 and 1962 Mr. Donahue had filed some 82 partial claims for unemployment benefits. It can scarcely be maintained that he was a novice at this sort of thing.

Moreover, it is clear that findings of fact, including reasonable inferences made by the commission, are conclusive on the reviewing court if supported by any evidence. Coopers, Inc., vs. Industrial Comm. and Edward F. Blanchette, 15 Wis. (2d) 589. See also Gant vs. Industrial Comm., 263 Wis. 64, 69-70.

It is also very important to the commission that a high degree of accuracy exists with respect to reports made by claimants in connection with their applications for unemployment compensation benefits. In other words, unemployment benefits are paid almost entirely on the basis of statements made by the claimants as to their unemployment status and lack of earned wages. Consequently claimants

must be charged with a high degree of responsibility for accurately and correctly reporting their earnings. The principal purpose of Sec. 108.04 (11) is to enforce a full, honest and complete disclosure and report by the claimant both of wages earned and of wages paid for the period covered by the claimant's application. This is particularly important because it permits, among other things, the industrial commission to verify with the employer involved the amount of wages reported as earned by the claimant; it also permits the commission to check with that employer all the facts in regard to the partial employment situation.

As indicated, the sole issue involved here is whether or not there is any evidence to support the commission's finding that Mr. Donahue knowingly concealed wages earned in weeks 17 and 18 when he filed for unemployment benefits for those two weeks. We think the commission's finding finds adequate support in the record.

(1) The claimant had broad experience in filing benefit claims and on many occasions in the past he had filed claims for partial benefits.

(2) Certainly by April 29, 1961, claimant had been informed by the manager of the furniture company that he was to receive wages for his work; nonetheless, claimant on May 2nd and May 9th completed and filed claim forms which completely omitted any reference to employment or earnings from the furniture company.

(3) The claims forms themselves asked the specific question, "Did you do any work in that week?" If the claimant's answer to the question is "Yes", he is then required to enter the name and address of the employer and the total wages earned in the week in question. He is also admonished to "include any pay still coming". Further, on the back of the claim form the warning is repeated: "Report all your wages earned in the week even if you haven't been paid yet." On Donahue's claim forms for weeks 17 and 18 he reported only that he had worked for Jorgenson Hardware and the wages, i.e., \$24 per week, earned from that employer. He made no reference whatever to his work and wages earned with the furniture company.

(4) We think that on the basis of the wages earned by claimant from the hardware company, i.e., \$24 per week, that the commission could reasonably infer that the claimant had a motive in concealing any wages earned from the furniture company as such amount would clearly put him over the \$25 per week maximum which is the cut-off point if a claimant is to receive his full benefit of \$50 per week. In other words if claimant reported an additional \$1.50 per week his benefit rate would immediately drop from \$50 to \$25 per week. Certainly this gave claimant a clear motive for deliberately omitting monies earned from the furniture company in weeks 17 and 18. Obviously, claimant knew that such earnings for those two weeks would in each week exceed \$1.00.

Mr. Donahue knew from his broad past experience that he had an absolute duty to report all wages earned when filing a claim for unemployment compensation. In the instant case he clearly failed to report earnings for weeks 17 and 18 after his own employer had advised him that he would be paid for those two weeks. Counsel for the plaintiff argues that the test here should be proof of concealment by clear and convincing evidence. Whether or not the commission actually applied that test or not we do not know. We do know, however, that there is clear and

satisfactory evidence in the record to support the commission's findings that Mr. Donahue did wilfully conceal wages earned in weeks 17 and 18 when he filed for unemployment benefits for those two weeks within the meaning of Sec. 108.04(11). Obviously, the quantum of proof necessary is far less than it would have been had the commission elected to charge claimant with a criminal violation under Sec. 108.24(1). Also the commission could have proceeded under Sec. 108.04(11)(a) and brought a civil action to recover the overpayment of benefits made because of claimant's wilful concealment. Instead, the commission elected to proceed under subsection (b) of Sec. 108.04(11) and unless claimant makes a further application for unemployment benefits before November 7th of this year, the entire proceeding will become moot. In other words, the applicant or claimant has in fact received but a rather gentle tap on the wrist for what might appear to be a fairly serious violation of the statutes. Certainly under those circumstances the court should not search the record for reasons to exonerate the plaintiff but rather we should search the record for some evidence to support the commission's finding and order. As indicated, we do find in this record credible evidence to support each material finding made by the commission.

Counsel for the commission may prepare the necessary form of judgment confirming in all respects the findings and order of the commission here under review. A copy of same should be furnished to counsel for the plaintiff before submission to the court for signature.

Dated, August 13, 1963.

RICHARD W. BARDWELL
Circuit Judge