Industrial Claim Appeals Office

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Action Key Punch Service, Inc., Petitioner,

v.

Industrial Commission of the State of Colorado and

Deborah J. Butler, Respondents

No. 85CA0329

709 P.2d 970

Court of Appeals of Colorado,

Div. III.

October 24, 1985

Bourke and Jacobs, P.C.; Charles H. Jacobs; Peter S. Ely, Denver, Colorado, Attorneys for Petitioner.

Duane Woodard, Attorney General; Charles B. Howe, Chief Deputy Attorney General; Richard H. Forman, Solicitor General; Mary Karen Maldonado, Assistant Attorney General, Denver Colorado, Attorneys for Respondent Industrial Commission.

No appearance for Respondent Deborah J. Butler.

METZGER, Judge.

Action Key Punch Service, Inc., (employer) seeks review of a final order of the Industrial Commission granting a full award of benefits to Deborah Butler (claimant) on the grounds that the termination of her employment was the result of her refusal, with good cause, "to work overtime without reasonable advance notice." We set the order aside.

Claimant was a key punch operator. On Thursday, April 19, 1984, the employer announced that there would be mandatory overtime work for the following Saturday. Mandatory overtime was sometimes required by the employer, and claimant had worked overtime on prior occasions.

Upon learning of the overtime, claimant reminded her supervisor that she would be unable to work on Saturday because she was planning a birthday party for her husband. The supervisor told claimant that if she did not work on Saturday she would be placed "on-call." "On-call" meant that claimant would report only if called, and claimant interpreted this to mean she was discharged. Consequently, claimant did not return to her job after April 19.

Contrary to the employer's evidence, claimant testified that she was not told that it was possible to make up the overtime. Further, she stated that she could not have worked overtime on Thursday because of a doctor's appointment, nor on Friday because it was a religious holiday.

The Commission held that claimant was discharged for refusal to work the mandatory overtime. Further, it found that claimant was unable to work overtime on Thursday and Friday, and that the birthday party constituted "good cause" for refusing to work on Saturday. See § 8-73-108(4)(k), C.R.S. (1984 Cum. Supp.).

The employer contends that the Commission erred in finding that claimant's desire to give a birthday party for her husband constituted "good cause" for failing to work overtime on Saturday. We agree.

Section 8-73-108(4)(k) limits "good cause" for refusing to work overtime to "compelling personal reasons affecting either the worker or his immediate family." The statute does not provide examples of "compelling personal reasons," nor do we find any Colorado cases interpreting the statute.

We interpret the statute in light of the General Assembly's statement that "unemployment insurance is for the benefit of persons unemployed through no fault of their own; and that each eligible individual who is unemployed through no fault of his own shall . . . . receive a full award of benefits." Section 8-73-108(1)(a), C.R.S. (1984 Cum. Supp.). "Fault," as that term is used in the statute, "is not limited to something worthy of censure but must be construed as meaning failure or volition." City & County of Denver v. Industrial Commission, 666 P.2d 160 (Colo. App. 1983).

In our view, "compelling personal reasons affecting either the worker or his immediate family" are circumstances so significant that they would deprive a reasonable person of the ability to make a truly volitional choice about whether to work overtime. The compulsion engendered by a given set of circumstances must be judged by an objective standard rather than by the claimant's subjective outlook. See Gatewood v. Russell, 29 Colo. App. 11, 478 P.2d 679 (1970).

The foregoing analysis is supported by Evenson v. California Unemployment Insurance Appeals Board, 62 Cal. App. 3d 1005, 133 Cal. Rptr. 488 (1976). In Evenson, the court considered whether an employee's disenchantment with a union constituted sufficient "good cause" for his refusal to pay union dues. It determined that he was not entitled to benefits after his employment was terminated because of that refusal. The court stated that "good cause may exist for personal reasons but those reasons must be so imperative and compelling as to make the voluntary leaving involuntary." The court stated the test as follows:

"In general, good cause as used in an unemployment compensation statute, means such a cause as justifies an employee's voluntarily leaving the ranks of the employed; the quitting must be for such a cause as would, in a similar situation, reasonably motivate the

average able-bodied and qualified worker to give up his or her employment with its certain wage rewards in order to enter the ranks of the unemployed."

Applying these principles here, we conclude that the Commission's findings of fact do not support the conclusion that claimant quit for compelling personal reasons. See § 8-74-107(6)(c), C.R.S. (1984 Cum. Supp.). While claimant understandably desired to give the birthday party for her husband, we do not think a reasonable person would refuse to work overtime and thereby sacrifice employment for this reason.

The employer further contends that we should hold that claimant is disqualified from receiving benefits, as a matter of law, pursuant to § 8-73-108(5)(e)(I), C.R.S. (1984 Cum. Supp.) (quitting because of dissatisfaction with standard hours of work). We decline to do so.

The Commission noted that there was evidence that claimant's termination was attributable to harassment not related to performance of the job. If such were found to be the cause of the termination, claimant would be entitled to benefits under § 8-73-108(4)(o), C.R.S. (1984 Cum. Supp.). However, the Commission declined to make findings in this regard because, in its view, § 8-74-108(4)(k) was dispositive. Since the harassment issue has not been considered, it would be improper for this court to enter any order concerning claimant's ultimate right to benefits.

The order of the Commission is set aside. The cause is remanded to the Commission with instructions to refer the matter to a referee for entry of appropriate findings and entry of a new order. Further hearings may be held at the discretion of the Commission.

Judge Berman and Judge Tursi concur.

Albertsons, Inc., Petitioner,

v.

The Industrial Commission of the State of

Colorado and Daryl Milanovich, Respondents

No. 86CA1292

735 P.2d 220

Colorado Court of Appeals,

Div. II.

February 19, 1987.

Damas and Smith, P.C., Daniel J. Collyar, Attorneys for Petitioner.

Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General, Kathryn J. Aragon, Assistant Attorney General, Attorneys for Respondent Industrial Commission.

No appearance for Respondent Daryl Milanovich.

BABCOCK, Judge.

Albertsons, Inc. (employer) seeks review of the Industrial Commission's determination that it failed to show good cause for its failure to appear at a hearing before a Division of Employment referee. We set aside the order.

Employer appealed the deputy's decision that claimant was entitled to full unemployment compensation benefits, and a hearing was scheduled in Longmont. Employer's representative did not appear at the scheduled time, and, after waiting 15 minutes, the referee dismissed the appeal. The representative arrived two minutes later.

Pursuant to Industrial Commission Regulation No. 11.2.13, 7 Code Colo. Reg. 1101-2, which permits a party to reopen an appeal upon establishing good cause for failure to appear, employer's representative filed a sworn affidavit stating her reasons for arriving late. She stated that she had left Denver for Longmont an hour before the hearing, but was delayed by construction and traffic. When she stopped to phone, she discovered she had forgotten her wallet. After finding someone who would let her use a phone, she attempted to phone an acquaintance in Longmont, but the line was busy. She then drove to Longmont but, once there, was twice delayed by a slow-moving train.

The appeals referee found that employer's representative had timely notice of the hearing, but that she had failed to act reasonably in leaving so late, and in not being responsible for her belongings. The referee concluded that employer had failed to show good cause for its failure to appear. The Commission affirmed the referee's decision, and the Industrial Claim Appeals Panel let the Commission's order stand.

Employer contends that the Commission, in determining that it did not establish good cause, erred in failing to consider all the relevant factors listed in Industrial Commission Regulation No. 12.1.8, 7 Code Colo. Reg. 1101-2. Employer also argues that Trujillo v. Industrial Commission, 648 P.2d 1094 (Colo. App. 1982) stands for the proposition that negligence of a party's representative is not by itself sufficient basis for a finding of no good cause. We agree.

One factor to be considered under Regulation 12.1.8 in determining whether good cause exists is whether "factors outside the control of the party" prevented timely action. Here, unanticipated traffic delays prevented the representative's timely appearance. Another factor to be considered is "the length of time the action was untimely." We find that the delay here is minimal, and that the Commission thus erred in failing to take into account such a short delay. An additional factor under Regulation 12.1.8 is "whether any other interested party has been prejudiced by the untimely action," and there was no showing of prejudice to claimant. See Trujillo v. Industrial Commission, supra.

Although we agree that employer's representative failed to act in a reasonably prudent manner in not allowing enough travel time, and in failing to contact either employer or the referee, we conclude that, in light of other considerations listed in Regulation 12.1.8, the Commission abused its discretion by giving undue weight to a single factor while disregarding others. See Esparza v. Industrial Commission, 702 P.2d 288 (Colo. App. 1985).

Furthermore, as we held in Trujillo v. Industrial Commission, supra, neglect on the part of a party's attorney is "outside the control of the party which prevented a timely action," and, as such, meets the requirements of Regulation 12.1.8 for determining good cause that would excuse failure to appear. Although employer's representative is not an attorney, she was authorized to represent employer pursuant to § 8-74-106(1)(e), C.R.S. (1986 Repl. Vol. 8B). See Unauthorized Practice of Law Committee v. Employers Unity, Inc., 716 P.2d 460 (Colo. 1986). Accordingly, the Commission erred in attributing the representative's negligent behavior to employer. See Trujillo v. Industrial Commission, supra.

Because we find that employer has shown good cause for its failure to appear at the scheduled hearing, the order of the Industrial Commission is set aside, and the cause is remanded to the Industrial Claim Appeals Office for further proceedings.

Judge Smith and Judge Tursi concur.

William E. Andersen, Plaintiff in Error,

v.

Industrial Commission of the State of Colorado (Ex Officio

Unemployment Compensation Commission of Colorado); and

Metropolitan Pontiac; Leo Payne Pontiac, Inc.; and

Pinkerton's Incorporated (Interested Employers),

Defendants in Error.

No. 23513.

167 Colo. 281

Supreme Court of Colorado,

In Department.

Nov. 18, 1968.

David W. Sarvas, L. L. Nathenson, Lakewood, for plaintiff in error.

L. James Arthur, Kelly O'Neall, Jr., Denver, for defendant in error, Pinkerton's, Inc.

Duke W. Dunbar, Atty. Gen., Frank E. Hickey, Deputy Atty. Gen., Robert L. Harris,

Asst. Atty. Gen., for defendant in error, Industrial Commission of the State of Colorado.

PRINGLE, Justice.

This writ of error is directed to a judgment of the district court affirming the denial of unemployment compensation benefits to the plaintiff in error, William E. Andersen. The defendants in error are the Industrial Commission (referred to as the Commission) and the interested employers, Metropolitan Pontiac, Leo Payne Pontiac, Inc. (Leo Payne), and Pinkerton's Incorporated (Pinkerton's). Of the interested employers, only Pinkerton's appeared at the hearing before the Commission to contest Andersen's claim for benefits.

Andersen's separation from his employment with Pinkerton's is the focal point of this dispute, but some additional information is necessary to put this case in its proper perspective. After working as an automobile salesman for some thirty years, Andersen left Metropolitan Pontiac to take another job at Leo Payne because the latter was closer to his home. The Commission found that on May 15, 1966, his employment there was

terminated, after about three months, through no fault of his own. He remained unemployed until March 31, 1967, when he accepted a job from Pinkerton's as a night security guard. After first asking Pinkerton's for a job which required less walking, and having been refused, Andersen resigned his employment on April 3, 1967, because he couldn't stand the walking required to perform his job. Andersen was sixty-four years old, was very heavy, and the walking caused his feet and ankles to swell. In subsequent proceedings, the Commission denied Andersen's claim for unemployment compensation benefits on the ground that he had left his employment at Pinkerton's for personal reasons. See 1965 Perm.Supp., C.R.S.1963, 82--4--8(6)(b)(xxii). The trial court affirmed.

Andersen's sole argument here is that the trial court erred in affirming the decision of the Commission because the evidence in the record requires the conclusion that he quit his job at Pinkerton's not for personal reasons, as found by the Commission, but for health reasons. We agree and reverse the judgment of the trial court.

The legislature has expressly declared that the Commission shall be guided in the granting of benefit awards by the tenet that unemployment insurance is for the benefit of persons unemployment through no fault of their own, and that each eligible individual who is unemployed through no fault of his own shall be entitled to receive benefits. 1965 Perm.Supp., C.R.S.1963, 82--4--8(1). Furthermore, we have stated that unemployment compensation acts are to be liberally construed to further their remedial and beneficient purposes. Industrial Commission v. Sirokman, 134 Colo. 481, 306 P.2d 669. With these principles in mind, we review this case.

In addition to the facts already recited, the record discloses that Andersen had never received unemployment benefits. After remaining unemployed from May 15, 1966, until March 31, 1967, he applied to Pinkerton's and was given a night shift as a security guard, which required his walking to check twenty-five time clocks every hour. His overweight condition was considered by his employer, and he was questioned as to his ability to perform the duties of his job. Having been advised of the strenuous routine required, Andersen replied that he wanted to try it anyway. After working three days, he notified his employer that he couldn't stand the walking and requested a leave of absence and an easier job. This was refused.

In its decision, the Commission found that Andersen quit his job with Pinkerton's because there was too much walking required, but denied him benefits because 'he did not have medical advice to quit.' Here, while there was no testimony that a doctor had advised Andersen to actually quit his job, there was testimony that a doctor had told Andersen that the walking was too much for him. We find no requirement in 1965 Perm.Supp., C.R.S.1963, 82--4--8(4)(c)(i) that, before he can be entitled to benefits, the claimant must be advised by a physician to terminate his employment. A medical statement to substantiate the claimant's assertion that he was required to leave his employment because of health reasons is required only if the employer requests it prior to the date of quitting or within a reasonable period thereafter. There is nothing in the record to indicate that such a request was made.

Accordingly, when under these circumstances the statute does not require proof of a doctor's advice to actually quit, the denial of benefits on the ground that Andersen did not have such specific advice was error as a matter of law. Where the Commission has misconstrued or misapplied the law, this Court is in no way bound by its decision. Industrial Commission v. Rowe, Colo., 425 P.2d 274. Thus Andersen is entitled to full benefits regarding this separation.

The defendants in error argue in their brief that even if this Court should reverse the decision of the Commission with regard to Andersen's separation from Pinkerton's, Andersen cannot recover a full award because he did not leave Metropolitan Pontiac to take a better job, as defined by 1965 Perm.Supp., C.R.S.1963, 82--4--8(4)(g)(i--iv). Their argument is directed to the requirement in the statute that the new job last at least ninety calendar days from the first day of employment before it can be considered a better job.

The Commission found that Andersen's employment with Leo Payne did not last ninety days, and on the basis of that finding concluded that it was not a better job. The Commission went father, however, to find that Andersen's separation from Leo Payne was through no fault of his own, but was the result of an unjustified termination by Leo Payne. Thus the facts, as found by the Commission, entitle Andersen to a full award. The pertinent sections of the statute require that the new job last at least ninety days 'unless sooner terminated under conditions of which, in the judgment of the department, the worker had no knowledge at the time he accepted the job and over which he had no control.' 1965 Perm.Supp., C.R.S.1963, 82--4--8(4)(g)(iii). Under the circumstances present here, the findings of the Commission that Andersen was discharged through no fault of his own bring this case within the section of the statute just quoted, and we therefore conclude that the Commission erroneously applied the law. See Industrial Commission v. Rowe, supra.

Accordingly, the judgment is reversed and remanded to the district court with directions to remand to the Commission to enter an award not inconsistent with the views expressed herein.

Moore, C.J., and Day and Groves, JJ., concur.

Laura Arias, Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado, Department of Labor and Employment, and

Sung W. Oh, d/b/a Dunkin Donuts, Respondents.

No. 92CA0491.

850 P.2d 161

Colorado Court of Appeals,

Div. III.

Feb. 25, 1993.

Ann M. la Plante, Greeley, for petitioner.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., John D. Baird, Asst. Atty. Gen., Denver, for respondents Industrial Claim Appeals Office and Dept. of Labor and Employment.

No appearance for respondent Sung W. Oh, d/b/a Dunkin Donuts.

CRISWELL, Judge.

Laura Arias (claimant) seeks review of a final order of the Industrial Claim Appeals Office (Panel) which disqualified her from the receipt of unemployment compensation benefits. She argues that the Administrative Law Judge (ALJ) denied her procedural due process rights by failing to ask if she desired to present any witnesses and that the ALJ and the Panel applied the wrong legal standard in determining that a change in her working conditions was not substantial. We affirm.

Claimant was employed by a Dunkin Donut franchisee as a donut finisher for about 21 months before her termination. For some time, she and another employee had worked the late shift from 10:00 p.m. until 6:00 a.m.

About six weeks before her termination, a new owner bought the franchise at which claimant was employed. This new owner concluded that, because only about 5% of the sales occurred on the late night shift, it was unnecessary to have that shift manned by two employees. The other employee was, therefore, assigned to another shift, and claimant thereafter became solely responsible for performing the duties that the two employees

had performed previously. According to the new owner's undisputed testimony, which was accepted by the ALJ, it is normal among similar franchises to use only one employee on such a shift.

After working this shift alone for about 30 days, and after being refused a raise in pay, claimant quit without giving a reason. When she applied for unemployment compensation benefits, however, she asserted that her voluntary termination resulted from a substantial change in her working conditions caused by her being required to work alone on the late night shift. Although another employee was physically present to bake the donuts, claimant asserted that, because she was required to wait on customers during this shift, she could not complete her donut-finishing work.

After an evidentiary hearing, the ALJ determined that the conditions under which claimant was required to work were "reasonable and normal for the industry." Hence, he concluded that claimant's benefits were required to be reduced pursuant to Sec. 8-73-108(5)(e)(I), C.R.S. (1986 Repl.Vol. 3B).

I.

We reject claimant's procedural due process assertions.

The record here is undisputed that the notice of hearing received by claimant specifically advised her of her right to present the testimony of witnesses at the hearing. And, claimant does not assert that she was unaware of her right in that respect.

The record does not disclose that the ALJ specifically asked either party whether there were additional witnesses to be presented. However, on several occasions before the hearing was closed, the ALJ inquired whether the parties had anything further to present, and claimant responded in the negative.

The information contained in claimant's post-hearing appeal and affidavit was not presented to the ALJ and, therefore, cannot properly be considered by the Panel or this court. Section 8-74-104(2), C.R.S. (1986 Repl.Vol. 3B); Clark v. Colorado State University, 762 P.2d 698 (Colo.App.1988).

However, even that information merely notes that, before the hearing commenced, the employer was asked "whether he had brought anybody else with him to the hearing." This statement could well have referred to a hearing representative, rather than to a witness.

Finally, claimant admits that she knew of her right to call witnesses, had a witness accompany her to the hearing, but "got nervous at the hearing and did not realize" that the ALJ should have been informed of that fact.

Under these circumstances, the record does not reflect that claimant's due process rights were infringed upon by the ALJ.

II.

We also reject claimant's argument that the Panel applied the wrong legal standard to her circumstances.

Section 8-73-108(4)(c), C.R.S. (1986 Repl.Vol. 3B) provides that an employee is entitled to a full award of benefits if the employment termination results from "unsatisfactory or hazardous working conditions when so determined by the division [of employment and training]." In determining whether unsatisfactory conditions exist, the division is enjoined to consider a number of factors, including "the working conditions of workers engaged in the same or similar work for the same and other employers in the locality...."

In a somewhat parallel provision, Sec. 8-73-108(4)(d), C.R.S. (1986 Repl.Vol. 3B) provides that a full award is also justified if the employee's termination results from "[a] substantial change in the worker's working conditions...." However, it is provided that no substantial change in working conditions can be determined to exist if, after any change, the conditions that then prevail "are those generally prevailing for workers performing the same or similar work."

It is conceded that, in determining the existence of "unsatisfactory or hazardous conditions" under Sec. 8-73-108(4)(c), the division must look to the conditions prevailing among other employees of like employers. Claimant argues, however, that, because Sec. 8-73-108(4)(d), unlike Sec. 8-73-108(4)(c), does not use the phrase "for the same or other employers," the division can compare a particular employee's working conditions only with the employees of the same employer in determining whether that employee's conditions have undergone a substantial change. We disagree.

From the face of these two provisions, we can discern only a single intent. If an employee asserts that the employment termination results either from unsatisfactory conditions or from a substantial change in conditions, the General Assembly intended that a full award would be granted only if the conditions complained about were less favorable to the employee than those prevailing among similar workers within the locality.

Indeed, any interpretation of Sec. 8-73-108(4)(d) that permitted the division to compare a terminated employee's working conditions only with the conditions of employees of the same employer would lead to absurd results.

On the one hand, an employee whose working conditions were changed so that they were substantially below local industry standards, would be denied benefits if it could be demonstrated that the same employer's other employees were also treated in such a miserly fashion. Under such interpretation, an employee would be entitled to benefits only if it could be established that the employee's termination resulted from the employer's discrimination against that employee. Nothing within either this particular legislative provision or the Employment Security Act as a whole permits the conclusion that it was intended to impose such an onerous burden upon a terminated employee. See Hellen v. Industrial Commission, 738 P.2d 64 (Colo.App.1987).

Conversely, under such a restrictive interpretation of the pertinent statute, an employee who continued to enjoy benefits greater than those enjoyed by similar workers in the local industry generally, even after a change in some of that employee's working conditions, could voluntarily quit the job and receive a full award of benefits, if that employee's conditions were not the same as his fellow employees. However, as we read the statute, this is precisely the specter that Sec. 8-73-108(4)(d) was intended to prevent.

In short, whether it be "unsatisfactory conditions" under Sec. 8-73-108(4)(c) or the "conditions that prevail" after a change under Sec. 8-73-108(4)(d), the comparison, in either case, must include employees engaged in the same or similar work in the locality, whether employed by the same or by other employers.

The opinion in Collins v. Industrial Claims Appeals Office, 813 P.2d 804 (Colo.App.1991) does not demand a contrary conclusion. While that opinion refers to the finding of the hearing officer that all employees of the employers were subjected to similar changes in pay and working conditions, the basis for the decision in that case was that the claimant had accepted the changes. See Jennings v. Industrial Commission, 682 P.2d 518 (Colo.App.1984). The issue decided here was not discussed in Collins.

Hence, because the Panel and the ALJ applied the standard that we find to be proper under Sec. 8-73-108(4)(d), the Panel's decision is entitled to affirmance.

Order affirmed.

Rothenberg and Smith*, JJ., concur.

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and Sec. 24-51-1105, C.R.S. (1988 Repl.Vol. 10B).

Gloria C. Baca, Petitioner,

v.

Marriott Hotels, Inc., and the Industrial Commission of the

State of Colorado, Respondents.

No. 86CA0471.

732 P.2d 1252

Colorado Court of Appeals,

Div. I.

Dec. 31, 1986.

Leroy R. Moya, Lakewood, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Christa D. Taylor, Asst. Atty. Gen., Denver, for respondent Industrial Com'n.

No appearance for respondent Marriott Hotels, Inc.

ENOCH, Chief Judge.

Gloria C. Baca, claimant, seeks review of a final order of the Industrial Commission denying her unemployment benefits pursuant to Sec. 8-73-108(5)(e)(XII), C.R.S. (1986 Repl. Vol. 3B). We affirm.

Claimant, a lobby attendant for Marriott Hotels, Inc. (employer), was terminated pursuant to a company policy allowing termination if an employee strikes a co-employee. The Industrial Commission found that claimant admitted she struck the co-worker, that this action was grounds for summary dismissal pursuant to employer's policies, and that claimant's volitional act caused her separation. The Commission therefore reduced claimant's benefits by the maximum amount permitted by law.

On review, claimant contends that the Commission's findings were not supported by substantial evidence. Relying on Escamilla v. Industrial Commission, 670 P.2d 815 (Colo.App.1983), claimant argues that the evidence in the record does not establish that she actively engaged in an assault on her co-employee, but instead establishes that she acted in response to her co-employee's provocation and therefore was not at fault for her discharge. We disagree.

Escamilla v. Industrial Commission, supra, is distinguishable from the situation here. In that case, the claimant was found not to be at fault for his termination and was awarded benefits based on the evidence that the claimant did not actively engage in an altercation, but acted only to defend himself against an unprovoked assault by his co-employee. Here, although claimant testified that her co-employee had verbally provoked her, and that she barely hit her co-employee, employer's representative testified that a heated argument had occurred before the altercation, that claimant was the aggressor in the assault, that the seated co-employee had to raise her arm to defend herself, and that claimant's blow left a sizeable bruise on the co-employee's arm.

Furthermore, the evidence established that employer's company policy required summary dismissal of an employee for fighting or hitting another employee or for other inappropriate conduct and that, contrary to claimant's testimony, employer rigidly adhered to this policy. Although claimant testified she was unaware of this policy, employer introduced copies of both an employer's handbook and an employment agreement which contained this and other policies. Both had been signed by claimant indicating her knowledge of this policy.

Since there is substantial evidence to support the findings of the Commission concerning the assault and claimant's fault, we will not disturb them on review. See In re Claim of Krantz v. Kelran Constructors, Inc., 669 P.2d 1049 (Colo.App.1983).

Claimant further contends that her disqualification from receiving benefits should be set aside because there was no finding that her co-employee was a reasonably emotionally stable person concerned about her physical safety, as was required by Sec. 8-73-108(5)(e)(XII), C.R.S. (1986 Repl. Vol. 3B). We disagree.

Pursuant to Sec. 8-73-108(5)(e)(XII), an individual may be disqualified from receiving benefits for "[a]ssaulting or threatening to assault under circumstances such as to cause a reasonably emotionally stable person to become concerned as to his physical safety."

Implicit in plaintiff's contention is the issue whether the phrase "under circumstances such as to cause a reasonably emotionally stable person to become concerned as to his physical safety" modifies only the phrase "threatening to assault" or whether it also modifies the word "assaulting."

Before answering claimant's contention we must first clarify the meaning of the word "assault" as used here.

The wording of Sec. 8-73-108(5)(e)(XII) would indicate that the general assembly intended to create a distinction between "assaulting" and "threatening to assault." However, there is no legal distinction between these two acts. See CJI-Civ.2d 20:1 (1980). To give meaning to this statutory provision, the general assembly must have meant, and we so hold, that the word "assaulting," as used here, was intended to mean an actual harmful or offensive contact similar to the common law tort of battery, see CJI-Civ.2d 20:5 (1980), and the phrase "threatening to assault" was intended to mean the

apprehension of harmful or offensive contact, similar to the common law tort of assault. See CJI-Civ.2d 20:1 (1980). To hold otherwise would make the phrase "threatening to assault" redundant. See Sec. 2-4-201, C.R.S. (1980 Repl. Vol. 1B).

In resolving claimant's contention, we must follow the rule that a statute is to be construed as a whole to give consistent, harmonious, and sensible effect to all its parts. See Colorado Department of Social Services v. Board of County Commissioners, 697 P.2d 1 (Colo.1985). Section 2-4-201, C.R.S. (1980 Repl.Vol. 1B).

In applying this rule of construction it becomes apparent that the phrase "under circumstances such as to cause a reasonably emotionally stable person to become concerned as to his physical safety" could modify only "threatening to assault" as we have defined it above. To apply this modifying phrase to the word "assaulting," which we have defined to mean a battery, would not be consistent with the offense of battery. It is the mental state of the actor, not the victim, which is determinative of whether a battery has been committed. CJI-Civ.2d 20:5 (1980). See Whitley v. Andersen, 37 Colo.App. 486, 551 P.2d 1083 (1976). Thus, we hold that this modifying phrase modifies only "threatening to assault."

Here, because claimant actually struck her co-employee, she was disqualified from receiving benefits for "assaulting" her co-employee. Therefore, the second disqualifying provision of Sec. 8-73-108(5)(e)(XII) was inapplicable, and no finding concerning the mental state of the co-employee was necessary.

Order affirmed.

Van Cise and Babcock, JJ., concur.

Luann F. Baldwin, Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado, The Colorado Division of Employment and

Training and Bethesda Hospital Ass'n, Respondents.

No. 90CA0489.

813 P.2d 807

Colorado Court of Appeals,

Div. III.

Jan. 31, 1991.

Rehearing Denied Feb. 28, 1991.

Certiorari Denied July 29, 1991.

William E. Benjamin, Boulder, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Michael J. Steiner, First Asst. Atty. Gen., Jill M.M. Gallet, Asst. Atty. Gen., Denver, for respondents Indus. Claim Appeals Office and Div. of Employment and Training.

Downey & Douglas, P.C., John R. Sleeman, Jr., Denver, for respondent Bethesda Hosp. Ass'n.

NEY, Judge.

Luann F. Baldwin, claimant, seeks review of a final order of the Industrial Claim Appeals Office (Panel) which disqualified her from the receipt of unemployment benefits. We affirm the order.

On March 10, 1989, claimant quit her job with Bethesda Hospital Association to accept what she considered to be a better job. When her new job ended, on June 30, 1989, she filed a claim for unemployment benefits that same day. The hearing officer and Panel concluded that claimant did not meet the criteria for a full award under Sec. 8-73-108(4)(f), C.R.S. (1990 Cum.Supp.) and disqualified her from the receipt of benefits

pursuant to Sec. 8-73-108(5)(e)(V), C.R.S. (1990 Cum Supp.) (quitting to accept other employment which does not meet the requirements of Sec. 8-73-108(4)(f)).

Before July 1, 1989, under Colo.Sess.Laws 1988, ch. 53, Sec. 8-73-108(4)(f) at 394, a worker who quit to accept a better job was entitled to a full award of benefits under certain circumstances. Conversely, under Sec. 8-73-108(5)(e)(V), C.R.S. (1986 Repl.Vol. 3B), a worker who quit to accept a job that was not better was disqualified from the receipt of benefits. The General Assembly, however, amended these statutes, effective July 1, 1989. Under the amended statute Sec. 8-73-108(4)(f), only construction workers who quit to accept better construction jobs under certain circumstances are entitled to an award of full benefits. Under the amended version of Sec. 8-73-108(5)(e)(V), C.R.S. (1990 Cum Supp.), all other workers who quit to accept other jobs are disqualified from the receipt of benefits.

I.

Claimant, who is not a construction worker, contends that Sec. 8-73-108(4)(f) discriminates against her and other non-construction workers and therefore denies her equal protection. However, Getts v. Industrial Claim Appeals Office, 804 P.2d 282 (Colo.App. 1990), held that Sec. 8-73-108(4)(f), on its face, does not operate to deny equal protection to non-construction workers, and that ruling is dispositive here.

We are aware that after Getts was announced, Higgs v. Western Landscaping & Sprinkler Systems, Inc., 804 P.2d 161 (Colo.,1991) was decided by our supreme court. Higgs held that Sec. 8-47-101, C.R.S. (1986 Repl.Vol. 3B) was violative of equal protection guarantees of the United States and Colorado Constitutions because it provided less workers' compensation benefits to farm and ranch labor employees than other workers by calculating "wages," which determine benefits, differently.

Because no suspect classification nor fundamental rights were implicated in Higgs, nor here, the appropriate standard of judicial scrutiny of the equal protection challenge is the rational-basis standard of review. See Lujan v. Colorado State Board of Education, 649 P.2d 1005 (Colo.1982). Under that standard a statutory classification which singles out a group of persons for disparate treatment must be rationally based on differences that are real and not illusory and must be reasonably related to a legitimate state interest. Higgs v. Western Landscaping & Sprinkler Systems, supra.

Because the differences encountered by workers in the construction industries directly relate to the preferential treatment given them by Sec. 8-73-108(4)(f), we distinguish the situation here from Higgs and conclude that the Getts holding remains viable.

The various subsections of Sec. 8-73-108(4)(f) recognize that a construction worker's employment is not of a continuing nature, normally has an "established termination date," and may necessitate travel of considerable distances to job sites. Further, a resident worker may be required to go out of state on a construction job or be subject to an

apprentice program requiring assignments to various jobs. Getts v. Industrial Claim Appeals Office, supra.

Accordingly, we conclude that the disparate treatment between construction workers and workers generally as provided in Sec. 8-73-108(4)(f) is based upon the "particular nature of the construction industry" and the different treatment is rationally related to that difference. Therefore, in our view, Higgs does not affect the Getts holding that the statute on its face does not violate constitutional equal protection standards.

II.

Claimant also contends the Panel violated Colo. Const. art. II, Sec. 11, by applying the amended version of Sec. 8-73-108(4)(f) to her claim. We disagree.

An unemployed worker is not eligible to claim benefits until she has been unemployed for at least one week. Section 8-73-107(1)(d), C.R.S. (1986 Repl.Vol. 3B). At that time, the worker's right to claim benefits accrues. See Nazzaro v. Industrial Commission, 671 P.2d 983 (Colo.App.1983). For purposes of determining a claimant's entitlement to benefits, the law in effect on the date a worker's right to claim benefits accrues is that which governs. See Nazzaro v. Industrial Commission, supra.

Here, since claimant became unemployed on June 30, 1989, her right to claim benefits did not accrue until one week later, well after July 1, 1989. Consequently, although most of the events supportive of her claim occurred prior to the effective date of the statute, and although claimant filed her claim for benefits before that time, her right to claim benefits actually did not accrue until after July 1, 1989. Therefore, the amended version of Sec. 8-73-108(4)(f), which became effective July 1, was not retroactively applied. See Nazzaro v. Industrial Commission, supra; Dailey, Goodwin & O'Leary, P.C. v. Division of Employment, Industrial Commission, 40 Colo.App. 256, 572 P.2d 853 (1977).

In reaching this conclusion, we reject the Panel's contention that Division of Employment Regulation 2.3, 7 Code Colo.Reg. 1101-2, governs here. That regulation, limited in its application to the calculation of "effective dates" for determining eligibility issues, ensures that unemployment benefit claims are uniformly processed. However, eligibility for and entitlement to benefits are distinct issues in the processing of unemployment claims and are governed by separate statutory and case law. See Arteaga v. Industrial Claim Appeals Office, 781 P.2d 98 (Colo.App.1989). Consequently, contrary to the Panel's assertion, the "effective dates" found in Regulation 2.3 are not applicable to the determination of entitlement issues and, therefore, do not apply here.

Order affirmed.

Metzger and Ruland, JJ., concur.

Alana Joyce Bartholomay, Petitioner,

v.

The Industrial Commission of The State of Colorado,

Jefferson County R-1(Employer), Respondents.

No. 81CA0801.

642 P.2d 50

Colorado Court of Appeals,

Div. III.

Feb. 11, 1982.

Alana Joyce Bartholomay, pro se.

J. D. MacFarlane, Atty. Gen., Richard F. Hennessey, Deputy Atty. Gen., Mary J. Mullarkey, Sol. Gen., Lynn L. Palma, Asst. Atty. Gen., Denver, for respondents.

STERNBERG, Judge.

Claimant, Alana Joyce Bartholomay, seeks review of a final order of the Industrial Commission which disallowed her claim for unemployment compensation benefits under § 8-73-107(1)(c), C.R.S. 1973 (1981 Cum.Supp.). We set aside the order.

The pertinent facts are essentially undisputed. Claimant broke her ankle and was unable to perform her duties as a part-time bus driver for Jefferson County R-1 School District (employer) beginning October 18, 1980. The injury was not work-related. Claimant was placed on leave of absence by the employer for the period of her disability.

Claimant filed a claim for benefits on October 27. Her attending physician submitted a medical report which stated that claimant could not perform the duties of her usual occupation but that as of November 3, 1980, she could work full time in work that did not require "being on (her) feet or having (her) leg down."

At the hearing on her claim in March 1981, claimant was using a cane and testified that, according to her doctor, she was still unable to resume the duties of a bus driver. She testified she had been using crutches until about two weeks prior to the hearing. She testified also that she had been seeking temporary employment since October 27, in jobs which she felt qualified for and physically able to perform at that time, such as cashiering and answering telephones. The employer's representative testified that claimant could have applied for other jobs with the employer while she was unable to perform her

regular duties. However, claimant was not made aware of this policy and did not explore the possibility of securing other employment with the employer.

The referee, in affirming the deputy's decision that the claim for benefits should be disallowed under § 8-73-107(1)(c), found that claimant was unable to perform her "normal duties and has made no showing that she's available for suitable work because of her difficulty with walking." The referee also based the disallowance on his conclusion that claimant had not been separated from employment because she was on leave of absence. He denied benefits for the period of disability. The Commission affirmed the decision of the referee.

On this appeal claimant contends that the Commission's findings and conclusions are not supported by the evidence and are erroneous as a matter of law. We agree that the Commission has misconstrued the statutes applicable to the facts of this case.

Insofar as the Commission's order is based on a determination that claimant has not been separated from employment, it is erroneous. In Denver Post, Inc. v. Department of Labor & Employment, 199 Colo. 466, 610 P.2d 1075 (1980), the court considered the statutory provisions defining "totally unemployed" and "partially employed." Sections 8-70-103(18) and 8-70-103(21), C.R.S. 1973. It noted that an individual who is otherwise totally unemployed in that he performs no services and receives no compensation but is "not totally separated from his regular employer," shall be deemed "partially unemployed" and subject to the regulations governing partial unemployment. These principles are applicable to claimant as a part-time employee. Cf. Industrial Commission v. Redmond, 183 Colo. 14, 514 P.2d 623 (1973).

We conclude that under the analysis set forth in Denver Post, Inc. v. Department of Labor & Employment, supra, claimant was "partially unemployed." She performed no services and received no compensation for periods for which unemployment benefits are claimed. She also was not "totally separated" from her regular employer.

Relative to the disallowance of benefits based on the determination that claimant was not available for suitable work, the Attorney General appears to contend that § 8-73-108(4)(b)(I), C.R.S. 1973 (1981 Cum.Supp.) requires that a claimant who is separated from her employment for health reasons must be able and available to return to her "normal" work duties before she may be entitled to benefits. In our view, this construction is too narrow, and it is violative of the principle that unemployment compensation acts are to be liberally construed to further their remedial and beneficent purposes. Industrial Commission v. Sirokman, 134 Colo. 481, 306 P.2d 669 (1957).

Claimant's partial unemployment was the result of her physical incapacity and thus comes within the purview of § 8-73-108(4)(b)(I) which provides, insofar as pertinent, for a full award of benefits when "(t)he health of the worker is such that he must quit his employment and refrain from working for a period of time, but at the time of filing his claim he is able and available for work ...." As one condition of eligibility for benefits, the Division of Employment must find that a claimant who is otherwise qualified "is able

to work and is available for all work deemed suitable pursuant to the provisions of section 8-73-108." Section 8-73-107(1)(c)(I), C.R.S. 1973 (1981 Cum.Supp.). See also § 8-73-107(1)(g), C.R.S. 1973, which further conditions eligibility on establishing that one is "actively seeking work." The Commission has also adopted the following regulation with respect to the benefit right of part-time workers:

"2.2.3 Able, Available, and Actively Seeking Work. Any unemployed part-time worker shall be deemed to have met the requirements of section 8-73-107(1)(c) and (g), C.R.S. 1973, if:

1. Said worker is able to work, available for and actively seeking his customary part-time work, or other part-time work for which he is qualified ...." See 7 Code Colo.Reg. 1101-2 at p. 6 (1977) (emphasis supplied).

The dispositive question here is whether the claimant can be considered to have met the condition of eligibility that she is able and available for work when she is unable for health reasons to perform the duties of the job she held at the time she became unemployed but not unable to perform other jobs within her physical capabilities and for which she is otherwise qualified. We hold that where an unemployment compensation claimant is, for health reasons, unable to perform such claimant's "normal" work for a period of time, the claimant may nevertheless be eligible for benefits if the claimant is able to perform and is available for other suitable work. See Kernisky v. Pennsylvania, 10 Pa.Commw.Ct. 199, 309 A.2d 181 (1973); see generally 81 C.J.S. Social Security and Public Welfare § 261. Indeed, the regulation allows for no other interpretation.

The claimant has the initial burden of proof to establish a prima facie case of eligibility for benefits. Medina v. Industrial Commission, 38 Colo.App. 256, 554 P.2d 1360 (1976). The determination of availability for suitable work is largely a question of fact for the Commission which it must make "within the context of the factual situation presented by each case."

Couchman v. Industrial Commission, 33 Colo.App. 116, 515 P.2d 636 (1973).

Here, claimant testified that she was available and had searched for work which she felt she could perform with her job qualifications and physical limitations. The Commission must make the necessary factual determinations, conducting such further hearings as may be necessary, on claimant's eligibility for benefits under §§ 8-73-107(1)(c) and (g). See Industrial Commission v. Redmond, supra; Couchman v. Industrial Commission, supra.

The order of the Commission is set aside and the cause is remanded for further proceedings consistent with this opinion.

Kirshbaum and Tursi, JJ., concur.

Bayly Manufacturing Company, a corporation, Plaintiff in Error,

v.

The Department of Employment of the State of Colorado, Frank B.

Van Portfliet, Ray H. Brannaman and Truman C. Hall, as members of

the Industrial Commission of the State of Colorado (Ex-Officio

Unemployment Compensation Commission of Colorado),

Alice M. Widener, et al., Defendants in Error.

No. 20570.

155 Colo. 433, 395 P.2d 216

Supreme Court of Colorado,

En Banc.

Sept. 14, 1964.

Phelps, Hall & Smedley, Denver, for plaintiff in error.

Duke W. Dunbar, Atty. Gen., Frank E. Hickey, Deputy Atty. Gen., James D. McKevitt, Asst. Atty. Gen., Denver, for defendants in error Department of Employment of State of Colorado, Frank B. Van Portfliet, Ray H. Brannaman and Truman C. Hall, as members of Industrial Commission of State of Colorado (Ex-Officio Unemployment Compensation Commission of State of Colorado).

PRINGLE, Justice.

This writ of error is directed to a judgment of the district court affirming awards of unemployment compensation benefits to thirteen claimants who had been employees of plaintiff in error, Bayly Manufacturing Company, hereinafter referred to as Bayly.

Bayly's contentions on this writ of error fall into two general categories: (I) those concerning the constitutional issues, and (II) those concerning the merits of the awards. We shall consider the alleged errors in the same order.

I. The Constitutional Issues

Bayly hurls sweeping broadsides against the Employment Security Act on constitutional grounds, against the Department of Employment Security and the claimants. We view the

Act as legislation intended to "foster and make secure the independence (actual and felt) of the individual, his dignity and autonomy, and his sense of economic security. The ethical relation between society and the claimant is that of obligee and obligor, not beggar and benefactor." Note: Charity Versus Social Insurance in Unemployment Compensation Laws, 73 Yale L.J. 357, 362. It is in this perspective that we examine Bayly's objections to the Employment Security Act on constitutional grounds.

It is our view that in the present case Bayly has the standing necessary to attack the constitutionality of the Employment Security Act on only one of the issues it raises, and that is the contention that CRS '53, 82-5-2 amounts to a deprivation of due process of law in that benefits are paid out regardless of any appeal to the courts. The pertinent language of the statute on this point is as follows:

"* * * If a referee affirms a decision of the deputy, or the commission affirms a decision of a referee, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid."

In Cottrell Clothing Co. v. Teets, 139 Colo. 558, 342 P.2d 1016, the same objection now made by Bayly was held to be without merit. The provision in question is designed to carry out the policy of alleviating the evils of unemployment. The very essence of the Act is its provision for the prompt payment of benefits to those unemployed. Any substantial delay would defeat this purpose and would bring back the very evil sought to be avoided.

Withholding benefits for long periods through the slow process of appeal to the courts simply is not in harmony with the beneficent and remedial purposes of the Act. Similar sentiments are expressed in Abelleira v. District Court of Appeal, Third District, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; Matson Terminals v. California Employment Commission, 24 Cal.2d 695, 151 P.2d 202; State ex rel. Aikens v. Davis, 131 W.Va. 40, 45 S.E.2d 486. In reality, the statute itself is sufficient answer to this argument, for it provides that "if such decision is finally reversed, no employer's account shall be charged with benefits so paid."

The remaining constitutional issues which Bayly raises are:

I. CRS '53, 85-2-6 and CRS '53, 82-3-9(1)(2) (3) constitute an unlawful delegation of the power of the General Assembly to the United States Congress;

II. CRS '53, 82-3-10 relating to reciprocal interstate agreements violates the Constitution of Colorado in that it (a) enables the department to pledge the faith and credit of the state contrary to Article XI, Section 1; (b) enables the department to contract debts by loan contrary to Article XI, Section 3; (c) enables the department to create debts by agreement, not by law, contrary to Article XI, Section 4; (d) constitutes an unlawful delegation of legislative power to the department and to other states.

The record before us is totally barren of any evidence which would show how Bayly has been in any wise adversely affected by these sections of the Act. It is manifest that this Court does not overturn statutes presumptively valid on the strength of the speculations and conjectures of counsel as to what might happen under them. Since the present record fails to reflect that Bayly has been in any way adversely affected by these sections of the statute, it has no standing to question their constitutionality. Rinn v. Bedford, 102 Colo. 475, 84 P.2d 827; Bunzel v. City of Golden, 150 Colo. 276, 372 P.2d 161. As is suggested by the cases cited, the fact that Bayly chooses to call this aspect of its case an action for declaratory judgment is of no moment, since it still must show how it is affected by the operation of the statutes.

II. The Merits

The issues presented here on the merits are covered by CRS '53, 82-4-8, as amended, and CRS '53, 82-4-9, as amended, as those sections read before the 1963 repeal and re-enactment with amendments of Sec. 82-4-9.

The claimants were employed by Bayly as garment workers in its Denver plant. Their wages were determined on a piecerate basis established by union contract. Each claimant had developed, by virtue of her many years of experience, a special skill in the tacking or sewing of seams on a jean garment manufactured by Bayly in its Denver plant. In December, 1960, Bayly terminated this operation in Denver and transferred it to Greeley, which is some distance from the Denver area.

Subsequent to the transfer of the jean operation to Greeley, some of the claimants remained at the Denver plant, working at tacking or sewing on overalls and coats, while the rest were laid off without this opportunity being afforded to them at that time. Those of the claimants who commenced work on overalls attempted to become proficient over varying periods of time, but they all eventually terminated their employment when it became apparent that they could not make a wage comparable to their past earnings.

The record discloses that while the claimants had been earning approximately $1.40 per hour to $2.00 and above per hour on the jean operation, they could make only approximately $1.00 per hour on the overalls operation, since they could not turn out as many pieces per hour, and that in some cases Bayly itself was forced to make up the difference so as to insure that the claimants would receive a minimum wage rate of $1.00 per hour. The piece-work wage rate on the overalls operation at Bayly's was the prevailing wage rate at other garment manufacturing plants in the Denver area, and was in accord with a union contract at Bayly's shop.

In April, 1961, Bayly made offers to rehire claimants to work on overalls. While the precise date differed in each case, for our purposes April 28 may be considered as the date of the offer. The claimants refused to accept this offer. Bayly's chief contention is that by their refusal to accept the offers of re-hire the claimants disqualified themselves from receiving further benefits after that date.

While counsel for both sides in their briefs and in oral argument before this Court have taken the attitude that all thirteen claimants stand in a similar position, we do not necessarily share this view since the last day worked by each of the various claimants was different.

Bayly contends that in awarding benefits the Department of Employment Security and the Industrial Commission ignored the requirements of CRS '53, 82-4-8, which are as follows:

"Eligibility conditions--penalty--Any unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

* * * * * *

"(3) He is able to work and is available for all work deemed suitable pursuant to the provisions of section 82-4-9.

* * * * * *

"(7) He is actively seeking work."

The pertinent provisions of CRS '53, 82-4-9, referred to in CRS '53, 82-4-8(3), are as follows:

Disqualification for misconduct.--(1)(a) An individual shall be disqualified for benefits if the department finds that such individual has, from the beginning of his base period to the time of filing any valid claim, left work voluntarily without good cause but under extenuating circumstances, or left work to marry or because of marital, parental, filial or other domestic obligation, or became unemployed because of pregnancy, or been discharged for misconduct connected with his work, or failed without good cause either to apply for available suitable work when so referred by the department or to accept suitable work when offered him. (1960 Perm.Supp.)

"(2) In determining whether or not any work is suitable for an individual, the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing work in his customary occupation, and the distance of the available local work from his residence, shall be considered.

"(3) Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

* * * * * *

"(b) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality."

The findings of the referees in the cases before us, which were adopted by the Industrial Commission as its findings, state, except in two cases, that Bayly's offer of rehire was not for "suitable" work because of the prior experience, training and earnings of the claimants. In the case of claimant Hulin, the finding was that the job offered would be injurious to her health.

In the case of claimant Cole the finding was that she refused the Bayly offer because she had another job which would pay better wages and that she was about to begin that job. Bayly contends that the mere fact that the job offer was at a rate of pay which produced less earnings per week than the claimants had earned in their previous jobs was not sufficient to render the offer unsuitable.

The record does not disclose whether any other garment manufacturer in the Denver area had an operation similar to the jean operation which was discontinued by Bayly. If such operation did in fact exist at other plants, none of the claimants attempted to seek employment at such operation. The only fact disclosed in the record with respect to wages at other garment manufacturing plants in the Denver area is that the wage rate was similar to that which the claimants would receive if they chose to work at Bayly's overalls operation.

The record also shows that the claimants' attempts to gain other employment were primarily directed at work other than in the garment industry at wages comparable to those they had received from Bayly while employed at the jean operation and that these attempts were unanimously unsuccessful up to the date of the offer of re-hire.

It is clear that the beneficent purposes of the Act do not include a guaranty that a job offer must be for wages equal to that of the old job in order to be deemed as "suitable" work, but work at a substantially lower wage should not be deemed "suitable" unless a claimant has been given a reasonable period to compete in the labor market for available jobs for which he has the skill at a rate of pay commensurate with his prior earnings. Where the offer is for work at a wage materially lower than the wage previously earned, the claimant may be justified in refusing the offer while seeking employment at a rate of pay commensurate with prior earning capacity, but this right is not without qualification and the claimant is entitled only to a reasonable opportunity to obtain work for which he is fitted by experience and training at a wage rate comparable to that for which he previously worked. The claimant may, if he wishes, place restrictions related to his prior employment upon the amount of wages he is willing to accept, but if the restrictions imposed by him reduce his prospects for employment to such an extent that he is no longer genuinely attached to the labor market, he is no longer available for work. Work which may be deemed "unsuitable" at the inception of the claimant's unemployment, and for a reasonable time thereafter, because it pays less than his prior earning capacity, may thereafter become "suitable" work when consideration is given to the length of unemployment and the prospects for obtaining customary work at his prior earning

capacity. What is a "reasonable time" is not rigid and inflexible and it must initially be determined as a question of fact under the peculiar circumstances of each individual case by the appropriate agency. See Hallahan v. Riley, 94 N.H. 48, 45 A.2d 886; Haug v. Unemployment Compensation Board of Review, 162 Pa.Super. 1, 56 A.2d 396; Pacific Mills v. Director of Division of Employment Security, 322 Mass. 345, 77 N.E.2d 413; Dubkowski v. Administrator, Unemployment Compensation Act, 150 Conn. 278, 188 A.2d 658; Sanders, Disqualification for Unemployment Insurance, 8 Vand.L.Rev. 307, 328; Menard, Refusal of Suitable Work, 55 Yale L.J. 134, 140; Freeman, Able to Work and Available for Work, 55 Yale L.J. 123, 126.

In Hallahan v. Riley, supra, we find the following:

"* * * Although the applicant may continue to refuse jobs paying a lower rate of compensation, she must do so at her own expense rather than at the expense of the unemployment fund. The cushion of security between jobs provided by the statute was not designed to finance an apparently hopeless quest for the claimant's old job or a job paying equal wages. What length of time should be regarded as sufficient to require this result is again a question of fact with which we have no concern. The statute specifically requires that consideration be given to the factor of length of unemployment. * * *" (Emphasis supplied.)

The Attorney General relies on Industrial Commission v. Brady, 128 Colo. 490, 263 P.2d 578, but that case is not controlling here. In Brady the claimant, a journeyman painter, had been receiving $2.39 per hour, working a forty hour week, with time and a half for overtime. The claimant became unemployed in October, 1952. On December 17, 1952 he declined an offer for work as a painter at $2.00 per hour for a forty-eight hour week, without additional compensation for overtime. This Court held that the claimant was improperly disqualified from receiving benefits on the ground that the prevailing wage for journeyman painters was $2.39 per hour and that the offer of hire was therefore unsuitable. In the instant case, there is no evidence whatever of a prevailing wage in the Denver area for garment workers employed at a jean operation, if there was any such operation in the area after Bayly discontinued its jean operation. As has already been indicated, the only evidence of a prevailing wage is that other garment manufacturers in the Denver area reward their workers with compensation similar to that which Bayly would pay for the jobs which it offered these claimants, and that the wage offered is within the terms of the union contract at the Bayly shop. It is obvious that under these circumstances Industrial Commission v. Brady, supra, is not in point.

Bayly would have this Court hold as a matter of law that certain of the claimants were not "actively seeking work" pursuant to CRS '53, 82-4-8(7) and, therefore, should be declared ineligible for benefits. This section of the Act is susceptible of several interpretations. See Peterson, Unemployment Insurance in Colorado--Eligibility and Disqualifications, 25 Rocky Mt. L.Rev. 180, 186. Ultimately, however, this concept is incapable of precise definition and it is for the appropriate agency to make such a determination after considering all the facts and circumstances in each particular case. Guidice v. Board of Review of Division of Employment Security, 14 N.J.Super. 335, 82

A.2d 206. Our review of the record leads us to the belief that we cannot conclude as a matter of law that the claimants were not "actively seeking work."

The finding of the Industrial Commission that the job offer to Hulin was unsuitable because the job would be injurious to her health finds support in the evidence and is, therefore, proper. The finding with respect to Cole is also proper under the evidence.

The judgment with respect to the Hulin and Cole claims is affirmed. The remainder of the judgment is reversed and the cause remanded to the district court with directions to remand the matter to the Industrial Commission for the purpose of determining whether the length of unemployment of each of the claimants at the time of the hearing afforded each of them a reasonable opportunity to secure work in their customary occupation or at their customary wages.

Hall, J., not participating.

COLORADO COURT OF APPEALS

Court of Appeals No. 10CA1685
Industrial Claim Appeals Office of the State of Colorado
DD No. 10948-2010

Jason M. Beinor,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Service Group, Inc.,

Respondents.

ORDER AFFIRMED

Division VII
Opinion by JUDGE RICHMAN
Furman, J., concurs Gabriel, J., dissents

Announced August 18, 2011

Jason M. Beinor, Pro Se

John W. Suthers, Attorney General, John August Lizza, First Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

This unemployment compensation benefits case raises a question of first impression: whether an employee terminated for testing positive for marijuana in violation of an employer's zero-tolerance drug policy may be denied unemployment compensation benefits even if the worker's use of marijuana is "medical use" as defined in article XVIII, section 14 of the Colorado Constitution. We conclude the benefits were properly denied in this case.

Claimant, Jason M. Beinor, appeals the final order of the Industrial Claim Appeals Office (Panel) disqualifying him from unemployment compensation benefits under section 8-73-108(5)(e)(IX.5), C.R.S. 2010 (disqualification for the presence of "not medically prescribed controlled substances" in worker's system during working hours). He contends that he is entitled to benefits because he legally obtained and used marijuana under the Colorado Constitution for a medically-documented purpose and consequently had a right to consume the drug. We conclude

that although the medical certification permitting the possession and use of marijuana may insulate claimant from state criminal prosecution, it does not preclude him from being denied unemployment benefits based on a separation from employment for testing positive for marijuana in violation of an employer's express zero-tolerance drug policy. We therefore affirm the Panel's decision.

I. Background

Claimant was employed by Service Group, Inc. (employer) as an operator assigned to sweep the 16th Street Mall in Denver with a broom and dustpan. He was discharged in February 2010 for violating employer's zero-tolerance drug policy after testing positive for marijuana in a random drug test ordered by employer. Employer's policy states: "[I]f a current employee is substance tested for any reason . . . and the results of the screening are positive for . . . illegal drugs, the employee will be terminated."

Claimant contends, and employer does not dispute, that he obtained and used the marijuana for severe headaches, as recommended by a physician pursuant to article XVIII, section 14 of the Colorado Constitution, which provides an exemption from state criminal prosecution to individuals issued a "registry identification card" to use marijuana for medical purposes. Colo. Const. art. XVIII, § 14(2)(b).

In pertinent part, the amendment provides:

> [I]t shall be an exception from the state's *criminal* laws for any patient or primary caregiver in lawful possession of a registry identification card to engage or assist in the medical use of marijuana, except as otherwise provided in subsections (5) and (8) of this section.

Colo. Const. art. XVIII, § 14(2)(b) (emphasis added). The amendment also specifies:

> A patient may engage in the medical use of marijuana, with no more marijuana than is medically necessary to address a debilitating medical condition. A patient's medical use of marijuana, within the following limits, is lawful:
>
> (I) No more than two ounces of a usable form of marijuana; and
>
> (II) No more than six marijuana plants, with three or fewer being mature, flowering plants that are producing a usable form of marijuana.

Colo. Const. art. XVIII, § 14(4)(a).

Claimant asserts that his use and possession of marijuana was therefore legal. A deputy initially denied claimant's request for unemployment benefits, but a hearing officer reversed that decision, finding that claimant was not at fault for his separation from employment because there was "no reliable evidence to suggest that . . . claimant was not eligible for a medical marijuana

license" or that his use of the substance negatively impacted his job performance. Moreover, the hearing officer noted that "claimant has a state constitutional right to use marijuana."

Although claimant did not produce a registry identification card, he did produce a physician certification form, contending that he had not yet been provided with the registry card. Employer did not contest his eligibility to receive the registration card. Nor did employer argue that the use of marijuana negatively impacted his job performance.

On employer's appeal, the Panel disagreed and set aside the hearing officer's order. Relying on a precedential case decided by the entire Panel, the Panel here concluded that article XVIII, section 14 of the Colorado Constitution does not create an exception to section 8-73-108(5)(e)(IX.5), which disqualifies from benefits an employee who tests positive for the presence of "not medically prescribed controlled substances" in his or her system "during working hours." The Panel accordingly disqualified claimant from receiving benefits pursuant to section 8-73-108(5)(e)(IX.5).

Claimant now appeals.

II. Analysis

Claimant contends that the Panel erred in setting aside the hearing officer's decision because the Colorado Constitution protects his marijuana use. He argues, essentially, that his constitutional right to "medical use" of marijuana was violated by the application of the disqualifying provision to his situation and the Panel's consequent denial of his request for unemployment benefits. He also argues that the Panel should have recognized that employer's categorization of marijuana with other more harmful illegal substances is inappropriate and "prejudicial" because marijuana can remain in one's system for several days after its use and long after it has lost its influence, as demonstrated by the lack of evidence that claimant's use of marijuana negatively affected his job performance.

Although claimant appears pro se, we liberally interpret his brief and discern that his appeal raises three separate issues: (1) whether the statutory disqualification in section 8-73-108(5)(e)(IX.5) applies to claimant's case; (2) if so, whether the statute violates a constitutional right of claimant; and (3) whether the record was sufficient to support the Panel's decision.

We are not persuaded that the statute was misapplied in this case or that any of claimant's rights under article XVIII, section 14 of the Colorado Constitution were violated. Because the record supports the Panel's determination, we affirm it.

A. Application of the Disqualification Provision

Under Colorado's unemployment compensation provisions, an employee may be disqualified from receiving unemployment compensation benefits if a separation from employment occurs because of

> [t]he presence in an individual's system, during working hours, of

> *not medically prescribed controlled substances, as defined in section 12-22-303(7), C.R.S.*, . . . as evidenced by a drug . . . test administered pursuant to a statutory or regulatory requirement or a previously established, written drug . . . policy of the employer and conducted by a medical facility or laboratory licensed or certified to conduct such tests.

§ 8-73-108(5)(e)(IX.5) (emphasis added); *see Slaughter v. John Elway Dodge Sw./AutoNation*, 107 P.3d 1165, 1170 (Colo. App. 2005) ("[Section] 8-73-108(5)(e)(IX.5) . . . provides that an employer shall not be charged for unemployment benefits when it has a previously established written drug policy and terminates an employee as the result of a drug test showing the presence of marijuana in the employee's system during working hours."). A "controlled substance" is defined in relevant part as "a drug, substance, or immediate precursor . . . including cocaine, marijuana, [and] marijuana concentrate." *See* § 12-22-303(7), C.R.S. 2010 (incorporating the definition of "controlled substance" set forth in section 18-18-102(5), C.R.S. 2010).

As noted above, the disqualification from receiving unemployment benefits is triggered if an employee tests positive for the presence of a controlled substance that is "not medically prescribed." § 8-73-108(5)(e)(IX.5). Underlying claimant's argument is an assumption that his authorization to use medical marijuana is equivalent to a medical prescription. This assumption is inaccurate.

Under article XVIII, section 14, a physician does not *prescribe* marijuana, but may only provide "written documentation" stating that the patient has a debilitating medical condition and might benefit from the medical use of marijuana. *See* Colo. Const. art. XVIII, § 14(2)(c)(II). Indeed, a physician's inability to prescribe marijuana under Colorado law is reflected in the very physician certification upon which claimant relies to legally consume marijuana. That document specifies that "[t]his assessment is *not* a prescription for the use of marijuana" (emphasis added).

Moreover, federal law, to which Colorado physicians are subject, requires a practitioner prescribing controlled substances to be registered with the Drug Enforcement Administration (DEA). *See* 21 C.F.R. § 1301.11 (2009). Such registration for the prescription of controlled substances can only be obtained for Schedule II through V controlled substances. *See* 21 C.F.R. § 1301.13 (2010). Marijuana, in contrast, remains a Schedule I controlled substance under the applicable federal statute and consequently cannot be prescribed. 21 U.S.C. § 812(c) (1999); *see United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001) ("In the case of the Controlled Substances Act, the statute reflects a determination that marijuana has no medical benefits worthy of an exception . . . .Whereas some other drugs can be dispensed and prescribed for medical use, the same is not true for marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has 'no currently accepted medical use' at all.") (citation omitted).

The federal prohibition against prescribing marijuana was reiterated by the Office of National Drug Control Policy in 1997 when it issued a notice mandating that enforcement of federal drug laws would remain in effect despite California's and Arizona's passage of medical marijuana provisions, because "prescribing Schedule I controlled substances is not consistent with the 'public interest' . . . and will lead to administrative action by the [DEA] to revoke the

practitioner's registration." 62 Fed. Reg. 6164, 6164 (Feb. 11, 1997); *see also Conant v. Walters*, 309 F.3d 629, 633 (9th Cir. 2002) (noting that under the federal policy "physicians who 'intentionally provide their patients with oral or written statements in order to enable them to obtain controlled substances in violation of federal law . . . risk revocation of their DEA prescription authority'") (quoting joint policy letter of Department of Justice and Department of Health and Human Services). Under this policy,

> the federal government may: 1) prosecute any physician who prescribes or recommends marijuana to patients; 2) prosecute any patient who uses prescribed marijuana; 3) revoke the DEA registration numbers of any physician who prescribes or recommends marijuana to patients; 4) exclude any physician who prescribes or recommends marijuana to patients from the Medicaid and Medicare programs; and 5) enforce all federal sanctions against physicians and patients.

Pearson v. McCaffrey, 139 F. Supp. 2d 113, 116 (D.D.C. 2001).

Although the Department of Justice has indicated it may not prosecute "individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana," the Department nonetheless remains "committed to the enforcement of the Controlled Substances Act in all States." Memorandum from Deputy Attorney General David W. Ogden to Selected United States Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), *available at* http://blogs.usdoj.gov/blog/archives/192. In a recent memorandum to the Colorado Attorney General, the United States Attorney for Colorado reiterated the Department's position as set forth in the Ogden memorandum. Memorandum from United States Attorney John F. Walsh to Attorney General John Suthers (Apr. 26, 2011), *available at* http://extras.mnginteractive.com/live/media/site36/2011/0427/2 0110427_121943_pot.pdf. Consequently, the policies expressed by the Office of National Drug Control Policy remain in effect.

In addition, we give consideration to the opinion of Colorado's Attorney General that under Colorado's medical marijuana amendment "no such prescription is contemplated." *See* Applicability of State Sales Tax to the Purchase and Sale of Medical Marijuana, Colo. Att'y Gen. Formal Op. No. 09-06 (Nov. 16, 2009); *see also Colorado Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988) ("Since the Attorney General's opinion is issued pursuant to statutory duty, the opinion is obviously entitled to respectful consideration as a contemporaneous interpretation of the law by a governmental official charged with the responsibility of such interpretation.").

We conclude that the medical use of marijuana by an employee holding a registry card under amendment XVIII, section 14 is not pursuant to a prescription, and therefore does not constitute the use of "medically prescribed controlled substances" within the meaning of section 8-73-108(5)(e)(IX.5). Accordingly, the presence of medical marijuana in an individual's system during working hours is a ground for a disqualification from unemployment benefits under that section.

B. Interpretation of Medical Marijuana Amendment

Claimant also argues that we should reinstate the hearing officer's conclusion that "claimant has a constitutional right to use marijuana" and therefore is not at fault for his separation from employment. The Panel, in setting aside the hearing officer's decision, concluded that the constitutional provisions "address exceptions to state criminal laws" and disagreed with the hearing officer's inferences regarding the interplay of the unemployment compensation act and the constitutional amendment.

On appeal, claimant contends that the basis for disqualification set forth in section 8-73-108(5)(e)(IX.5) should not apply to him because he may legally obtain and consume marijuana as a "medical marijuana" user. We are not persuaded that the constitutional amendment provides the broad protections claimant asserts or broadly grants an unlimited right to use marijuana, and we decline to hold the disqualification provision unconstitutional under article XVIII, section 14.

When interpreting constitutional provisions enacted by voter referendum, it is this court's "duty . . . to give effect to the will of the people." *Washington Cnty. Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 150 (Colo. 2005). In so doing, "we afford the language of constitutions and statutes their ordinary and common meaning; we ascertain and give effect to their intent." *Id.* at 149. Further, "[w]e construe statutory and constitutional provisions as a whole, giving effect to every word and term contained therein, whenever possible." *Bd. of Cnty. Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1273 (Colo. 2001). Nor can we add or subtract language from the express words of the amendment. *See Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007) ("We do not add words to the statute or subtract words from it."). "Where the language of the Constitution is plain and its meaning clear, that language must be declared and enforced as written." *Colo. Ass'n of Pub. Emps. v. Lamm*, 677 P.2d 1350, 1353 (Colo. 1984).

As noted above, since passage of the medical marijuana amendment, the Colorado Constitution expressly provides that "it shall be an exception from the state's *criminal* laws for any patient or primary care-giver in lawful possession of a registry identification card to engage or assist in the medical use of marijuana, except as otherwise provided in subsections (5) and (8) of this section." Colo. Const. art. XVIII, § 14(2)(b) (emphasis added). Although subsection (4) of the amendment provides more generally that "[a] patient may engage in the medical use of marijuana, with no more marijuana than is medically necessary to address a debilitating condition," we do not read this as creating a broader constitutional right than exemption from prosecution. Because subsection (4) also provides specific limits for the quantity of marijuana and the number of marijuana plants that may be possessed, we understand the purpose of this subsection as setting the limits beyond which prosecution is not exempted, and not the creation of a separate constitutional right.

In addition to placing quantity limits on possession of medical marijuana, it is also apparent that the constitutional amendment was not intended to create an unfettered right to medical use of marijuana. The amendment expressly prohibits the medical use of marijuana in a way that endangers the health or well-being of any person. Colo. Const. art. XVIII, § 14(5)(a)(I).

It also prohibits the medical use of marijuana in plain view, or in a place open to the general public. *Id.* § 14(5)(a)(II).

Subsection (8) of the amendment also provides that the General Assembly shall define the terms and enact legislation to implement the amendment. In response, in 2001, the General Assembly enacted section 18-18-406.3, C.R.S. 2010, which established the criminal penalties for violation of the prohibitions contained in the amendment. In enacting this legislation, the General Assembly declared the purpose of the amendment as follows:

> (b) [The amendment] *creates limited exceptions to the criminal laws of this state* for patients, primary care givers, and physicians concerning the medical use of marijuana by a patient to alleviate an appropriately diagnosed debilitating medical condition; . . .
>
> (f) [The amendment] sets forth the lawful limits on the medical use of marijuana; . . .
>
> (h) In interpreting the provisions of [the amendment], the general assembly . . . has attempted to give the . . . words of the constitutional provision their plain meaning;
>
> (i) This section reflects the considered judgment of the general assembly regarding the meaning and implementation of the provisions of [the amendment].

§ 18-18-406.3(1), C.R.S. 2010 (emphasis added).

Thus, contrary to claimant's interpretation, the General Assembly understood Colorado's medical marijuana amendment to have created an exception to criminal prosecution, and not to be a grant to medical marijuana users of an unlimited constitutional right to use the drug in any place or in any manner. The General Assembly's construction of an initiated constitutional amendment made shortly after its adoption is to be given great weight. *See Zaner v. City of Brighton*, 899 P.2d 263, 267 (Colo. App. 1994), *aff'd*, 917 P.2d 280 (Colo. 1996).

Moreover, the amendment specifically provides: "Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place." Colo. Const. art. XVIII, § 14(10)(b). The "medical use of marijuana" is broadly defined in the amendment to mean "the acquisition, possession, production, use or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition." *Id.* § 14(1)(b). Thus, the Colorado Constitution does not give medical marijuana users the unfettered right to violate employers' policies and practices regarding use of controlled substances.

To interpret the medical marijuana amendment as claimant suggests – as a blanket "right to use marijuana as long as it is recommended by a physician and registered with the state" – would require us to disregard the amendment's express limitations protecting only against

criminal prosecution and allowing employers not to accommodate the use of marijuana in the workplace, as well as the General Assembly's interpretation of the amendment. We decline to do so.

Our interpretation is consistent with other cases that have examined the scope of medical marijuana provisions in this and other states. Colorado has already recognized that the medical marijuana amendment to Colorado's Constitution is not limitless. Rather, as a division of this court noted, because all provisions and language in the amendment must be given their full force and effect, "primary care-giver" under the provision does not encompass everyone who may "supply marijuana for medical use," but is instead limited to those who "do more than merely supply a patient who has a debilitating medical condition with marijuana." *People v. Clendenin*, 232 P.3d 210, 212, 214 (Colo. App. 2009). In addition, a prohibition in a parenting plan against using medical marijuana while exercising parenting time did "not constitute a restriction of parenting time." *In re Marriage of Parr*, 240 P.3d 509, 511 (Colo. App. 2010).

We also emphasize that the issue presented here is whether unemployment compensation benefits may be denied due to the presence of "not medically prescribed controlled substances" in a tested employee. We are not deciding whether the amendment limits an employer from discharging an employee for using medical marijuana. Nonetheless, we note that in the context of wrongful termination cases, language similar to section 14(10)(b) ("Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place.") has been interpreted not to require employers to accommodate employees' off-site use of medical marijuana. *Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC*, ___ P.3d ___, 2011 WL 2278472, at * 6 (Wash. No. 83768-6, June 9, 2011).

We therefore conclude that the Panel did not err in determining that claimant was not shielded by Colorado's medical marijuana amendment from being at fault for his separation from employment and could be disqualified from receiving unemployment compensation benefits under section 8-73-108(5)(e)(IX.5).

C. Substantial Evidence

Claimant contends that the evidence did not establish that he violated employer's "previously established" policy regarding the use of drugs because the policy was unclear or did not apply to him. He apparently refers to employer's policy which states:

> Employees who operate vehicles as part of their Service Group responsibilities must notify their supervisors or appropriate Company manager when they are taking prescription or non-prescription medication which contains a WARNING LABEL stating that use of that drug may impair their ability to safely operate machinery or vehicles.

It is undisputed that claimant did not operate any machinery or drive any vehicles for employer. Therefore, he argues, because he was legally taking a drug, he was not obligated to advise

employer of his use of marijuana and should not have been penalized for his positive drug test.

While claimant's "sweeping and panning" duties may have rendered the above-quoted employer's policy inapplicable, and absolved him from the obligation to notify his supervisor of his marijuana usage, we do not read that provision as precluding the Panel from finding that claimant was terminated under employer's zero-tolerance drug policy set forth above. The separate zero-tolerance policy prohibits the presence of any "illegal drugs." Although Colorado's medical marijuana provision may protect claimant from prosecution under Colorado's criminal laws, as noted above the amendment has no bearing on federal laws, under which marijuana remains an illegal substance. *See* 21 U.S.C. §§ 802, 812, 841.

As employer's representative noted, the illegality of marijuana use under federal law made its presence in any worker's system inappropriate under employer's policy. We therefore conclude that substantial evidence supports the Panel's conclusion that claimant's status as a "sweeper and panner" who was not required to alert his supervisor of his marijuana use did not render his termination inappropriate under employer's zero-tolerance drug policy.

Having determined that claimant was subject to employer's zero-tolerance drug policy and could be disqualified from benefits by section 8-73-108(5)(e)(IX.5), we turn to the evidence supporting the Panel's determination that claimant was not entitled to benefits because he had the presence of marijuana in his system. "A decision of the [P]anel may not be set aside where there are findings of fact supported by substantial evidence." *Colo. Div. of Emp't & Training v. Hewlett*, 777 P.2d 704, 707 (Colo. 1989).

Claimant admitted he had used marijuana in the days preceding employer's drug test, and he does not dispute that marijuana was still in his system at the time of the testing. Moreover, the laboratory report of the positive drug test results was introduced into evidence before the hearing officer. *Cf. Sosa v. Indus. Claim Appeals Office*, ___ P.3d ___, ___, 2011 WL 2650490 (Colo. App. No. 10CA1671, July 7, 2011). Claimant did not dispute the accuracy of the reported test results or the qualifications of the laboratory performing the test. Thus, there was substantial evidence that claimant had a controlled substance in his system that was not medically prescribed.

Claimant also raises arguments concerning the properties of marijuana and its potency. He first argues that marijuana should not be categorized as a "Schedule I substance" because other substances so categorized "have no medicinal value." However, it is not within the power of this court to determine what substances should be included on Schedule I. *United States v. Phifer*, 400 F. Supp. 719, 736 (E.D. Pa. 1975) ("Congress has designated marijuana as a controlled substance and has listed it in Schedule I as such. 21 U.S.C. § 812(c)[(Sched. I)](c)(10). Congress has thus made the determination that, as a matter of law, marijuana is a controlled substance."), *aff'd*, 532 F.2d 748 (3d Cir. 1976) (unpublished table decision).

He further contends that the trace amount of marijuana detected in his sample was insubstantial and he consequently was not "under the influence" of marijuana while at work. We need not address these arguments, however, for two reasons.

First, claimant was not denied benefits for being "under the influence" of marijuana at work. Section 8-73-108(5)(e)(VIII), C.R.S. 2010, provides for disqualification when use of drugs results in "interference with job performance," but the denial of benefits to claimant was not based on this section. Second, although claimant discussed the level of marijuana reported in his drug test at the hearing, the hearing officer declined to consider claimant's statements because no expert addressed the meaning of the results or the effects due to the reported level of marijuana.

Because evidence as to the effect of the amount of marijuana detected in claimant was neither offered nor considered below, we may not address these contentions here. Like the Panel, we may not consider any factual assertions or documentation offered by claimant in support of his arguments in this appeal that he did not raise or present before the hearing officer, nor any arguments that were expressly rejected by the hearing officer as unsupported. *See* § 8-74-107(1), C.R.S. 2010; *Huddy v. Indus. Claim Appeals Office*, 894 P.2d 60, 62 (Colo. App. 1995) (appellate court has no authority under section 8-74-107, C.R.S. 2010, to consider supplemental evidence); *Goodwill Indus. v. Indus. Claim Appeals Office*, 862 P.2d 1042, 1047 (Colo. App. 1993).

In our view, the evidence supports the Panel's determination that claimant was disqualified from benefits from his employment under section 8-73-108(5)(e)(IX.5). Because the Panel's decision is supported by substantial evidence in the record, we may not set the decision aside. *See* § 8-74-107(6), C.R.S. 2010; *Tilley v. Indus. Claim Appeals Office*, 924 P.2d 1173, 1177 (Colo. App. 1996).

III. Conclusion

We conclude that the Panel did not err in setting aside the hearing officer's order.

The order is affirmed.

JUDGE FURMAN concurs.
JUDGE GABRIEL dissents.

JUDGE GABRIEL dissenting.

I agree with the majority's conclusion that the medical use of marijuana by an employee holding a registry card under article XVIII, section 14 of the Colorado Constitution (medical marijuana amendment) is not pursuant to a prescription and therefore does not constitute the use of "medically prescribed controlled substances" within the meaning of section 8-73-108(5)(e)(IX.5), C.R.S. 2010. The question thus becomes whether application of section 8-73-108(5)(e)(IX.5) to deny claimant benefits here violated the medical marijuana amendment. The majority holds that it did not, because in its view, the medical marijuana amendment merely created an immunity from criminal prosecution, and not a separate constitutional right. Because I disagree with that conclusion and believe that the amendment, in fact, established a right to possess and use medical marijuana in the limited circumstances described therein, I respectfully dissent.

I. Constitutional Construction

"In construing a constitutional provision, our obligation is to give effect to the intent of the electorate that adopted it." *Harwood v. Senate Majority Fund, LLC*, 141 P.3d 962, 964 (Colo. App. 2006). We look to the words used, reading them in context and according them their plain and ordinary meaning. *Id.* If the language is clear and unambiguous, we must enforce it as written. *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004).

"Language in an amendment is ambiguous if it is 'reasonably susceptible to more than one interpretation.'" *Id.* (quoting *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996)). If the language of a citizen-initiated measure is ambiguous, "a court may ascertain the intent of the voters by considering other relevant materials such as the ballot title and submission clause and the biennial 'Bluebook,' which is the analysis of ballot proposals prepared by the legislature." *In re Submission of Interrogatories on House Bill 991325*, 979 P.2d 549, 554 (Colo. 1999). "We consider the object to be accomplished and the mischief to be prevented by the provision." *Harwood*, 141 P.3d at 964.

Here, as the majority points out, several provisions of the medical marijuana amendment state that the authorized use of medical marijuana establishes an affirmative defense or an exception from the state's criminal laws for the possession or use of marijuana. *See, e.g.*, Colo. Const. art. XVIII, § 14(2)(a)-(c), (4)(b). Section 14(4)(a) of that amendment, however, provides, "*A patient may engage in the medical use of marijuana*, with no more marijuana than is medically necessary to address a debilitating medical condition. A patient's medical use of marijuana, within [certain listed] limits, *is lawful . . . .*" (Emphasis added.)

Because section 14(2)(a)-(c), on the one hand, and (4)(a), on the other hand, appear to be separate and do not modify one another, in my view, one could reasonably read the amendment, as the majority does, merely to establish an affirmative defense or exception to prosecution for possession or use of marijuana. Conversely, one could reasonably read the amendment as creating a right to use medical marijuana (within established limits). Accordingly, I believe that the language of the amendment is ambiguous. *See Davidson*, 83 P.3d at 654 (language in an amendment is ambiguous if it is reasonably susceptible of more than one interpretation). Thus, I turn to extrinsic aids to attempt to ascertain the voters' intent in passing this amendment. *See In re Submission of Interrogatories*, 979 P.2d at 554.

As presented to Colorado voters, the ballot title of the medical marijuana amendment read, in pertinent part:

> *An amendment to the Colorado Constitution authorizing the medical use of marijuana for persons suffering from debilitating medical conditions*, and, in connection therewith, establishing an affirmative defense to Colorado criminal laws for patients and their primary care-givers relating to the medical use of marijuana; establishing exceptions to Colorado criminal laws for patients and primary caregivers in lawful possession of a registry identification card for medical marijuana use and for physicians who advise

> patients or provide them with written documentation as to such medical marijuana use; defining "debilitating medical condition" and authorizing the state health agency to approve other medical conditions or treatments as debilitating medical conditions . . . .

Colorado Legislative Council, Research Pub. No. 475-0, *An Analysis of 2000 Ballot Proposals* (Bluebook) 35 (2000) (emphasis added).

Although this title may not be a model of clarity, I read it to provide that the general intent of the amendment was to authorize the medical use of marijuana, and then to list specific provisions that would implement that general intent.

My interpretation finds further support in the Bluebook, which provided an analysis of the medical marijuana amendment. That analysis nowhere mentioned any immunity from or exception to state criminal laws. Rather, it stated, in pertinent part:

> The proposed amendment to the Colorado Constitution:
>
> - allows patients diagnosed with a serious or chronic illness and their care-givers to *legally possess* marijuana for medical purposes. . . .
>
> - allows a doctor to *legally provide* a seriously or chronically ill patient with a written statement that the patient might benefit from medical use of marijuana . . . .
>
> . . . .
>
> Current Colorado and federal criminal law prohibits the possession, distribution, and use of marijuana. The proposal does not affect federal criminal laws, but amends the Colorado Constitution *to legalize the medical use of marijuana for patients who have registered with the state.*
>
> . . . .
>
> Patients on the registry are allowed *to legally acquire, possess, use, grow, and transport marijuana and marijuana paraphernalia*. Employers are not required to allow the medical use of marijuana in the workplace.

Id. at 1 (emphasis added).

Similarly, in the section of the Bluebook entitled, "Arguments For," the proponents of the amendment stated, "Using marijuana for other than medical purposes will still be illegal in Colorado. *Legal use of marijuana will be limited to patients on the state registry*." *Id.* at 2 (emphasis added).

"Legalize" means "[t]o make lawful; to authorize or justify by legal sanction." *Black's Law Dictionary* 977 (9th ed. 2009); *accord Webster's Third New International Dictionary* 1290 (2002) (defining "legalize" to mean "to make legal: give legal validity or sanction to"). Accordingly, in my view, the medical marijuana amendment was intended not merely to create a defense to a charge of marijuana possession or use, but rather to make medical marijuana possession and use legal under the conditions identified in the amendment.

Although in *Roe v. TeleTech Customer Care Mgt. (Colo.), LLC*, ___ P.3d ___, ___ (Wash. No. 83768-6, June 9, 2011), the Washington Supreme Court reached the opposite conclusion, I note that the language of the Washington State Medical Use of Marijuana Act is quite different from that of the relevant portions of Colorado's medical marijuana amendment. For example, as adopted by Washington voters, the Washington act's statement of purpose provided, as pertinent here,

> Therefore, the people of the state of Washington intend that . . . [q]ualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana . . . .

Wash. Rev. Code § 69.51A.005 (version in effect from adoption in 1998 until amended July 22, 2007) (quoted in *Roe*, ___ P.3d at ___). The act further stated the intent of the voters to provide a defense to caregivers and physicians and to provide an affirmative defense to both qualifying patients and caregivers. Wash. Rev. Code §§ 69.51A.005, 69.51A.040(2). As noted above, Colorado's medical marijuana amendment is not similarly limited, when read as a whole.

Nor am I persuaded that section 14(10)(b) of the medical marijuana amendment provides the broad exception that the Panel asserts. That section provides, "Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place." Colo. Const. art. XVIII, § 14(10)(b). "Medical use," in turn, is defined as

> the acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition, which may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician or physicians, as provided by this section.

Id. at § 14(1)(b).

In my view, these provisions are clear and unambiguous and refer solely to the acquisition, possession, production, use, or transportation of medical marijuana, or paraphernalia related to it, *in the workplace*. I do not believe that these provisions encompass the presence of marijuana in one's blood after the lawful use of medical marijuana at home. In particular, I am not persuaded that the presence of medical marijuana in one's blood amounts to either "use," which I believe connotes contemporaneous consumption, or "possession," which I interpret as

holding at one's disposal, within the meaning of the above-quoted definition. If it did, then under a zero-tolerance policy like that at issue here, many patients who are eligible to use medical marijuana would likely abandon their right to do so, because even lawful use at home would put their benefits, and perhaps even their jobs, at risk. I do not believe that the voters who passed the medical marijuana amendment intended section 14(10)(b) to sweep that broadly. *Cf.* § 24-34-402.5, C.R.S. 2010 (providing that, subject to certain exceptions, it is a discriminatory or unfair employment practice for an employer to terminate the employment of an employee for engaging in lawful activity off the premises of the employer during nonworking hours).

Given my view that sections 14(1)(b) and (10)(b) of the medical marijuana amendment are unambiguous, I would not resort to extrinsic aids to ascertain their meaning. Were I to do so, however, I believe that the available extrinsic evidence supports my interpretation of those provisions. Thus, as noted above, the analysis contained in the Bluebook noted, "Employers are not required to allow the medical use of marijuana in the workplace." Bluebook, at 1. To me, this analysis makes clear that the voters' intention was precisely what the amendment says it was, namely, to give employers the right to prohibit the acquisition, possession, production, use, or transportation of medical marijuana, or paraphernalia related to it, in the workplace.

For these reasons, I would conclude that claimant had a constitutional right to possess and use medical marijuana pursuant to the limitations contained in the medical marijuana amendment. I recognize that such an interpretation could potentially implicate Supremacy Clause issues, given prevailing federal law. In my view, the same issues could apply to the majority's interpretation because the medical marijuana amendment creates a regulatory scheme that potentially conflicts with federal law. Because no party has raised any issue concerning the Supremacy Clause, however, I do not address that question.

II. Constitutionality of Denial of Benefits

The question thus becomes whether the denial of benefits to claimant here was consistent with his constitutional rights. In my view, it was not.

"[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . ." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *accord 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996); *Alliance for Open Society Int'l, Inc. v. U.S. Agency for Int'l Dev.*, ___ F.3d ___, ___ (2d Cir. No. 08-4917-CV, July 6, 2011). This rule, known as the doctrine of "unconstitutional conditions," however, is not absolute. Thus, the doctrine allows the government to condition the grant of a discretionary benefit on the release of a constitutional right when the government has an interest that outweighs the particular constitutional right at issue. *See Lorenz v. State*, 928 P.2d 1274, 1283 (Colo. 1996).

The United States Supreme Court has long held that unemployment compensation benefits constitute one type of governmental benefit that cannot be conditioned on a willingness to abandon one's constitutional rights. *See, e.g., Hobbie v. Unemployment Appeals Comm'n*, 480

U.S. 136, 139-42 (1987); *Thomas v. Review Bd.*, 450 U.S. 707, 716-18 (1981); *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963); *see also Everitt Lumber Co. v. Indus. Comm'n*, 39 Colo. App. 336, 339 & n.3, 565 P.2d 967, 969 & n.3 (1977) (holding that "invoking the protection of the Fifth Amendment, or refusing to waive its protections, may not be used as the basis for denying . . . claimants unemployment compensation benefits," but not reaching the question of whether a denial of benefits due solely to a private employee's assertion of Fifth Amendment rights would be precluded on the basis that such action would amount to state action under the Fourteenth Amendment).

Thus, where the state conditions receipt of an important benefit on conduct protected by the constitution, or where it denies such a benefit based on constitutionally protected conduct, thereby putting substantial pressure on an adherent to modify his or her behavior and forgo the exercise of a constitutional right, a burden on that right exists. *See Hobbie*, 480 U.S. at 141; *Thomas*, 450 U.S. at 717-18. "While the compulsion may be indirect, the infringement upon [the exercise of that constitutional right] is nonetheless substantial." *Thomas*, 450 U.S. at 718; *accord Hobbie*, 480 U.S. at141.

The foregoing case law thus suggests three issues to be decided in this case: (1) whether the denial of benefits here constituted state action; (2) if so, whether the state conditioned the receipt of such benefits on the release of a constitutional right; and (3) if so, whether the state's interest outweighs the constitutional right in question. I address each of these issues in turn.

First, in *Hobbie*, *Thomas*, and *Sherbert*, the Supreme Court made clear, albeit implicitly, that a denial of unemployment benefits arising from the exercise of a constitutional right constitutes state action. *See Hobbie*, 480 U.S. at 139-42; *Thomas*, 450 U.S. at 71618; *Sherbert*, 374 U.S. at 403-06. I would so hold here.

Second, for the reasons set forth above, I believe that claimant had a constitutional right to use medical marijuana, and in my view, the denial of benefits based on his exercise of that right infringed the right. Specifically, claimant was denied benefits solely because he exercised his constitutional right to use medical marijuana. In this regard, this case is similar to *Hobbie*, *Thomas*, and *Sherbert*, in which the claimants were denied benefits solely because they chose to exercise their religious beliefs, which resulted in their being discharged from employment. *Hobbie*, 480 U.S. at 138; *Thomas*, 450 U.S. at 709-13; *Sherbert*, 374 U.S. at 399-401. In my view, the denial of benefits here, like the denial of benefits in *Hobbie*, *Thomas*, and *Sherbert*, placed substantial pressure on claimant to forgo the exercise of his constitutional rights, and thereby burdened his exercise of those rights. Although the compulsion may have been indirect, it was nonetheless substantial. *See Hobbie*, 480 U.S. at 141; *Thomas*, 450 U.S. at 718; *cf. Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 883-85 (1990) (distinguishing *Sherbert*, *Hobbie*, and *Thomas* in a case, unlike the present one, in which the court construed the claimant to be seeking an exemption from generally applicable criminal law on free exercise of religion grounds); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559-77 (1993) (Souter, J., concurring) (criticizing *Smith* and calling for its reexamination).

Finally, I perceive nothing in the record to suggest that the state's interest in denying

benefits here outweighs claimant's constitutional rights. In their appellate brief, the People asserted, in conclusory fashion, that claimant had no constitutional right at all. Based on that premise, which I believe to be incorrect, the People did not proceed to address the balancing of interests and, thus, failed to indicate any state interest that outweighs claimant's rights. Because my own review of the record and applicable case law failed to reveal such an interest, I would conclude that the state's interests do not outweigh claimant's interests here.

For these reasons, I believe that claimant's lawful use of medical marijuana outside of the workplace – particularly where, as here, there is no evidence of any impairment of performance in the workplace – cannot constitutionally be used as a basis for denying claimant unemployment benefits.

Accordingly, I respectfully dissent.

The Board of County Commissioners of the County

of Weld, State of Colorado, Employer

v.

Agnes Martinez, Nora E. Archuleta, and Mary H. Quintana, Employees;

The Director of the Division of Labor; and the Industrial

Commission of the State of Colorado

Nos. 79CA0130, 79CA0131, 79CA0291

43 Colo. App. 322; 602 P.2d 911

Colorado Court of Appeals,

Div. I.

November 1, 1979

R. Russell Anson, Assistant County Attorney, for petitioner.

J. D. MacFarlane, Attorney General, Richard F. Hennessey, Deputy Attorney General, Edward G. Donovan, Assistant Attorney General, David Aschkinasi, Assistant Attorney General, for respondents.

SILVERSTEIN, Judge.

Based upon the Industrial Commission's allegedly erroneous interpretation of the eligibility exclusion contained in § 8-73-107(5), C.R.S. 1973 (1978 Cum. Supp.), petitioner, by consolidated petitions, seeks reversal of the award of unemployment compensation benefits to certain teachers' aids, the individual respondents. We reverse.

Respondents were teachers' aids employed by the Board of County Commissioners of Weld County through the county Department of Human Resources, with federal funds appropriated through Project Headstart. See 42 U.S.C.A. §§ 2922 and 2928. They worked from September 1977 through May 1978; each was offered and had accepted a contract to be reemployed as a teachers' aid in September 1978.

The referee determined that respondents had been separated from employment because Headstart classes were not conducted during the summer months and that this was equivalent to separation due to lack of work, entitling respondents to full unemployment compensation. The referee further concluded that § 8-73-107(5), C.R.S. 1973, did not apply to exclude respondents from coverage because the Headstart program was not a

part of the public school district, and, therefore, that the reasonable assurances concept of the section did not apply. The Industrial Commission adopted the referee's findings and awarded respondents full unemployment compensation.

Section 8-73-107(5), C.R.S. 1973 (1978 Cum. Supp.) provides, in pertinent part:

"With respect to any services performed after December 31, 1977, in any capacity for an educational institution . . . benefits shall not be paid on the basis of such services to any individual for any week which commences during a period between two successive academic years, or during a similar period between two regular but not successive terms . . . if such individual performs services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform services in the second of such academic years or terms."

Respondents concede § 8-73-107(5), C.R.S. 1973 (1978 Cum. Supp.) is not limited in application to public school employees. See Wilmore v. Annear, 100 Colo. 106, 65 P.2d 1433 (1937). However, they defend the Commission's orders, claiming the section does not apply because the Headstart program is not an "educational institution." We disagree.

Since "institution" is an imprecise word, with many diverse applications, see Webster's New International Dictionary (2d ed. 1956), we look to the legislative history of this section to determine the legislative intent. Travelers Indemnity Co. v. Barnes, 191 Colo. 278, 552 P.2d 300 (1976); Haines v. Colorado State Personnel Board, 39 Colo. App. 459, 566 P.2d 1088 (1977).

This statutory addition was prepared by the Colorado Department of Employment to bring the state unemployment laws into conformity with federal provisions outlined in 26 U.S.C.A. § 3304 (a)(6)(A). Transcript, Colorado Senate Business Committee Hearing, April 20, 1977 (H.B. 1614). Like the comparable federal statute, the state statutory exclusion was intended to preclude school teaching and non-teaching personnel from receiving unemployment compensation during summer recess if they had the promise of work in the fall. Transcript, Colorado House Business Committee Hearing, March 29, 1977 (H.B. 1614); and see Legislative History Pub. L. No. 94-566 [1976], U.S. Code Cong. & Ad. News 6035.

The General Assembly provided a guide to interpretation of the unemployment compensation laws by declaring the purpose of the act was to alleviate economic insecurity due to involuntary unemployment of persons unemployed through no fault of their own. Section 8-70-102, C.R.S. 1973. The General Assembly further determined that personnel of educational institutions, including teachers, whose work schedules included a three-month summer vacation, rather than a three-month period of involuntary unemployment, did not fit into the class of persons to be protected by the unemployment compensation fund. Section 8-73-107, C.R.S. 1973.

Project Headstart is a preschool program for economically disadvantaged children providing classes and services to meet the intellectual, social, and health needs and to

enhance the potential for success of each child in the program. 42 U.S.C.A. §§ 2922 and 2928; and see Legislative History Pub. L. No. 93-644 [1974], U.S. Code Cong. & Ad. News 8048 and 8084. Further, the record here reveals Headstart programs are run similarly to public school programs, following the regular school calendar for classes and vacation periods. In the context of this statute an institution is "an established organization; especially, one dedicated to public service." American Heritage Dictionary (1969). An "educational institution" is one which "teaches and improves its pupils; a school, seminary, college or educational establishment." Clinic v. Oglesby, 42 Ariz. 98, 22 P.2d 1076 (1933).

Weld County, through its Department of Human Resources, is an institution which, as to the Headstart program, is conducting a school, and, as such, is an "educational institution" under the unemployment compensation act. Its employees are, therefore, excluded from coverage during summer recess so long as the other provisions of the section are met.

We set aside the orders and remand the causes for further proceedings to determine whether the other provisions of § 8-73-107(5) C.R.S. 1973 (1978 Cum. Supp.) have been met.

Judge Coyte and Judge Kelly concur.

Board of Water Commissioners, Denver Water Department,

Petitioner,

v.

The Industrial Claim Appeals Office of

the State of Colorado, Division of Employment and Training, and

Darrin E. Johnston, Respondents.

No. 94CA0108.

881 P.2d 476

Colorado Court of Appeals,

Div. III.

Aug. 11, 1994.

Patricia L. Wells, Anne R. Avery, Denver, for petitioner.

Gale A. Norton, Atty. Gen., Stephen K. ErkenBrack, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Mary Karen Maldonado, Sr. Asst. Atty. Gen., Denver, for respondents Indus. Claim Appeals Office and Div. of Employment and Training.

No appearance for respondent Darrin E. Johnston.

PLANK, Judge.

In this unemployment compensation case, employer, the Denver Water Board, seeks review of a final order of the Industrial Claim Appeals Panel which upheld a hearing officer's decision awarding benefits to claimant, Darrin E. Johnston. We set aside the order and remand for further proceedings.

We agree with employer that the established findings of evidentiary fact do not support the hearing officer's conclusion, upheld by the Panel, that claimant was not responsible or "at fault" for the separation from this employment. Consequently, the award of unemployment benefits based on this conclusion cannot be sustained on review. See § 8-74-107(6), C.R.S. (1986 Repl. Vol. 3B).

Rather, we conclude that this matter must be remanded to the Panel for further proceedings and the entry of a new order consistent with the established findings of evidentiary fact. Specifically, on remand, based on these evidentiary findings, the Panel is

directed to enter an order disqualifying claimant from benefits based on the application of § 8-73-108(5)(e)(XX), C.R.S. (1986 Repl. Vol. 3B) (failure to meet other defined and established job standards).

Here, the relevant evidentiary findings made by the hearing officer are not challenged on appeal, having been based on the uncontroverted evidence presented by employer at the hearing conducted in this matter. Thus, it is undisputed that claimant was terminated from this employment in accordance with employer's established substance abuse policies because he tested positive for cocaine in a drug test required by employer.

Specifically, the evidence established, and the hearing officer found, the following facts. Claimant was required, as a condition of his employment, to complete satisfactorily a drug and alcohol screening test as part of a pre-placement physical examination. Employer's substance abuse policy required termination of those individuals who tested positive for illegal drugs other than marijuana in such tests. Claimant was aware of the drug testing requirement and the consequences of not successfully passing the drug test, and he was advised of the test in advance. Even so, claimant tested positive for cocaine in the drug test, and he was then terminated by employer on that basis in accordance with its policies. In his exit interview, claimant also admitted that he had used cocaine.

However, the hearing officer rejected employer's contention that claimant should be disqualified from benefits based on the application of § 8-73-108(5)(e)(VII), C.R.S. (1986 Repl. Vol. 3B) (violation of a company rule which resulted or could have resulted in serious damage to employer's property or interests or which could have endangered employees' lives). Rather, the hearing officer ruled that, although claimant was terminated for violating a company rule, employer had failed to establish all of the requisite elements for the application of this subsection in this case, i.e., that claimant's violation of employer's drug policy resulted or could have resulted in "serious damage" or "endangerment."

Nevertheless, although the hearing officer also specifically found that this case involved "a willful action on the claimant's part" that resulted in his termination, the hearing officer then went on to conclude that claimant was not responsible or "at fault" for the separation here and awarded him benefits on that basis.

On review, the Panel upheld the hearing officer's decision. The Panel also rejected employer's further contentions that claimant should be disqualified under either § 8-73-108(5)(e)(VIII), C.R.S. (1986 Repl. Vol. 3B) (off-the-job use of controlled substances to a degree interfering with job performance) or § 8-73-108(5)(e)(IX), C.R.S. (1986 Repl. Vol. 3B) (on-the-job use of controlled substances, without further limitations). As to these subsections, the Panel similarly ruled that employer also failed to establish all of the requisite elements for the application of either of these provisions in this case.

However, the Panel then went on to uphold the hearing officer's award of benefits without addressing the "fault" issue. Moreover, neither the hearing officer nor the Panel considered whether claimant should be disqualified from benefits under § 8-73-

108(5)(e)(XX), which provides, in pertinent part, for a disqualification "[f]or other reasons including, but not limited to ... failure to meet established job performance or other defined standards." (emphasis added)

Contrary to the Panel's argument on appeal, we conclude that the determination as to whether a claimant was responsible or "at fault" for the separation from employment is not a question of evidentiary fact, but rather is an ultimate legal conclusion to be based on the established findings of evidentiary fact. See Keil v. Industrial Claim Appeals Office, 847 P.2d 235 (Colo. App.1993); Nielsen v. AMI Industries, Inc., 759 P.2d 834 (Colo. App.1988); see also Federico v. Brannan Sand & Gravel Co., 788 P.2d 1268 (Colo.1990).

Thus, the "fault" issue is governed by a different standard of review than is applicable to review of evidentiary findings, and the Panel's ruling must be set aside if, as here, the established findings of evidentiary fact do not support the conclusion that claimant was not at fault for the separation. See § 8-74-107(6); Nielsen v. AMI Industries, Inc., supra.

Here, it is undisputed from the evidentiary record that employer had an established drug testing requirement that claimant, as a condition of his employment, was required to pass.

Further, claimant was aware of this requirement and the consequences of failing to meet it, and yet he acted "willfully" in using cocaine anyway, resulting in the positive test results and his termination on that basis.

Because these undisputed evidentiary facts support the conclusions that claimant was indeed responsible or "at fault" for the separation here, a disqualification pursuant to § 8-73-108(5)(e)(XX) is warranted. See Keil v. Industrial Claim Appeals Office, supra; Pabst v. Industrial Claim Appeals Office, 833 P.2d 64 (Colo. App.1992).

In light of this disposition of the issues, we need not address employer's remaining contentions of error.

Accordingly, the Panel's order is set aside, and the cause is remanded to the Panel for entry of an order disqualifying claimant from receipt of benefits pursuant to § 8-73-108(5)(e)(XX).

Sternberg, C.J., and Jones, J., concur.

Kim A. Boeheim, Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado

and PGT, Inc., d/b/a Turley's, Respondents.

No. 00CA1320

23 P.3d 1247

Colorado Court of Appeals,

Div. V.

March 29, 2001

Kim A. Boeheim, Pro Se

Ken Salazar, Attorney General, Mark W. Gerganoff, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

No Appearance for Respondent PGT, Inc.

ROY, Judge.

In this unemployment benefits case, petitioner, Kim A. Boeheim (claimant), seeks review of a final order of the Industrial Claim Appeals Office (Panel). The Panel upheld a hearing officer's decision disqualifying claimant from the receipt of benefits attributable to part-time employment as a waitress and imposing a ten-week deferral of benefits attributable to other employment as an accountant from which she had previously separated. We affirm.

The relevant facts are not in dispute. Claimant was laid off from her full-time position as an accountant with a severance package and filed an initial claim for unemployment benefits. At that time, she was also employed part-time as a waitress. Several weeks later, claimant quit the part-time employment at issue here to move to New York.

Based on these facts, the hearing officer imposed a disqualification from benefits attributable to the part-time employment pursuant to § 8-73-108(5)(e)(IV), C.R.S. 2000 (providing for disqualification from benefits when a job separation results from quitting to move to another area). The hearing officer also imposed a ten-week deferral in the benefits attributable to the full-time employment, effective the week following claimant's separation from the part-time employment. On review, the Panel affirmed.

I.

On appeal, claimant does not challenge the disqualification imposed concerning her separation from the part-time employment. As she did before the hearing officer and the Panel, however, claimant continues to challenge the ten-week deferral of benefits imposed as a result. We conclude that the Panel properly addressed and rejected claimant's arguments in this regard, and we agree with the Panel's disposition and analysis of these issues.

As noted by the Panel, Colorado statutes mandate that a ten-week deferral of any benefits to which a claimant is entitled shall be imposed if, as here, a disqualification is imposed on the most recent separation from employment. Sections 8-73-108(3)(b) and 8-73-108(5)(g), C.R.S. 2000. Also by statute, such a deferral shall begin with the effective date of the additional claim resulting from the most recent separation. Section 8-73-108(5)(g).

Thus, the Panel properly upheld both the imposition and the timing of the ten-week deferral of benefits mandated by statute and ordered by the hearing officer in this case. See §§ 8-73-108(3)(b) and 8-73-108(5)(g); Parker v. Daniels Motors, Inc., 738 P.2d 68 (Colo.App. 1987); see also Boselli Investments, L.L.C. v. Division of Employment, 975 P.2d 204 (Colo.App. 1999) (statutory directive using the word "shall" is intended to be mandatory).

II.

Claimant also testified that she was told by a state employee upon the filing of her initial claim that her upcoming departure from her part-time job would not affect the timing of her receipt of benefits. She contends that she relied to her detriment on that misinformation in that she would have changed the timing of her separation from the part-time job to minimize the negative impact on her benefits.

However, we agree with the Panel that being given incorrect information concerning such matters did not provide a basis for awarding benefits contrary to the statutory provisions. We must give effect to the statutory requirements governing the ten-week deferral of benefits as written. Moreover, having sought benefits under this statutory scheme, claimant is presumed to know these statutory requirements. See Lewis v. Colorado Department of Labor & Employment, 924 P.2d 1183 (Colo.App. 1996); Paul v. Industrial Commission, 632 P.2d 638 (Colo.App. 1981); see also Boselli Investments, L.L.C. v. Division of Employment, supra.

Finally, we reject the claimant's estoppel argument with respect to any advice given to her by an employee of the division and her reliance on that advice. A party generally cannot state a claim for relief under a theory of equitable estoppel against a governmental entity acting in its governmental capacity. See Peterkin v. Industrial Commission, 698 P.2d 1353 (Colo.App. 1985), aff'd, Peterkin v. Curtis, Inc., 729 P.2d 977 (Colo. 1986).

Thus, the Panel's ruling will not be disturbed on judicial review. See § 8-74-107(6), C.R.S. 2000.

The Panel's order is affirmed.

Judge Rothenberg and Judge Taubman concur.

Billy J. Campbell, Jr., Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and

Autotron Products Inc., Respondents.

No. 03CA0595

97 P.3d 204

Colorado Court of Appeals

Div. II.

Dec. 18, 2003

Law Offices of Gary A. Fisher, P.C., Gary A. Fisher, Boulder, Colorado, for Petitioner.

Ken Salazar, Attorney General, Y.E. Scott, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office.

No Appearance for Respondent Autotron Products Inc.

ROTHENBERG, Judge.

In this unemployment benefits case, petitioner, Billy J. Campbell, Jr. (claimant), seeks review of a final order of the Industrial Claim Appeals Office (Panel) that reversed a hearing officer's decision awarding him such benefits. We set aside the order and remand with directions to reinstate the decision of the hearing officer.

I. Background

Claimant was employed as a salaried shipping and warehouse manager for Autotron Products Inc. (employer) for eighteen years. His scheduled hours were from 7:30 a.m. to 4:00 p.m. Monday through Friday, or approximately forty hours per week. He worked at that schedule from June 1984 until May 30, 2002, when he resigned.

At the hearing, claimant testified, and the hearing officer found, that during the last two years of his employment, his work hours increased significantly. He testified that his employer required him to work ten to eleven hours daily, and another six to eight hours eighty percent of the Saturdays. The hearing officer found that while a typical work week for claimant was not necessarily forty hours per week, during his last two years on the job, he was working a "minimum" of sixty-six hours per week. He had not received a raise since July 1999, and he received no overtime pay.

Claimant testified that he reported the problem to his supervisor on several occasions, expressing his repeated concern that he could not be effective at his job without the help of additional shipping clerks. There also was testimony that employer recognized the problem and tried to accommodate claimant, but was unable to do so because of the turnover at the warehouse.

The hearing officer granted claimant a full award of benefits pursuant to § 8-73-108(4)(c), C.R.S. 2003, finding that he quit his job because of unsatisfactory working conditions.

On review, the Panel accepted the hearing officer's finding regarding the cause of claimant's separation, although it found he worked between fifty-six and sixty-three hours per week, rather than the minimum of sixty-six hours per week found by the hearing officer. However, the Panel overturned the conclusion of the hearing officer that claimant was entitled to benefits.

The Panel concluded (1) there was no basis in the record for the hearing officer's determination that claimant's working conditions were objectively unsatisfactory under § 8-73-108(4)(c); (2) the hearing officer's decision was based on limited evidence regarding the number of hours claimant worked; and (3) being required to work fifty-six to sixty-three hours per week does not, per se, constitute "unsatisfactory working conditions" within the meaning of the statute.

The Panel cited Arias v. Indus. Claim Appeals Office, 850 P.2d 161 (Colo. App. 1993), for the proposition that the absence of evidence concerning the working conditions of similarly engaged workers did not preclude an award of benefits under § 8-73-108(4)(c). However, the Panel then concluded that:

[The] limited evidence [in the record] fails to establish that the working conditions were objectively unsatisfactory based on the factors enumerated in the statute or other comparable considerations. Although the hearing officer found the claimant informed the employer that the claimant "could not" continue to work the hours, the claimant related this to his ability to be effective, and did not testify that he was somehow unable to continue working. Moreover, the hearing officer found that the employer was making attempts to obtain additional personnel, and there is no evidence the employer was dissatisfied with the claimant's performance.

The Panel disqualified claimant from the receipt of benefits pursuant to § 8-73-108(5)(e)(XXII), C.R.S. 2003 (providing for disqualification when job separation results from quitting for personal reasons that do not support an award of benefits under other statutory provisions). Claimant appealed.

Employer has not participated in this appeal.

II. Statutory Interpretation

Claimant contends the Panel erred in reversing the hearing officer's decision awarding him benefits under § 8-73-108(4)(c). We agree.

A court's primary task in construing a statute is to give effect to the intent of the General Assembly. Courts should interpret statutory terms in accordance with their plain and ordinary meaning, and a statute must be construed as a whole. Therefore, we must give consistent, harmonious, and sensible effect to all of its parts. Freedom Newspapers, Inc. v. Tollefson, 961 P.2d 1150 (Colo. App. 1998); Lymburn v. Symbios Logic, 952 P.2d 831 (Colo. App. 1997).

A. Alternative Claims

First, we note that in the document entitled "Initial Request for Job Separation Information" that claimant filed with the Department of Labor and Employment, he checked off boxes indicating he was entitled to benefits for either unsatisfactory working conditions under § 8-73-108(4)(c) or for a substantial change in working conditions under § 8-73-108(4)(d).

However, the hearing officer only addressed claimant's entitlement to benefits for unsatisfactory working conditions under § 8-73-108(4)(c). Neither the hearing officer nor the Panel addressed whether claimant was also entitled to benefits for a substantial change in working conditions under § 8-73-108(4)(d). Likewise, claimant's entitlement under § 8-73-108(4)(d) was not raised by either party on appeal.

Therefore, we conclude the applicability of § 8-73-108(4)(d) is not before us.

B. Standard of Review and Burden of Proof

Section 24-4-105(15)(b), C.R.S. 2003 provides, in part, that findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by the administrative law judge or hearing officer "shall not be set aside by the agency on review of the initial decision unless such findings of evidentiary fact are contrary to the weight of evidence. See Samaritan Inst. v. Prince-Walker, 883 P.2d 3 (Colo. 1994); Clark v. Colorado State University, 762 P.2d 698 (Colo. App.1988).

In Samaritan Inst. v. Prince-Walker, supra, 883 P.2d at 10 , the supreme court explained:

Unlike the substantial evidence standard, the Colorado APA weight of the evidence standard is phrased in the negative . . . . The negative phrasing of this standard establishes a baseline assumption that the hearing officer's findings of evidentiary fact are accurate. In situations in which the evidence could equally support alternative findings, the hearing officer's finding may not be set aside. The standard consequently places the "weight of the evidence" showing on the party challenging the hearing officer's findings, rather than on the party seeking to uphold those findings. Accordingly, although this standard gives

the agency's reviewing body discretion to weigh the evidence independently, it forbids the reviewing body from substituting its determination for that of the hearing officer.

See Federico v. Brannan Sand & Gravel Co., 788 P.2d 1268, 1272 (Colo. 1990) (holding that the court of appeals correctly set aside the Panel's findings because the Panel "instead of weighing the evidence pursuant to section 24-4-05(15)(b), substituted its own finding that the claimants had been permanently replaced").

Evidentiary facts are the raw historical data underlying the controversy whereas ultimate conclusions of fact are conclusions of law or mixed questions of law and fact that are based on evidentiary facts and determine the rights and liabilities of the parties. The distinction between evidentiary fact and ultimate conclusion of fact is not always clear, but an ultimate conclusion of fact is as a general rule phrased in the language of the controlling statute or legal standard. Federico v. Brannan Sand & Gravel Co., supra; Lee v. State Board of Dental Examiners, 654 P.2d 839 (Colo. 1982).

Generally, in an unemployment compensation proceeding, the initial burden is on the claimant to establish a prima facie case of entitlement. As relevant here, the claimant must prove the employment separation was for a reason that would justify an award of benefits. See Ward v. Indus. Claim Appeals Office, 916 P.2d 605 (Colo. App. 1995).

Once the claimant establishes a prima facie case, the burden of going forward shifts to the employer to demonstrate that claimant's termination was for a reason that would disqualify the claimant from the receipt of benefits. Ward v. Indus. Claim Appeals Office, supra.

C. Unsatisfactory, Hazardous, and Changed Conditions

Section 8-73-108(4)(c) addresses both unsatisfactory and hazardous working conditions and permits the receipt of unemployment benefits for either condition. However, the statute includes certain provisions applicable to hazardous, but not unsatisfactory working conditions. It separately defines the term "hazardous working conditions," enumerates factors to be used in determining whether working conditions are hazardous, and limits the type of work that may be considered hazardous.

"No work shall be considered hazardous if the working conditions surrounding a worker's employment are the same or substantially the same as the working conditions generally prevailing among workers performing the same or similar work for other employers engaged in the same or similar type of activity." Section 8-73-108(4)(c). (Emphasis added.)

Section 8-73-108(4)(d) also permits an award of unemployment benefits if it is shown there is a "substantial change in the worker's working conditions, said change in working conditions being substantially less favorable to the worker." Like the language in the hazardous working conditions portion of § 8-73-108(4)(c), § 8-73-108(4)(d) limits the type of change in working conditions that may be considered substantial.

"No change in working conditions shall be considered substantial if it is determined by the division that the conditions prevailing after the change are those generally prevailing for other workers performing the same or similar work." Section 8-73-108(4)(d). (Emphasis added.)

However, there is no provision in the unsatisfactory working conditions portion of § 8-73-108(4)(c) that requires any comparison with the conditions generally prevailing for other workers performing the same or similar work. The statute simply provides that in determining whether working conditions are unsatisfactory for an individual, a number of factors shall be considered:

> the degree of risk involved to [the employee's] health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, the distance of the work from his residence, and the working conditions of workers engaged in the same or similar work for the same and other employers in the locality shall be considered.

Section 8-73-108(4)(c).

We view it as significant that where a claimant's separation is allegedly caused by hazardous working conditions under § 8-73-108(4)(c) or substantially changed working conditions under § 8-73-108(4)(d), the General Assembly specifically chose to disallow unemployment benefits if the conditions complained of were not less favorable to the employee than those prevailing among similar workers within the locality. However, the statute relating to unsatisfactory working conditions contains no such clause specifically prohibiting benefits.

Further, the statute relating to unsatisfactory working conditions refers to several factors, not all of which will be relevant in every case. The Panel acknowledged this fact in its order by stating that the evidence failed to establish the working conditions were objectively unsatisfactory "based on the factors enumerated in the statute or other comparable considerations" (emphasis added). The Panel's interpretation is consistent with § 8-73-108(4), C.R.S. 2003, which states that a full award of benefits may be given to an employee for a number of reasons, including unsatisfactory working conditions, and further provides that "the determination of whether or not the separation from employment shall result in a full award of benefits shall be the responsibility of the division. The following reasons shall be considered, along with any other factors that may be pertinent to such determination . . . ." (Emphasis added.)

Although we conclude the evidence here justified the hearing officer's award of benefits, we agree with the Panel that the factors listed in § 8-73-108(4)(c) are not all-inclusive and that other "comparable" factors may be considered if they are "pertinent to such determination."

Therefore, we read the statute as requiring that if any evidence of the enumerated factors is presented, such evidence must be considered in determining whether the working conditions were unsatisfactory. However, we further conclude, as did the Panel, that a

claimant's failure to submit proof regarding the working conditions of workers engaged in the same or similar work for the same and other employers in the locality does not prevent an award of benefits under § 8-73-108(4)(c). See Chris the Crazy Trader, Inc. v. Indus. Claim Appeals Office, 81 P.3d 1148, ___, 2003 Colo. App. LEXIS 1782 (Colo. App. No. 03CA0678, Nov. 20, 2003) (holding that § 8-73-108(4)(d) does not impose upon the Panel an affirmative obligation to seek and obtain evidence of prevailing conditions "for other workers performing the same or similar work"); see also Hellen v. Indus. Comm'n, 738 P.2d 64 (Colo. App. 1987) .

Accordingly, here, we conclude that claimant's failure to submit proof regarding the working conditions of workers engaged in the same or similar work for the same and other employers in the locality did not prevent him from receiving an award of benefits for unsatisfactory working conditions, provided that he otherwise presented sufficient evidence to satisfy the statute.

We base our conclusion on the plain language of the statute, and we therefore need not resort to legislative history. See Lymburn v. Symbios Logic, supra. Nevertheless, we observe that § 8-73-108(4)(c) and (d) have remained unchanged in substance since their enactment in 1963, and no relevant legislative history exists on the General Assembly's intent as to these provisions. See Colo. Sess. Laws 1963, ch. 188, § 82-4-9(3)(b)(ii)-(iii) at 670-71.

While we agree with the Panel that the absence of evidence concerning the working conditions of similarly engaged workers does not preclude an award of benefits for unsatisfactory working conditions, we disagree that this conclusion can be extrapolated from Arias v. Indus. Claim Appeals Office, supra.

In Arias, the claimant was employed by a donut franchisee and worked on the night shift with another employee. When the other employee was reassigned, the claimant became solely responsible for performing the duties the two had previously performed. After working the shift alone for about a month without a raise, the claimant quit. She later sought unemployment benefits, asserting that her voluntary termination resulted from a substantial change of working conditions.

At the evidentiary hearing, the employer's testimony -- which the ALJ found credible -- was that it was normal among similar franchises to use only one employee on such a shift. Based on that evidence, the ALJ found the conditions under which the claimant worked were "reasonable and normal for the industry" and disqualified her from receiving benefits. Arias v. Indus. Claim Appeals Office, supra, 850 P.2d at 162. A division of this court affirmed, relying on § 8-73-108(4)(d).

In Arias, the claimant did not allege unsatisfactory working conditions under § 8-73-108(4)(c), but claimed her working conditions had substantially changed within the meaning of § 8-73-108(4)(d). The specific issue before the court was her contention that, in determining whether her work conditions had substantially changed, the division could

compare her working conditions only with employees of the same employer. The division rejected the argument, stating:

From the face of these two provisions [comparing "unsatisfactory" conditions under § 8-73-108(4)(c) with "prevailing conditions" under § 8-73-108(4)(d)], we can discern only a single intent. If an employee asserts that the employment termination results either from unsatisfactory conditions or from a substantial change in conditions, the General Assembly intended that a full award would be granted only if the conditions complained about were less favorable to the employee than those prevailing among similar workers within the locality.

Arias v. Indus. Claim Appeals Office, supra, 850 P.2d at 163.

Because the claimant in Arias was not seeking benefits based upon unsatisfactory working conditions, we view any discussion of such working conditions as dictum. Further, the parties there conceded, and the division assumed, that in determining the existence of unsatisfactory or hazardous conditions, the division was required to look to the conditions prevailing among other employers of like employees.

The Arias court refused to adopt a statutory interpretation unfair to the employee, explaining that "nothing within either this particular legislative provision or the [Workers' Compensation Act] as a whole permits the conclusion that it was intended to impose such an onerous burden upon a terminated employee." Arias v. Indus. Claim Appeals Office, supra, 850 P.2d at 164. The court thus recognized that unemployment compensation hearings are designed to be informal and expeditious, see § 8-74-101, et seq., C.R.S. 2003, and it would impose an onerous burden on an employee to present evidence that is not directly relevant to the circumstances of his or her separation from employment.

The Arias court did not discuss the burden of proof, but there, the employer presented evidence that it was following the standard practices of other franchises. In contrast, at the hearing in this case, employer did not present any such evidence, or even assert that other similarly situated employees were working more than sixty hours per week as claimant had been doing for over two years. Employer's witnesses acknowledged claimant's problem of working excessive hours, but stated that their attempts to remedy the problem were unsuccessful. Employer's only defense at the hearing was that claimant quit for personal reasons.

Because of these factors and because Arias focused on § 8-73-108(4)(d), we do not read that decision as holding that the absence of evidence concerning the working conditions of similarly engaged workers either precludes or does not preclude an award of benefits for unsatisfactory working conditions under § 8-73-108(4)(c).

III. Weight of the Evidence

Turning to the statutory factors mentioned in § 8-73-108(4)(c), we conclude the hearing officer's determination that claimant's working conditions were objectively unsatisfactory

was not contrary to the weight of the evidence. Thus, the Panel erred in disturbing the conclusion of the hearing officer.

A claimant's subjective determination that working conditions are unsatisfactory is insufficient. Rather, a reasonableness standard is applied in light of the claimant's particular circumstances, including those set forth in the statute. See Rodco Sys., Inc. v. Indus. Claim Appeals Office, 981 P.2d 699 (Colo. App. 1999).

In this case, it was undisputed that claimant worked for employer for eighteen years, and that the hours he was required to work increased significantly during his last two years on the job. The hearing officer found that "the claimant was generally working half again as many hours as anticipated in the normal 40 hour workweek, and informed the employer that he could not continue to work that many hours . . . ."

First, this is unlike the situation where an employee, when hired, is fully aware of the hours, pay, or responsibility that he or she is accepting. See § 8-73-108(5)(e)(I), C.R.S. 2003 (disqualifying employee from receiving benefits if the employee quits because of dissatisfaction with "standard working conditions"); cf. Heidelberg Township v. Unemployment Comp. Bd. of Review, 94 Pa. Commw. 108, 503 A.2d 462, 464 (Pa. Commw. Ct. 1986) (claimant admitted initial suitability of conditions of employment by voluntarily accepting employment).

Second, there was evidence that claimant repeatedly requested help from employer during the last two years, and that employer recognized the problem. Claimant did not simply walk off the job.

Third, claimant presented evidence that the excessive hours affected him. In his letter of resignation, he stated that his work hours made it difficult to "give attention to [his] personal life," and he also testified at the hearing that he could no longer do the job. The hearing officer noted the detrimental effects on claimant's personal life, his inability to do the job, and his unsuccessful efforts to obtain help from his employer. And, the hearing officer specifically referred to the claimant's written resignation which recited "the fact that he could not continue to put in the hours that he did and be effective," "the lack of attention that [claimant] could give to his personal life, and the necessity of making a change."

The hearing officer's conclusion that claimant quit due to unsatisfactory working conditions thus credited claimant's testimony, necessarily inferred that he acted reasonably, and rejected employer's argument that claimant quit for other reasons. See Tilley v. Indus. Claim Appeals Office, 924 P.2d 1173 (Colo. App. 1996) (In unemployment insurance cases, it is the hearing officer's responsibility to assess the credibility of witnesses, resolve any conflicts in the evidence, and determine the weight to be accorded the evidence).

We therefore conclude claimant met his initial burden of establishing a prima facie case of entitlement because he showed his separation was for a reason that would justify an

award of benefits. Once he established a prima facie case, the burden of going forward shifted to employer to demonstrate that claimant resigned for a reason that would disqualify him from the receipt of benefits. See Ward v. Indus. Claim Appeals Office, supra.

Employer's witnesses merely stated their belief that claimant quit for personal reasons. Employer did not present any evidence or argument at the hearing that other similarly situated employees were working similar hours. See Chris the Crazy Trader, Inc. v. Indus. Claim Appeals Office, supra.

Contrary to the Panel's statement, the fact that employer was not dissatisfied with claimant's performance was irrelevant to whether his working conditions were objectively unsatisfactory. As the court explained in Manning v. State Unemployment Appeals Commission, 787 So. 2d 954, 955 (Fla. Dist. Ct. App. 2001), "It does not matter that the employer was entitled to change the employee's hours under the employment agreement. The employer's right to change the conditions of employment is relevant to whether a breach of the employment contract occurred, but is not relevant to the employee's entitlement to unemployment compensation."

We have found no reported Colorado decisions in which employees have quit because of the employer's unilateral increase in working hours and then sought unemployment benefits. However, other states have addressed the issue relying upon analogous, though not identical, provisions of their unemployment compensation statutes.

Most state courts that have addressed the issue have deferred to the fact finder, but have reviewed the question of the sufficiency of evidence as a matter of law. See Chavez (Token) v. Unemployment Comp. Bd. of Review, 738 A.2d 77, 80 (Pa. Commonw. Ct. 1999) (whether an employer's unilateral change in the terms and conditions of employment provides a necessitous and compelling reason for employees to leave work is generally a question of law).

For example, in Zepp v. Arthur Treacher Fish & Chips, Inc., 272 N.W.2d 262, 263 (Minn. 1978), the Minnesota Supreme Court reversed a decision denying the claimant benefits where the court concluded the employer made impossible demands on the employee that no one person could be expected to meet.

There, the claimant's work hours increased and had more than doubled when he quit, and he accepted the change and continued to work until, "as a result of the long hours, and what claimant felt was a lack of cooperation on the part of the employer, [he] quit this employment voluntarily." Zepp v. Arthur Treacher Fish & Chips, supra, 272 N.W.2d at 263. The court added:

The fact that employee . . . tried to do so before he finally quit because of the excessive demands upon him suggests that he is unusually conscientious and industrious. He should not be penalized for those traits, nor should the employer be rewarded for its treatment of him . . . .

Zepp v. Arthur Treacher Fish & Chips Inc., supra. See Porrazzo v. Nabisco, Inc., 360 N.W.2d 662 (Minn. App. 1985) (employee entitled to unemployment compensation benefits where his work hours and responsibilities increased significantly without any increase in salary).

Other courts have similarly concluded that an increase in hours which result in making excessive demands on an employee may constitute "good cause attributable to the employer" and justify an employee to resign, but nevertheless remain eligible for an award of unemployment benefits. See Manning v. State Unemployment Appeals Comm'n, supra.

In Pennsylvania, the relevant statutes permit employees to collect unemployment compensation benefits if they leave work for a necessitous and compelling reason. This requirement may be met by an employer's unilateral imposition of a significant change in the terms and conditions of employment that place excessive demands upon the employee. Chavez (Token) v. Unemployment Comp. Bd. of Review, supra. Nevertheless, the Pennsylvania court has recognized "there is no talismanic percentage to determine when an employer's unilateral changes in the terms and conditions of employment are substantial; rather, each case must be examined under its own attendant circumstances." Chavez (Token) v. Unemployment Comp. Bd. of Review, supra, 738 A.2d at 82.

We agree with the rationale of these decisions and similarly conclude that a claimant may receive a full award of benefits, pursuant to § 8-73-108(4)(c), under such circumstances, provided he or she presents evidence that the working conditions were objectively unsatisfactory.

Here, claimant presented evidence, which was accepted by the fact finder, that his sixty-hour workweeks were taking a toll on him such that he felt he could no longer perform the job; that the schedule was not consistent with his training, experience, and prior earnings; and that during the last two years his employer had unilaterally increased his work hours by at least fifty percent with no overtime or increase in pay which placed excessive demands upon claimant.

We therefore conclude the hearing officer's determination that claimant's working conditions were objectively unsatisfactory under § 8-73-108(4)(c) was not contrary to the weight of the evidence, and the Panel thus erred in disqualifying him from benefits. See Samaritan Inst. v. Prince-Walker, supra.

The order is set aside, and the case is remanded with directions to reinstate the order of the hearing officer.

Judge Marquez concurs.

Judge Graham dissenting.

In my view, the Panel correctly applied Colorado law in concluding "that this limited evidence fails to establish that the working conditions were objectively unsatisfactory based on the factors enumerated in the statute or other comparable considerations." The Panel ruled that "working between 56 and 63 hours per week does not, per se, constitute 'unsatisfactory working conditions.'" I believe that, as a practical result, the majority's opinion establishes such a rule and rejects outright the holding of another division of this court in Arias v. Indus. Appeals Office, 850 P.2d 161 (Colo. App. 1993). Therefore, I respectfully dissent.

I fear that the majority opinion will be cited for the proposition that a showing of increased working hours by a salaried employee (the record shows those hours were approximately fifty-six per week) constitutes objective proof of a substantial change justifying an award, without proof of the working conditions of similar employees working for similar employers.

In my view, the majority also incorrectly distinguishes Arias, and relies upon law that is not applicable to the unique Colorado statutory language at issue. I also disagree that there is evidence of any objectively unsatisfactory working condition.

Arias dealt directly with the language of § 8-73-108(4)(c) and (d), construing them together, and the division there concluded that "the General Assembly intended that a full award would be granted only if the conditions complained about were less favorable to the employee than those prevailing among similar workers within the locality." Arias v. Indus. Appeals Office, supra, 850 P.2d at 163 . (Emphasis added.)

In reaching its conclusion, the Arias division determined that there was but a single intent in the two provisions, even though § 8-73-108(4)(c) requires the hearing officer to consider "the working conditions of workers engaged in the same or similar work for the same and other employers in the locality" and subsection § 8-73-108(4)(d) requires the hearing officer to consider whether a change in conditions is still in accordance with "those generally prevailing for workers performing the same or similar work." The division rejected the employee's argument that the hearing officer should have compared a particular employee's working conditions only with the employees of the same employer in determining whether that employee's conditions had undergone a substantial change. In doing so, the division in Arias interpreted and applied both § 8-73-108(4)(c) and (d). Both subsections disallow an award in the absence of proof that the conditions -- hazardous, unsatisfactory, or changed -- are objectively unique when compared to the community. I disagree that this finding was dictum.

The majority draws a distinction between unsatisfactory working conditions and hazardous working conditions under § 8-73-108(4)(c) because the General Assembly said that "no work shall be considered hazardous if the working conditions surrounding a workers' employment are the same or substantially the same as the working conditions generally prevailing among workers performing the same or similar work for other employers engaged in the same of similar type of activity." The majority also notes that § 8-73-108(4)(d) contains similar language in its provision that "no change in working

conditions shall be considered substantial if it is determined . . . that the conditions prevailing after the change are those generally prevailing for other workers performing the same or similar work."

Because similar language does not preface the unsatisfactory working conditions component of § 8-73-108(4)(c), the majority concludes that "a number of factors" may be considered in determining whether working conditions are unsatisfactory. In my view, § 8-73-108(4)(c)'s requirement that "the working conditions of workers engaged in the same or similar work for the same and other employers in the locality shall be considered" when the hearing officer determines "whether or not working conditions are unsatisfactory" is the functional equivalent of the other language in the two sections. Section 8-73-108(4)(c). (Emphasis added.) This language communicates a "single intent." Arias v. Indus. Appeals Office, supra, 850 P.2d at 163 . "Whether it be "unsatisfactory conditions" under § 8-73-108(4)(c) or the 'conditions that prevail' after a change under § 8-73-108(4)(d), the comparison, in either case must include employees engaged in the same or similar work in the locality . . . ." Arias v. Indus. Appeals Office, supra, 850 P.2d at 164. (Emphasis added.)

In my view, claimant here failed to establish either objectively unsatisfactory working conditions under § 8-73-108(4)(c), C.R.S. 2003, or an objectively substantial change in working conditions under § 8-73-108(4)(d), C.R.S. 2003. Because his claim was denied at the deputy level under § 8-73-108(5)(e), C.R.S. 2003, when he proceeded to the de novo hearing before the hearing officer, he had the burden of proof. The majority's suggestion that the employer had a burden in this case, in my view, is also contrary to the clear language of the statute and cannot rest on the authority of Chris the Crazy Trader, Inc. v. Indus. Claim Appeals Office, 81 P.3d 1148, 2003 Colo. App. LEXIS 1782 (Colo. App. No. 02CA0678, Nov. 20, 2003). That case does not hold that the burden is on the employer to present evidence of similar working conditions. Nothing in the statute suggests that the employer is required to prove similar circumstances either as an affirmative defense or part of its defense.

Although Chris the Crazy Trader holds that the hearing officer is not required to review evidence which has not been produced by the parties, it does not stand for the proposition that the employer must shoulder this burden in the absence of the claimant's showing a prima facie case.

Relying upon cases from Florida, Minnesota, and Pennsylvania, even though none of those states has the statutory mandate adopted by our General Assembly, the majority concludes that a unilateral increase in the employee's working hours may constitute unsatisfactory working conditions without proof of similar employees' circumstances. However, the cases cited by the majority did not deal with statutes like § 8-73-108.

Although the majority finds substantial evidence that the claimant's working conditions were objectively unsatisfactory under § 8-73-108(4)(c), I can find nothing in the record before us to support that holding. Indeed, the lack of such evidence is the basis for the Panel's decision to reverse the hearing officer. The majority in effect concedes that there

was no objective evidence to support the hearing officer's decision by concluding that the absence of evidence concerning the working conditions of similarly engaged workers does not preclude an award of benefits.

Here, as the Panel ruled, the evidence is so slim that no prima facie case was made by claimant. Therefore, this appeal challenges the Panel's resolution of an ultimate conclusion of fact, and as a reviewing court, we must determine whether there is substantial evidence, or a lack thereof, in the record as a whole to support that conclusion. See Samaritan Inst. v. Prince-Walker, 883 P.2d 3 (Colo. 1994).

Furthermore, we are authorized to set aside the Panel's decision if it misinterprets the law under § 8-74-107(6)(d), C.R.S. 2003. Here, the Panel's ultimate conclusion applied the absence of facts to the law. The Panel has considerable expertise in unemployment matters, and its conclusions ought to be given deference.

In any event, I would not place the blame for the lack of evidence upon employer, because I continue to believe that one who seeks an award against an employer bears the burden of proving his claim and must first establish a claim prima facie.

I therefore would affirm the Panel's order.

Chris the Crazy Trader, Inc. and Christopher Dodge, Inc., Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and

Jesus A. Madrid, Respondents.

No. 03CA0678.

81 P.3d 1148

Colorado Court of Appeals,

Div. III.

Nov. 20, 2003

Gary F. Burke, Arvada, Colorado, for Petitioners

Ken Salazar, Attorney General, Eric S. Rothaus, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

No Appearance for Respondent Jesus A. Madrid.

ROY, Judge.

In this unemployment compensation case, petitioners, Chris the Crazy Trader, Inc. and Christopher Dodge, Inc. (collectively employer), seek review of a final order of the Industrial Claim Appeals Office (Panel) that upheld a hearing officer's decision awarding unemployment benefits to Jesus A. Madrid (claimant). We affirm.

Claimant was hired as a full-time employee in employer's body shop. The hearing officer found with support in the record that (1) upon hiring claimant, employer informed claimant that he would be working full-time; (2) during his first two weeks the employment approximated full-time employment; (3) thereafter, because of a lack of work, employer reduced claimant's hours such that he was working only part time and making approximately $200 per week; (4) claimant eventually quit because he could not afford to continue working the reduced number of hours; and (5) other employees doing body repair work for employer were getting "significantly more hours of work" than claimant got.

The hearing officer concluded that claimant quit because of a substantial change in working conditions with employer that were substantially less favorable to him. Thus, the hearing officer determined that claimant was entitled to a full award of benefits pursuant to § 8-73-108(4)(d), C.R.S. 2003. The Panel affirmed.

Employer contends on appeal that the hearing officer and the Panel erred in their construction and application of § 8-73-108(4)(d). More specifically, employer argues that if benefits are to be awarded under that section, the Division of Employment and Training (Division) has an affirmative duty to obtain evidence concerning employees doing similar work for other employers in the locality. We disagree.

Section 8-73-108(4)(d) provides for an award of benefits if there has been a "substantial change in the worker's working conditions, said change in working conditions being substantially less favorable to the worker." The section goes on to provide: "No change in working conditions shall be considered substantial if it is determined by the division that the conditions prevailing after the change are those generally prevailing for other workers performing the same or similar work." (Emphasis added.)

The § 8-73-108(4)(d) inquiry is not limited to other workers performing the same or similar work for the particular employer involved in the case. Rather, the inquiry should include workers engaged in the same or similar work "in the locality," whether employed by the same employer or by others. See Arias v. Indus. Claim Appeals Office, 850 P.2d 161 (Colo. App. 1993). Here, neither party presented any evidence concerning individuals doing similar work for other employers in the locality.

In determining eligibility for unemployment benefits, the Division is an adjudicatory, not investigatory, body. Its function and responsibility are to conduct a neutral adjudication of unemployment claims, not to investigate the factual basis for such claims. See Wafford v. Indus. Claim Appeals Office, 907 P.2d 741 (Colo. App. 1995); Rotenberg v. Indus. Comm'n, 42 Colo. App. 161, 590 P.2d 521 (1979).

Contrary to employer's contention, we perceive nothing in the language of § 8-73-108(4)(d) itself or in the Arias decision that imposes an affirmative obligation on the Division to seek out and obtain evidence concerning individuals doing similar work for other employers in the locality.

The order is affirmed.

Judge Marquez and Judge Dailey concur.

The City and County of Denver, Petitioner,

v.

Industrial Commission of the State of Colorado,

and Pamela Kay Ortega, Respondents.

No. 86SC252.

756 P.2d 373

Supreme Court of Colorado,

En Banc.

May 16, 1988.

Stephen H. Kaplan, City Atty., Geoffrey S. Wasson, Asst. City Atty., Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Mary Ann Whiteside, First Asst. Atty. Gen., Denver, for respondent Indus. Comn.

Law Firm of Leonard M. Chesler, Earl S. Wylder, Rodney Allison, Denver, for respondent Pamela Kay Ortega.

VOLLACK, Justice.

The City and County of Denver petitioned this court requesting certiorari review of City & County of Denver v. Industrial Commission, 725 P.2d 89 (Colo.App.1986). In that case, the court of appeals affirmed the Industrial Commission's holding that the respondent, Pamela Ortega, was entitled to a full award of unemployment compensation benefits after her employment with the City and County of Denver was terminated because she was unable to perform her job due to her alcoholism. We reverse the court of appeals' affirmance of the Industrial Commission's order and remand for further proceedings consistent with this opinion.

I.

Pamela Ortega (Ortega or the claimant), began working for the City and County of Denver (the City) in 1975 as a recreation leader and lifeguard at Washington Park Recreation Center. On a number of days in March 1982, Ortega reported for work in an intoxicated condition. On March 30, 1982, she was given a "Written Reprimand" for reporting to work smelling of alcohol. The reprimand stated that because Ortega worked

as a lifeguard, she was jeopardizing the safety of swimmers at the recreation center, as well as her own safety, due to her "impaired performance because of drinking before coming to work." The reprimand warned Ortega that "a repeat of this incident will warrant an immediate dismissal."

On April 28, 1982, she received a written "final warning" document from the Department of Recreation, advising her that despite the March 30 reprimand she had reported to work "since that date smelling of alcohol." Ortega eventually admitted that she had an alcohol problem and the City requested that she enroll in a monitored Antabuse1 program at Denver General Hospital (DGH). The City again stressed its concern that Ortega was endangering the lives of herself and others at the swimming facility. After participating in the Antabuse program for "[a]pproximately seven to ten days," she was permitted to withdraw from the program because she complained that the Antabuse made her ill.

Two years later, on March 14, 1984, Ortega again reported to work in an intoxicated condition. When confronted by her supervisor, she admitted that she had been drinking. The City gave Ortega the choice to either be terminated immediately, or to reenroll in the monitored Antabuse program. Ortega chose the latter, and in April 1984 entered into a Stipulation and Agreement with the City by which she agreed to participate in the Antabuse program under conditions established by DGH's Employees Medical Clinic. She agreed to participate in the program for the remainder of her employment or for a period of at least twelve months. The stipulation also provided that her failure to attend the program "may result in her dismissal," and that if she appeared on duty while under the influence of alcohol she would be immediately dismissed. The stipulation was signed by the parties on April 13, 1984.

Less than a month later, on May 9, 1984, Ortega again reported to work while under the influence of alcohol. This time she denied that she had been drinking, so her employer sent her to Denver General Hospital where a blood alcohol test confirmed that she was under the influence of alcohol.2 In a letter dated May 11, 1984, Ortega was notified of the termination of her employment, effective May 14, 1984, for violation of Career Service Authority Personnel Rule 16-22.

Ortega filed a claim for unemployment insurance benefits with the Colorado Department of Labor and Employment, Division of Employment and Training (Division). A Division deputy determined that the claimant was responsible for her discharge due to "[o]ff-the-job use of not medically prescribed intoxicating beverages or narcotics to a degree resulting in interference with job performance." Sec. 8-73-108(9)(a)(VIII), 3 C.R.S. (1983 Supp.). Her unemployment compensation benefits were reduced under this provision of the statute.

The claimant appealed and a hearing was held before a Division referee. The referee found "no dispute between the claimant and the employer as to the facts which led up to the claimant's separation from employment." The only dispute was whether Ortega was at fault for her alcoholism or whether, as she contends, she suffered from "the disease of alcoholism" and therefore could not be held at fault. The referee held that "her alcoholism

was such that, despite taking Antabuse treatment, the claimant could not refrain from ingesting alcohol, [therefore] ... [t]he referee simply has to conclude that the claimant was, in fact, suffering from an illness over which she had no control." (Emphasis added). This ruling made Ortega eligible for full unemployment compensation benefits.

The City appealed the referee's award of benefits to the Industrial Commission (Commission). The Commission affirmed, holding that the referee's findings of fact and conclusions of law were "supported by competent and substantial evidence" and "made in accordance with the law."

The City appealed the Commission's decision to the court of appeals. In City & County of Denver v. Industrial Commission, 725 P.2d 89 (Colo.App.1986), the court of appeals affirmed the Commission's holding in a two-one decision, Judge Pierce dissenting. Id. at 92. The City filed a petition for writ of certiorari which we granted to decide this issue: Whether Ortega should be disqualified from unemployment compensation benefits because she was discharged from her employment after repeatedly appearing for work in an intoxicated condition.

II.

A.

The claimant was terminated for violation of this Career Service Authority Personnel Rule:

16-22 Causes for Immediate Dismissal.. .

3) Being under the influence of alcohol while on duty. . . .

5) Lying to superiors or falsifying records with respect of official duties.

20) Any other act of dishonesty, gross misconduct, or neglect not listed specifically above.

The Division originally denied Ortega's claim based on its application of section 8-73-108(9)(a)(VIII), 3 C.R.S. (1983 Supp.),3 which states that a worker is disqualified from receiving unemployment compensation benefits for a certain period of time if the worker engages in off-the-job use of intoxicating beverages which are not medically prescribed and which affects the worker's job performance.4 The referee disagreed with both the deputy's application of 108(9)(a)(VIII) and the result reached. The referee instead applied two subsections of section 8-73-108(4), and held that Ortega was entitled to benefits.

Section 8-73-108(4)(b) provides for a full award of unemployment compensation benefits, under certain circumstances, when a worker leaves employment due to a health problem.5 Subsection 4(j) provides for a full award of benefits if the worker has been

separated from a job for "[b]eing physically or mentally unable to perform the work."6 The Commission adopted the referee's findings and conclusions.

The court of appeals affirmed the Commission's order, reconciling the different provisions of the statute in this manner:

[T]here was evidence to support the application of Sec. 8-73-108(5)(e)(VIII). However, there was also evidence to support the application of Sec. 8-73-108(4)(j). Since each subparagraph of Sec. 8-73-108(4) is an independent criterion for determining benefits, and the Commission's decision to apply Sec. 8-73-108(4)(j) was supported by substantial evidence, that decision will not be disturbed on review.

City & County of Denver, 725 P.2d at 91.

Our resolution of this dispute under the Colorado Employment Security Act depends on whether a worker's conduct which results from his or her alcoholism is volitional or nonvolitional. As framed by Judge Pierce in his dissent, "[t]he critical question raised here ... is what degree of legal responsibility should be imposed upon persons who are alcoholics, and under what circumstances, if any, should alcoholics receive unemployment benefits." Id. at 92.

B.

"It is the reason for separation that determines which statutory section applies." Kortz v. Industrial Comm'n, 38 Colo.App. 411, 413, 557 P.2d 842, 843 (1976) (emphasis added). "[T]he reason for termination is a question of fact." Mountain States Tel. & Tel. Co. v. Industrial Comm'n, 697 P.2d 418, 420 (Colo.App.1985). The express intent of the General Assembly in granting benefit awards is "that the division at all times be guided by the principle that unemployment insurance is for the benefit of persons unemployed through no fault of their own." Sec. 8-73-108(1)(a), 3B C.R.S. (1986) (emphasis added). "[T]he concept of 'fault' under the statute is not necessarily related to culpability, but must be construed as requiring a volitional act." Zelingers v. Industrial Comm'n, 679 P.2d 608, 609 (Colo.App.1984). The question then becomes whether misconduct resulting from alcoholism constitutes a volitional act which disqualifies a claimant from eligibility for unemployment compensation benefits, or a nonvolitional act which is through no fault of the worker.

"Conduct induced by alcoholism may or may not be voluntary in the law, depending upon the degree of impairment caused by the alcoholism. The degree of impairment must be determined under the facts of each case." Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979), cert. denied, 444 U.S. 852, 100 S.Ct. 105, 62 L.Ed.2d 68 (1979).

Other jurisdictions have used this or a similar approach.7 See Jacobs v. California Unemployment Ins. Appeals Bd., 25 Cal.App.3d 1035, 1038, 102 Cal.Rptr. 364, 366 (1972) ("To describe alcoholism as a 'disease' may be meaningful in one legal context,

misleading in another. To label the individual an 'alcoholic' may shield him from one kind of legal responsibility but not another."); Craighead v. Administrator Dep't of Employment Sec., 420 So.2d 688, 689 (La.App.2nd Cir.), aff'd on rehearing, 420 So.2d 690 (1982) (en banc) ("[W]here an employee's impairment resulting from alcoholism is of a sufficient degree to deprive the individual of his ability to abstain from the use of alcohol thus resulting in an intoxication-caused work lapse, the individual's absence or misconduct cannot be said to be voluntary and, therefore, cannot constitute grounds for disqualification from unemployment compensation benefits."); Moeller v. Minnesota Dep't of Transp., 281 N.W.2d 879, 882 (Minn.1979) (Behavior resulting from alcoholism does not constitute "misconduct" for purposes of unemployment benefits if the employee made "a reasonable effort to retain his employment. Given the nature of the disease, it is unreasonable to require the employee to maintain total abstinence even after he enters treatment." (emphasis in original)); Federoff v. Rutledge, 332 S.E.2d 855, 861 (W.Va.1985) ("The afflicted employee must assume the responsibility of dealing with this problem--or face the consequences of failing to do so, including discharge and possible disqualification for unemployment compensation.... Refusal to undertake and pursue rehabilitative treatment for chronic alcoholism, therefore, may also place one's eligibility for continued benefits in question."); see also Huntoon, 275 N.W.2d at 448 ("It is only when the impairment is sufficient to deprive the individual of the ability to abstain from the intoxication-caused work lapse that the individual does not incur the disqualification for misconduct.").

When a claimant's alcoholism has advanced to the stage that the alcoholic is unable to abstain from drinking, the claimant's conduct may be considered nonvolitional and disqualification from benefits is not required. In contrast, when a claimant's alcoholism is such that the alcoholic is able to choose or decide whether to drink alcoholic beverages, the act of drinking is characterized as volitional. Because fault under the statute requires "a volitional act," this misconduct constitutes fault. Zelingers, 679 P.2d at 609. The degree of impairment and the volitional or nonvolitional nature of a claimant's alcoholism can only be determined under the particular facts of each case. "At a minimum, the claimant must have performed some volitional act or have exercised some control over the circumstance resulting in the discharge from employment." Gonzales v. Industrial Comm'n, 740 P.2d 999, 1003 (Colo.1987) (applying Sec. 8-73-108(5)(e)(XX) to a claimant who was terminated for violating the employer's disciplinary guidelines).

We do not characterize "off-the-job" drinking under section 8-73-108(9)(a)(VIII) as strictly volitional. Nor do we classify alcoholism as a disease or health problem which is inherently or by definition nonvolitional. To do either would be irrelevant: "To label the individual an 'alcoholic' may shield him from one kind of legal responsibility but not another." Jacobs, 25 Cal.App.3d at 1038, 102 Cal.Rptr. at 366. The disease classification is not necessary to nor dispositive of the issue before us.8 Rather, the degree and nature of a particular claimant's alcoholism must be determined on an individual basis in each case. In this way, the agency can learn whether a claimant's drinking of alcoholic beverages and resulting misconduct were involuntary, or whether a claimant could have refrained from becoming intoxicated but elected not to do so.

A number of jurisdictions use this volitional/nonvolitional approach.9 See, e.g., Mooney v. Commonwealth, 39 Pa.Commw. 404, 395 A.2d 675 (1978), aff'd, 487 Pa. 448, 409 A.2d 854 (1980) (per curiam). ("[A]s the Board found, claimant knew that the only cure for his disease was to completely abstain from alcohol, yet he nevertheless 'decided' to take that first drink. Claimant must now bear the responsibility for that decision." Id. at 408, 395 A.2d at 677.). Another aspect of this issue which demonstrates the need for a case-by-case determination of voluntary and involuntary behavior is that "[t]he mere fact that a person suffers from a disease does not necessarily mean that he or she has no control over the progress of the disease. One can, for example, seek appropriate help and treatment and avoid activities known to aggravate the problem." Id. at 407 n. 1, 395 A.2d at 676 n. 1.

In this case, if Ortega was unable to refrain from ingesting alcohol, her inability to perform her job was not the product of a volitional act. On the other hand, if she was able to control or curb her drinking, by whatever means, then her behavior was volitional; such a finding would limit her right to receive unemployment compensation benefits.

C.

The initial burden of proof is always on a claimant to establish a prima facie case of eligibility for unemployment compensation benefits. Duenas-Rodriguez v. Industrial Comm'n, 199 Colo. 95, 97, 606 P.2d 437, 438 (1980); Arvada v. Industrial Comm'n, 701 P.2d 623, 624 (Colo.App.1985). If the claimant presents a prima facie case for eligibility and the employer contests "an otherwise eligible claimant's right to benefits on the grounds that the claimant was discharged for misconduct," the employer then has the burden to make a prima facie showing to the contrary. Arvada, 701 P.2d at 624; Denver Symphony Ass'n v. Industrial Comm'n, 34 Colo.App. 343, 347, 526 P.2d 685, 687 (1974). If the employer meets this burden, the claimant is entitled to present evidence "to justify the acts which led to the discharge." Arvada, 701 P.2d at 624-25.

Here, Ortega would be required to make a prima facie showing of her eligibility for benefits, i.e., a showing that her behavior directly resulted from alcoholism that was, for her, nonvolitional. If she meets this burden, then the City has the opportunity to establish that Ortega's alcoholism was a matter of choice on her part. See, e.g., Durst Buster Brown v. Commonwealth, 56 Pa.Commw. 135, 140-41, 424 A.2d 580, 583 (1981) (The order granting unemployment benefits is reversed because "the record affords no competent basis for concluding that the claimant could not control his behavior.") Ortega may then present evidence "to justify the acts which led to the discharge." Arvada, 701 P.2d at 625.

"[A]n Industrial Commission decision must be set aside if the findings of fact do not support the decision or if the decision is erroneous as a matter of law." Gonzales, 740 P.2d at 1001; see Sec. 8-74-107(6)(c), 3B C.R.S. (1986) ("The Industrial Claim Appeals Panel's decision may be set aside only upon the following grounds: (c) That the findings of fact do not support the decision.").

The record in this case establishes that at the hearing before the Division Referee, a physician with DGH who had treated Ortega when she was in the Antabuse program testified that he met with her a few times and administered the Antabuse medication. He stated that the hospital's determination that she had a blood alcohol content of .206 was an indication that her responses and judgment would be impaired. The physician testified that Ortega came to the clinic as scheduled "[s]even times." Ortega's counsel asked the doctor if her alcoholism was "beyond her control," but this question was never answered. The doctor's records showed that he advised Ortega to get counseling in addition to the Antabuse treatment; she agreed that she would.

When Ortega testified, no testimony was elicited regarding the volitional or nonvolitional nature of her drinking although she did admit that she drank alcoholic beverages during both periods of time when she was on Antabuse.

A psychologist who had consulted with Ortega twice and conducted psychological interviews and screening tests also testified. He testified that she suffered from chronic alcoholism and was participating in Alcoholics Anonymous, but that she also needed additional one-to-one psychotherapy. Both professionals who testified at the hearing agreed that Antabuse alone is not a cure for alcoholism, and is not intended to be.

There are not sufficient facts in the record about Ortega's ability to control her drinking for us to ascertain the volitional or nonvolitional nature of Ortega's alcoholism. First, the referee entered an ambiguous holding which first held that "the claimant was, in fact, suffering from an illness over which she had no control," but stated in the next paragraph: "The Referee finds, at this point, that the claimant is, in fact, undergoing treatment for a cure and is able to engage in an active job search." The decision does not reveal whether the claimant's nonvolitional drinking had become volitional during the time between her termination from employment and her testimony at the hearing. Second, the referee's conclusion that Ortega suffered from "an illness over which she had no control" was conclusory because neither Ortega nor the two health professionals addressed the issue.

Because this determination is necessary, we reverse the court of appeals' affirmance and order the case remanded to the Division for further proceedings to make the factual determination whether Ortega's alcoholism was volitional or nonvolitional. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Footnotes

1. Antabuse is a prescription drug which causes a patient to become ill if he or she ingests alcohol. The Physician's Desk Reference states:

ANTABUSE (disulfiram) is an aid in the management of selected chronic alcoholic patients who want to remain in a state of enforced sobriety so that supportive and psychotherapeutic treatment may be applied to best advantage. (Used alone, without proper motivation and without supportive therapy, ANTABUSE is not a cure for

alcoholism, and it is unlikely that it will have more than a brief effect on the drinking pattern of the chronic alcoholic).

Physician's Desk Reference 611-12 (40th ed. 1986) (emphasis in original).

2. Ortega's blood alcohol content was .206 milligrams of alcohol per hundred milliliters of blood.

3. The version of section 8-73-108(9) which was in effect at the time of these proceedings stated:

(9)(a) Subject to the maximum reduction consistent with federal law, and insofar as consistent with interstate agreements, if a separation from employment occurs for any of the following reasons, the employer from whom such separation occurred shall not be charged for benefits which are attributable to such employment and, because any payment of benefits which are attributable to such employment out of the fund as defined in section 8-70-103(13), shall be deemed to have an adverse effect on such employer's account in such fund, no payment of such benefits shall be made from such fund:

. . . .(VIII) Off-the-job use of not medically prescribed intoxicating beverages or narcotics to a degree resulting in interference with job performance; . . . .

3 C.R.S. (1983 Supp.) (emphasis added). Section 8-73-108(9)(a)(VIII) was repealed, effective July 1, 1984, and reenacted as section 8-73-108(5)(e)(VIII), 3B C.R.S. (1986). The only change in language is that subpart VIII now states: "intoxicating beverages or controlled substances, as defined in section 12-22-303(7), C.R.S., to a degree resulting in interference with job performance." Sec. 8-73-108(5)(e)(VIII), 3B C.R.S. (1986).

4. There was no dispute in the record that Ortega's intoxication adversely affected her ability to perform her job. The City's written reprimand to Ortega stated: "Jeopardizing participants['] lifes [sic] while they swim due to impaired performance because of drinking before coming to work, can not be tolerated!" Dr. Beck of Denver General Hospital testified that Ortega's blood alcohol level of .206 rendered her ... "responses and ... judgment ... impaired."

5. Section 8-73-108 provides:

(4) Full award. An individual separated from a job shall be given a full award of benefits if any of the following reasons and pertinent conditions related thereto are determined by the division to have existed. The determination of whether or not the separation from employment shall result in a full award of benefits shall be the responsibility of the division. The following reasons shall be considered, along with any other factors which may be pertinent to such determination:. . . .

(b)(I) The health of the worker is such that he is separated from his employment and must refrain from working for a period of time, but at the time of filing his claim he is able and

available for work, or the worker's health is such that he must seek a new occupation, or the health of the worker, his spouse, or his dependent child is such that the worker must leave the vicinity of his employment; except that, if the health of the worker or that of his spouse or his dependent child has caused the separation from work, the worker, in order to be entitled to a full award, must have complied with the following requirements: Informed his employer of the condition of his health or the health of his spouse or dependent child prior to his separation from employment; substantiated the cause by a competent written medical statement issued prior to the date of his separation from employment when so requested by the employer prior to the date of his separation from employment or within a reasonable period thereafter; submitted himself or his spouse or his dependent child to an examination by a licensed practicing physician selected and paid by the interested employer when so requested by the employer prior to the date of his separation from employment or within a reasonable period thereafter; and submitted himself, his spouse, or his dependent child to an examination by a licensed practicing physician selected and paid by the division when so requested by the division. Award of benefits pursuant to this subparagraph (I) shall include benefits to a worker who, either voluntarily or involuntarily, is separated from employment because of pregnancy and who otherwise satisfies the requirements of this subparagraph (I). . . .

3B C.R.S. (1986).

6. Section 8-73-108 provides:

(4) Full award. An individual separated from a job shall be given a full award of benefits if any of the following reasons and pertinent conditions related thereto are determined by the division to have existed.. . . .

(j) Being physically or mentally unable to perform the work....

3B C.R.S. (1986).

7. The United States Supreme Court recently addressed a similar concept in the context of the "willful misconduct" language of the Rehabilitation Act, 38 C.F.R. Sec. 3.301(c)(2) (1987). Traynor v. Turnage, --- U.S. ----, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988). This Act provides educational assistance benefits to veterans of the Armed Forces under the G.I. Bill. Veterans who have been honorably discharged from the armed forces are entitled to receive educational assistance benefits through the Veterans' Administration (VA). These benefits generally must be used within ten years following discharge or release from active duty. Id. at ----, 108 S.Ct. at 1376. The petitioners, Traynor and McKelvey, both sought to continue to receive benefits after the ten-year period had expired "on the ground that they had been disabled by alcoholism during much of that period." Id. The issue was whether the petitioners' alcoholism constituted willful misconduct under the statute, thus justifying the VA's denial of the requested extension of time. Id. at ----, 108 S.Ct. at 1378.

The statute governing VA educational benefits under the G.I. Bill contains "an exception to [the] 10-year delimiting period for veterans who delayed their education because of 'a physical or mental disability which was not the result of [their] own willful misconduct.' " Id. at ----, 108 S.Ct. at 1380. The Court concluded, after analysis of other statutes and the legislative history, that the willful misconduct provision enacted in 1977 "precluded an extension of time to a veteran who had not pursued his education because of primary alcoholism." Id. at ----, 108 S.Ct. at 1381. Primary alcoholism is alcoholism that is not secondary to, and a manifestation of, an acquired psychiatric disorder.

8. There exists " 'a substantial body of medical literature that even contests the proposition that alcoholism is a disease, much less that it is a disease for which the victim bears no responsibility.' Indeed, even among many who consider alcoholism a 'disease' to which its victims are genetically predisposed, the consumption of alcohol is not regarded as wholly involuntary." Traynor, --- U.S. at ----, 108 S.Ct. at 1383 (citation omitted) (quoting McKelvey v. Turnage, 792 F.2d 194, 198 (D.C.Cir.1986) (per curiam)).

9. Jacobs, 25 Cal.App.3d at 1038, 102 Cal.Rptr. at 366; Huntoon, 275 N.W.2d at 448; Craighead, 420 So.2d at 689; Moeller, 281 N.W.2d at 882. See Morrell v. Commonwealth, 108 Pa.Commw. 499, --- n. 3, 485 A.2d 1214, 1217 n. 3 (1984)

(Williams, J., dissenting).

Leslie S. Cole, Petitioner,

v.

The Industrial Claim Appeals Office of the State of Colorado

and Exabyte Corporation, Respondents.

No. 98CA0639.

964 P.2d 617

Colorado Court of Appeals,

Div. III.

Aug. 20, 1998.

Review of the Order from the Industrial Claim Appeals Office of the State of Colorado
DD No. 16957-97

OPINION PREVIOUSLY ANNOUNCED AS NON-PUBLISHED JULY 16, 1998, IS NOW SELECTED FOR PUBLICATION.

Gary A. Fisher, Boulder, Colorado, for Petitioner

Gale A. Norton, Attorney General, Martha Phillips Allbright, Chief Deputy Attorney General, Richard A. Westfall, Solicitor General, Jeannette W. Kornreich, Assistant Attorney General, Denver, Colorado, for Respondent The Industrial Claim Appeals Office of the State of Colorado

No Appearance for Respondent Exabyte Corporation

DAVIDSON Judge.

Petitioner, Leslie S. Cole (claimant), seeks review of a final order of the Industrial Claim Appeals Office (Panel) which reversed a hearing officer's decision awarding her unemployment benefits. Based on the hearing officer's evidentiary findings and the record, the Panel instead disqualified her from the receipt of benefits pursuant to § 8-73-108(5)(e)(XXII), C.R.S.1997 (job separation from quitting for personal reasons which do not support an award of benefits under other statutory provisions). We affirm the Panel's order.

Following an evidentiary hearing, the hearing officer found, on substantial supporting evidence, that claimant quit this employment "due to the health problems incurred by her children and her two surgeries." Noting that "[a]ll of the changes and problems involved

were beyond the control of the claimant," the hearing officer ruled that "she shall not be denied unemployment insurance benefits as a result." Thus, under "the totality of the circumstances," the hearing officer determined that claimant was "not responsible" for the separation, and granted her an award of benefits on this basis.

On review, because it reached the opposite conclusion as to claimant's responsibility for the separation under the circumstances shown here, the Panel reversed the hearing officer's decision.

Specifically, despite the undisputed health problems shown, the Panel noted that claimant became separated from this employment because she resigned. And, while acknowledging that the health problems experienced by claimant and her children were outside her control, the Panel ruled that the findings and the record did not show that her resignation "was somehow nonvolitional," i.e., "that she was unable to continue working, or that she could not exercise some control in resigning because of those circumstances." Based on this analysis, the Panel ruled that the findings did not support the award of benefits granted by the hearing officer, but rather supported a disqualification from benefits pursuant to § 8-73-108(5)(e)(XXII).

On appeal, claimant contends that the Panel erred in reversing the hearing officer's decision and disqualifying her from benefits based on the factual findings expressly and implicitly made by the hearing officer. Rather, she asserts that she established that she was not responsible or "at fault" for the separation and that the hearing officer properly granted her an award of benefits on this basis. We are not persuaded. To the contrary, on the record here, we agree with the Panel's analysis of the "fault" issues.

The disqualifying provisions of § 8-73-108(5)(e), C.R.S.1997, must be read in light of the express legislative intent set forth in § 8-73-108(1)(a), C.R.S.1997, to provide benefits to those who become unemployed through "no fault" of their own. Thus, even if the findings of the hearing officer may support the application of one of the disqualifying sections of the statute, a claimant may still be entitled to benefits if the totality of the circumstances establishes that the claimant's separation occurred through no fault of her own. See Gonzales v. Industrial Commission, 740 P.2d 999 (Colo.1987); Keil v. Industrial Claim Appeals Office, 847 P.2d 235 (Colo.App.1993).

Under the unemployment scheme, "fault" is a term of art which is used as a factor to determine whether the claimant or the employer is responsible overall for the separation from employment. In this context, "fault" has been defined as requiring a volitional act or the exercise of some control or choice by the claimant in the circumstances resulting in the separation such that the claimant can be said to be responsible for the separation. See Richards v. Winter Park Recreational Ass'n, 919 P.2d 933 (Colo.App.1996); Collins v. Industrial Claim Appeals Office, 813 P.2d 804 (Colo.App.1991).

We also note that the determination as to whether a claimant was responsible or "at fault" for the separation from employment is not a question of evidentiary fact, but rather is an ultimate legal conclusion to be based on the established findings of evidentiary fact.

Board of Water Commissioners v. Industrial Claim Appeals Office, 881 P.2d 476 (Colo.App.1994).

Here, although it is undisputed that various health problems motivated claimant's decision to quit, it is also clear that her separation from this employment resulted when she chose to resign. Thus, while claimant's health concerns may have provided her with subjectively compelling personal reasons for quitting this employment, she could not be entitled to an award of benefits on a "no fault" basis unless she established that her separation was essentially involuntary under the objective circumstances shown, notwithstanding her resignation. Cf. Goddard v. E G & G Rocky Flats, Inc., 888 P.2d 369 (Colo.App.1994) (quitting in the face of an otherwise imminent involuntary termination was not a separation from employment by claimant's volitional choice, and disqualification therefore unwarranted).

We agree with the Panel that an involuntary separation was not demonstrated here. Contrary to claimant's argument, the hearing officer did not make any evidentiary finding, implicitly or otherwise, that claimant was unable to continue working at the time of her resignation, nor would the record support any such finding.

Rather, the record shows that, notwithstanding the health problems, claimant had been working until she abruptly quit after a confrontation with her supervisor. The hearing officer also did not find, and the record does not show, that claimant's job was in any imminent jeopardy from her attendance deficiencies stemming from the health problems. To the contrary, although claimant was to be given a written warning for having left early the previous day, the supervisor testified that claimant was not going to be discharged over the incident, and claimant acknowledged that she was not told her job was in jeopardy at that point.

On this record, we perceive no error in the Panel's ruling. Rather, we conclude that, based on the established findings of evidentiary fact, the Panel properly ruled that claimant was responsible or "at fault" for her separation by her volitional choice to quit under the circumstances shown, notwithstanding the health problems. We further agree with the Panel that the factual findings and the record support the conclusion that claimant quit this employment for subjective, personal reasons which do not provide an objective basis for an award of benefits.

Thus, the Panel's ruling imposing a disqualification from benefits pursuant to § 8-73-108(5)(e)(XXII) will not be disturbed on review. See § 8-74-107(6), C.R.S.1997; Richards v. Winter Park Recreational Ass'n, supra; Board of Water Commissioners v. Industrial Claim Appeals Office, supra; see also Ward v. Industrial Claim Appeals Office, 916 P.2d 605 (Colo.App.1995).

The Panel's order is affirmed.

Plank and Marquez, JJ., concur.

Ralph W. Collins, Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado, and L.P.W., Incorporated, Respondents.

No. 90CA0810.

813 P.2d 804

Colorado Court of Appeals,

Div. III.

Feb. 28, 1991.

Rehearing Denied March 28, 1991.

Certiorari Denied July 29, 1991.

Pikes Peak Legal Services, Leo L. Finkelstein, Colorado Springs, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Carol A. Finley, Asst. Atty. Gen., Denver, for respondent Industrial Claim Appeals Office.

No appearance for respondent L.P.W., Inc.

METZGER, Judge.

Ralph W. Collins, claimant, seeks review of a final order of the Industrial Claim Appeals Office (Panel) which disqualified him from the receipt of unemployment benefits. We affirm.

Claimant worked as a paving crew foreman for L.P.W., Incorporated, a paving company. In March 1989, because of an economic downturn, the employer reduced the wages of all employees by 10 percent and increased the employee contribution amount for health insurance coverage. On or about April 30, 1989, claimant quit because he had been offered what he considered to be a better job with another paving company. In September 1989, he separated from employment with that company. On October 23, 1989, he filed a claim for unemployment compensation.

The hearing officer found, among other things, that claimant did not meet the criteria for a full award pursuant to Sec. 8-73-108(4)(f), C.R.S. (1990 Cum.Supp.) and disqualified him from the receipt of benefits pursuant to Sec. 8-73-108(5)(e), C.R.S. (1990 Cum.Supp.). The Panel affirmed.

I.

Claimant argues that when he quit his job with L.P.W. in March 1989 he satisfied the criteria of Sec. 8-73-108(4)(f) as it then existed, and therefore, he would have been entitled to benefits at that time. Consequently, he argues, when the Panel applied the amended version of Sec. 8-73-108(4)(f) to deny him benefits, it improperly applied the statute retrospectively in violation of Colo. Const. art. II, Sec. 11. We disagree.

Before July 1, 1989, a worker who quit to accept a better job was entitled to a full award of benefits. See Sec. 8-73-108(4)(f), C.R.S. (1986 Repl.Vol. 3B). However, by an amendment effective July 1, 1989, the General Assembly changed the statute to provide that only construction workers who quit to accept better construction jobs under certain circumstances were entitled to an award of full benefits. See Colo.Sess.Laws 1989, ch. 72 at 427-28. By virtue of that amendment, all other workers who quit to accept other jobs could no longer seek benefits on that basis. Colo.Sess.Laws 1989, ch. 72 at 427-28.

Colo. Const. art. II, Sec. 11, prohibits any law "retrospective in its operation." A statute operates retrospectively if it impairs vested rights, imposes a new duty, or attaches a new disability in respect to transactions already past. Martin v. Board of Assessment Appeals, 707 P.2d 348 (Colo.1985).

A statute is not retrospective merely because some of the facts upon which it operates occurred before its adoption. See Dailey, Goodwin & O'Leary, P.C. v. Division of Employment, 40 Colo.App. 256, 572 P.2d 853 (1977); Tucker v. Claimants in re Death of Gonzales, 37 Colo.App. 252, 546 P.2d 1271 (1975).

Claimant does not contend that he was a construction worker. And, his right to seek unemployment benefits, to which the Panel applied the amended version of Sec. 8-73-108(4)(f), did not accrue until September 1989, one week after claimant became unemployed from his job with the second paving company. See Baldwin v. Industrial Claim Appeals Office, 813 P.2d 807 (Colo.App.1991). This was well after the July 1, 1989, effective date of the amended version of Sec. 8-73-108(4)(f). Consequently, there was no attempt to attach a new disability to a past transaction.

Additionally, according to the provisions of Sec. 8-73-108(4)(f), as it existed prior to the July 1, 1989, amendment, quitting one job for what a claimant considered to be a better job was only one of many criteria which a claimant was required to satisfy in order to be entitled to benefits. Consequently, pursuant to the previous version of Sec. 8-73-108(4)(f), entitlement to benefits based on a separation from employment because of acceptance of a better job could not be determined until there had been a separation from the better job. See Sec. 8-73-108(4)(f)(VII), C.R.S. (1986 Repl.Vol. 3B).

Therefore, contrary to claimant's argument, his right, if any, to benefits based on his separation from L.P.W. in March 1989 did not "accrue" at that time. Any entitlement to further benefits could not have been known or established until one week after he separated from his "better" job in September 1989. Only then could a determination be made whether claimant satisfied all the criteria of the previous version of Sec. 8-73-108(4)(f). We therefore reject claimant's argument that he was entitled to benefits in March 1989, simply because he quit his job at L.P.W. for what he considered to be a better job.

II.

We also disagree with claimant's related contention that he was erroneously determined to be ineligible for benefits because of conduct that was not his fault, in contravention of Sec. 8-73-108(1)(a), C.R.S. (1986 Repl.Vol. 3B). Claimant notes that, at the time he voluntarily terminated his employment with L.P.W. in March, 1989, the version of Sec. 8-73-108(4)(f) then in effect would have allowed him to receive benefits if he remained at his better job for at least 90 days before termination. Therefore, he argues, the Panel's application of the amended version of Sec. 8-73-108(4)(f) effectively transformed conduct which was not fault into conduct which was fault, thus violating the prohibition against retrospective legislation. We disagree.

As used in the statutory scheme governing unemployment, "fault" is a term of art. In determining a claimant's entitlement to benefits, it is defined and applied as a factor separate and apart from the qualifying and disqualifying sections found at Sec. 8-73-108(4) and (5), C.R.S. (1986 Repl.Vol. 3B). See Gonzales v. Industrial Commission, 740 P.2d 999 (Colo.1987); Zelingers v. Industrial Commission, 679 P.2d 608 (Colo.App.1984); Sec. 8-73-108(1)(a), C.R.S. (1986 Repl.Vol. 3B). Consequently, the qualifying and disqualifying sections are not couched in terms of "fault."

Instead, "fault," which has been defined as a volitional act or the exercise of some control in light of the totality of the circumstances, is used as a factor to determine whether the claimant or the employer is responsible overall for the claimant's separation from employment. Gonzales v. Industrial Commission, supra. Even if the findings of the hearing officer support the application of one of the disqualifying sections, a claimant may still be entitled to benefits if the totality of circumstances supports the conclusion that claimant was not "at fault" in his separation. See Gonzales v. Industrial Commission, supra. Given this statutory scheme, we therefore find no merit to claimant's argument that application of the amended version of Sec. 8-73-108(4)(f) turned his concededly volitional conduct into "fault" as it has been defined and applied in the unemployment act.

III.

Claimant also contends that the Panel erred in failing to award him benefits pursuant to Sec. 8-73-108(4)(d), C.R.S. (1986 Repl.Vol. 3B) (quit following substantial, unfavorable change in working conditions). We find no error.

Section Sec. 8-73-108(4)(d) provides that a claimant may be awarded full benefits if he or she quits because of substantial changes in working conditions if the changes are substantially less favorable to the claimant. However, the statute also provides that no change in working conditions shall be considered substantial if it is determined by the Division of Employment that the conditions prevailing after the change are those generally prevailing for other workers performing the same or similar work.

Here, the hearing officer made a specific finding that changes similar to those imposed on claimant were made in the rates of pay and the working conditions for all other persons working for L.P.W. at that time. He also determined that the change occurred due to a general slowdown in the Colorado Springs economy.

Furthermore, the hearing officer specifically found that claimant had accepted the changes. See Jennings v. Industrial Commission, 682 P.2d 518 (Colo.App.1984). Claimant testified that he agreed to remain as an employee unless "something else came along." There is no evidence that claimant protested these reductions, or commenced any legal proceedings. Cf. Nimmo v. Town of Monument, 736 P.2d 435 (Colo.App.1987). He did not seek other employment, and he accepted the offered employment with the second paving company because he considered it to be a better job.

These findings, supported by substantial evidence, may not be disturbed on review. See Mohawk Data Sciences Corp. v. Industrial Commission, 660 P.2d 922 (Colo.App.1983). Consequently, the Panel's refusal to award claimant benefits pursuant to Sec. 8-73-108(4)(d) was not error.

IV.

For the same reasons, we reject claimant's contention that the findings more appropriately supported an award of benefits under Sec. 8-73-108(4)(e), C.R.S. (1986 Repl.Vol. 3B).

Order affirmed.

Ney and Ruland, JJ., concur.

Colorado Division of Employment and Training and

Industrial Claims Appeals Office, Petitioners, and

Longmont Bakery Company, Inc., Employer,

v.

Sharon K. Hewlett, Respondent.

No. 88SC86.

777 P.2d 704

Supreme Court of Colorado,

En Banc.

July 24, 1989.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Curt P. Kriksciun, Asst. Atty. Gen., Denver, for petitioners.

William E. Benjamin, Boulder, for respondent.

MULLARKEY, Justice.

We granted certiorari to review Hewlett v. Colorado Division of Employment and Training, 753 P.2d 791 (Colo.Ct.App.1987), in which the court of appeals set aside the order of the Industrial Claims Appeals Panel denying unemployment benefits to a claimant who asserted that she left her job because of on-the-job harassment. We conclude the court of appeals erred when it reversed the administrative decision and directed that the test in Ward v. Industrial Commission, 699 P.2d 960 (Colo.1985), be applied to determine whether the claimant was entitled to receive unemployment benefits. We reverse and remand the case to the court of appeals for further proceedings consistent with this opinion.

I.

On August 24, 1986, Sharon Hewlett resigned her employment with the Longmont Bakery and subsequently filed a claim for unemployment benefits with the Colorado Division of Employment and Training (division).1 The claim was denied by a deputy of the division pursuant to section 8-73-108(5)(e)(XXII), 3B C.R.S. (1986), on the basis that Hewlett had left her employment for personal reasons.

Pursuant to section 8-74-103, 3B C.R.S. (1986), Hewlett appealed the decision of the deputy and a hearing was held.2 The evidence indicates that both Hewlett and her husband were employed by the Longmont Bakery; she worked in the production unit and he was the sales supervisor. Hewlett had been employed for approximately two years when she resigned on the day after her husband was terminated from his position. Hewlett contended that she resigned because of harassment by her supervisor and co-employees. The harassment took the form of written and oral comments about other female employees working with Hewlett's husband. These comments, which suggested improper relationships between her husband and the female employees, continued over the course of approximately one year despite Hewlett's complaints to management. Hewlett testified that she would have left her job earlier, but that she tolerated the harassment because she believed that, if she resigned, her husband's position would be threatened.

The referee found that even though Hewlett was subjected to harassment not related to job performance, she tolerated the harassment for over a year and would have acquiesced to the harassment as long as her husband's employment continued. The referee ruled that Hewlett's separation from employment was caused by her husband's termination and not by the alleged harassment. Thus, the referee concluded that Hewlett resigned for personal reasons and was subject to the maximum reduction of benefits under section 8-73-108(5)(e)(XXII).

Hewlett appealed to the Industrial Claims Appeals Panel (panel), contending that she was entitled to a full award of benefits under section 8-73-108(4), 3B C.R.S. (1986) because her resignation was caused by personal harassment not related to job performance. The panel affirmed the referee's decision. It reasoned that, although Hewlett was harassed and did not acquiesce in the harassment, the direct and proximate cause of Hewlett's separation was her husband's termination from the bakery. Hence, the panel found that she resigned for personal reasons and was disqualified from receiving benefits.

Hewlett appealed the decision of the panel to the court of appeals pursuant to section 8-74-107, 3B C.R.S. (1986), claiming that the findings and conclusions of the panel were not supported by the evidence. The court did not address the substantial evidence issue but held that the referee and panel failed to apply the appropriate standard in evaluating the evidence presented at the hearing. The court stated:

The public policy of the state of Colorado generally prohibits employment discrimination based upon sex. See Sec. 24-34-402, C.R.S. (1982 Repl.Vol. 10). Federal policy contains similar prohibitions. See 42 U.S.C. Sec. 2000e-2; 29 C.F.R. 1604.11(a) (1987); Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Moreover, the provisions of Sec. 8-73-108(4)(o), C.R.S. (1986 Repl.Vol. 3B) discloses a public policy to assure that the work place is to remain free of "personal harassment by the employer not related to the performance of the job." While the improper conduct here did not take the stereotypical form of sexual harassment, it was based upon claimant's gender and marital status and, thus, arguably contravened public policy.

Hewlett, 753 P.2d at 792. The court then rephrased the issue as whether Hewlett's job separation resulted from the employer's violation of public policy or her personal choice. Id. The court of appeals concluded that "where such a 'dual motive' issue is presented, the burden of proof between the parties must be allocated, and the evidence must be considered, in the manner described in Ward v. Industrial Commission, 699 P.2d 960 (Colo.1984)." Id.

II.

A.

Several general principles are relevant to our analysis of this case. Foremost among these principles is our recognition that the Colorado Employment Security Act, section 8-70-101 to 8-82-105, 3B C.R.S. (1986), was designed to lighten the burden of unemployment on those who are involuntarily unemployed through no fault of their own. Under the law, unemployment benefits must be granted to an employee unless the job separation was due to one or more statutorily enumerated causes. Colorado Springs v. Industrial Comm'n, 749 P.2d 412, 414 (Colo.1988); Salida School Dist. R-32-J v. Morrison, 732 P.2d 1160 (Colo.1987). The Act is to be liberally construed to further its remedial and beneficent purposes. Harding v. Industrial Comm'n, 183 Colo. 52, 59, 515 P.2d 95, 98 (1973); Andersen v. Industrial Comm'n, 167 Colo. 281, 284, 447 P.2d 221, 223 (1968). We also emphasize that the unemployment law is intended to provide a speedy determination of eligibility through a simplified administrative procedure. See Salida School Dist., 732 P.2d at 1165 (hearing designed to adjudicate promptly narrow issue of law and to grant a limited remedy to unemployed worker). Claimants and employers frequently appear pro se before adjudicators who need not be attorneys. "The matter in controversy is small and the legal issues are limited, and consequently, the hearings are often informal." Id. at 1164.

Procedurally, the claimant has the initial burden of proof to establish a prima facie case of eligibility for benefits. City & County of Denver v. Industrial Comm'n, 756 P.2d 373, 380 (1988); Duenas-Rodriguez v. Industrial Comm'n, 199 Colo. 95, 97, 606 P.2d 437, 438 (1980); Bartholomay v. Industrial Comm'n, 642 P.2d 50 (Colo.Ct.App.1982). If the initial burden of the claimant is met, the burden shifts to the employer to establish the statutory disqualification for benefits. City & County of Denver, 756 P.2d at 380; City of Arvada v. Industrial Comm'n, 701 P.2d 623, 624 (Colo.Ct.App.1985). A decision of the panel may not be set aside where there are findings of fact supported by substantial evidence. Gonzales v. Industrial Comm'n, 740 P.2d 999, 1001 (Colo.1987).

B.

With this background, we turn to the issue before us. Both parties argue that Ward does not apply to this case. We agree.

The Ward analysis applies when an unemployment claimant contends that her separation from government employment resulted from her assertion of a constitutionally protected

right, e.g., her first amendment right of free speech. In such a case, the three factor test of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), is used to determine whether the claimant is entitled to unemployment benefits. Ward, 699 P.2d at 964-65. The Mt. Healthy test requires a plaintiff to prove by a preponderance of the evidence that her conduct which led to her employment discharge was constitutionally protected and that the conduct was a "substantial" or "motivating" factor in the decision to terminate her employment. If the plaintiff carries that burden of proof, the employer must show that it would have reached the same decision in the absence of the protected conduct. Mt. Healthy, 429 U.S. at 287, 97 S.Ct. at 576. The Mt. Healthy test was followed in Ward because the claimant was a state employee and the focus of the case was "whether constitutionally protected activity has been used by a state employer to justify a reduction of unemployment benefits." Ward, 699 P.2d at 964-65.

In the case now before us, Ward is not relevant. Hewlett was not a government employee, Longmont Bakery is not a government employer and Hewlett does not contend that she was compelled to leave her employment because she engaged in constitutionally protected conduct.

The court of appeals found it necessary to apply the Mt. Healthy test adopted in Ward because public policy prohibits gender-based harassment in employment and because Hewlett had mixed motives for her resignation. In our view, the court of appeals erred when it extended the Ward analysis to this case because the statute itself addresses the issues. An employee who quits her job because of personal harassment is entitled to receive unemployment benefits by the express terms of section 8-73-108(4), which states:

An individual separated from a job shall be given a full award of benefits if any of the following reasons and pertinent conditions related thereto are determined by the division to have existed. The determination of whether or not separation from employment shall result in a full award of benefits shall be the responsibility of the division. The following reasons shall be considered along with any other factors which may be pertinent to such determination:

(o) Quitting employment because of personal harassment not related to the performance of the job.

Gender-based harassment is encompassed within the more general term "personal harassment" and a claimant who carries her burden of proving that she quit her job because of personal harassment will receive unemployment benefits.

A claimant is not disqualified for benefits under section 8-73-108(5)(e)(XXII) (quitting for personal reasons) if she is otherwise eligible for benefits under one of the provisions of section 8-73-108. Section 8-73-108(5)(e) states:

[I]f a separation from employment occurs for any of the following reasons, the employer from whom such separation occurred shall not be charged for benefits which are

attributable to such employment and, because any payment of benefits which are attributable to such employment out of the fund as defined in section 8-70-103(13) shall be deemed to have an adverse effect on such employer's account in such fund, no payment of such benefits shall be made from such fund:

(XXII) Quitting under conditions involving personal reasons which do not, under other provisions of this section, provide for an award of benefits.

Thus, an employee who proves that she quit her job because of personal harassment is not disqualified under section 8-73-108(5)(e)(XXII) because personal harassment is a statutory ground for the award of benefits. Personal harassment need not be the sole factor in her decision to quit because section 8-73-108(5)(e)(XXII) is a residuary provision requiring disqualification only if no other provision permits an award.

The Minnesota Court of Appeals reached the same conclusion in Dura Supreme v. Kienholz, 381 N.W.2d 92 (Minn.App.1986), where an unemployment claimant resigned her job after being sexually harassed and the employer asserted that her resignation was motivated by her dissatisfaction with the postponement of the Christmas party and lack of cost-of-living increases. The court awarded benefits to the claimant, stating that sexual harassment attributable to the employer need not be the sole reason for termination. Id. at 96. See also Curry v. Gatson, 376 S.E.2d 166, 169 (W.Va.1988) ("[I]f an employee is sexually or racially harassed at the workplace and this discriminatory treatment would cause a reasonably prudent person to resign, such employee is not disqualified from receiving unemployment compensation benefits upon resignation . . . .").

Because of its disposition of the case, the court of appeals did not address the question of whether substantial evidence supported the panel's decision. Accordingly, we reverse the court of appeals' decision and remand the case to that court with directions to decide that issue.

Footnotes

1. Section 8-73-102, 3B C.R.S. (1986) provides a deputy designated by the director of the division will review the claim of a party along with pertinent information submitted by the employer and issue a decision. The decision will set forth findings of fact, conclusions of law and an order.

2. Section 8-73-103 provides in relevant part:

(1) Any interested party who is dissatisfied with a deputy's decision may appeal that decision and obtain a hearing covering any issue relevant to the disputed claim. The issue of a claimant's availability will be relevant to the extent set forth in section 8-73-107(1)(c)(I)(A).

(3) The hearing officer, after affording all interested parties a reasonable opportunity for a fair hearing in conformity with the provisions of this article and the regulations of the

division, shall make a decision on each relevant issue raised, including findings of fact, conclusions of law, and an order.

Colorado State Judicial Department, Petitioner,

v.

Industrial Commission of the State of Colorado (Ex-Officio

Unemployment Compensation Commission of Colorado), and

Joseph V. Medina, employee, Respondents

No. 80CA1274

630 P.2d 102

Colorado Court of Appeals,

Div. I.

May 14, 1981

J. D. MacFarlane, Attorney General, Richard F. Hennessey, Deputy Attorney General, Mary J. Mullarkey, Special Assistant Attorney General, Deanna E. Hickman, Assistant Attorney General, Denver, Colorado, Attorneys for Petitioner.

J.D. MacFarlane, Attorney General, Richard F. Hennessey, Deputy Attorney General, Mary J. Mullarkey, Special Assistant Attorney General, Robert S. Hyatt, Assistant Attorney General, Denver, Colorado, Attorneys for Respondent, Industrial Commission of Colorado.

John R. Naylor, Henry J. Geisel, Pueblo, Colorado, Attorneys for Respondent, Joseph V. Medina.

SILVERSTEIN, Judge.*

Petitioner, Colorado State Judicial Department (Department), seeks reversal of a final order of the Industrial Commission which awarded respondent Joseph V. Medina full unemployment compensation benefits which follow his discharge by the Department. We affirm.

The facts are undisputed. Medina was discharged because of excessive absenteeism. The Department admitted that all of Medina's absences were the result of illness. The major symptom of that illness was pain stemming from a work-related back injury.

The referee determined that Medina was discharged because of absenteeism and disqualified him from benefits for a period of twelve weeks, pursuant to § 8-73-108(5)(x), C.R.S. 1973 (1980 Cum. Supp.) which provide for reduced benefits if the

separation is "for . . . . excessive . . . . absenteeism . . . . unless such failure is attributable to factors listed in paragraph (j) of subsection (4) of this section." Section 8-73-108(4)(j), C.R.S. 1973 (1980 Cum. Supp.) provides that an individual separated from a job shall receive full benefits if the separation occurred because of the employee's "being physically or mentally unable to perform the work . . . ."

On review, the Industrial Commission found that "the controlling factor in this case is the physical inability of the claimant to perform work." It therefore awarded full benefits. Petitioner contends that being "physically unable" does not include an inability to work which results from an "illness" such as Medina's. We do not agree.

Physical inability to work has been defined as the inability to perform the labor, or equally remunerative work, that an injured person was engaged in at the time of his injury. Keith v. Chicago B. & Q. R.R., 82 Neb. 12, 116 N.W. 957 (1908); see Hagman v. Equitable Life Assur. Soc., 214 Ky. 56, 282 S.W. 1112 (1926). Here, the evidence is undisputed that, because of Medina's condition, there were days when he could not get out of bed, or could not remain in either a standing or sitting position for sustained periods. Hence, at such times, he was physically unable to perform the work for which he was employed, and the section relied on by the Commission is applicable.

When two sections of the Unemployment Compensation Act § 8-73-101, et seq., C.R.S. 1973, are pertinent, the Commission has wide latitude in determining which section it will apply. Mattison v. Industrial Commission, 33 Colo. App. 203, 516 P.2d 1143 (1973). And where, as here, its decision is supported by the evidence, that decision will not be disturbed. Morrison Road Bar, Inc. v. Industrial Commission, 138 Colo. 16, 328 P.2d 1076 (1958).

Order affirmed.

Chief Judge Enoch and Judge Pierce concur.

* Retired Court of Appeals Judge sitting by assignment of the Chief Justice under provisions of the Colo. Const., Art. VI, Sec. 5(3), and § 24-51-607(5), C.R.S. 1973 (1980 Cum. Supp.).

COLORADO COURT OF APPEALS **2012 COA 148**

Court of Appeals No. 12CA0062
Industrial Claim Appeals Office of the State of Colorado
DD No. 17029-2011

Communications Workers of America 7717, n/k/a Communications Workers of America, Local 7750,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Thomas W. Costello,

Respondents.

ORDER AFFIRMED

Division I
Opinion by JUDGE J. JONES
Taubman and Vogt*, JJ., concur

Announced August 30, 2012

Rosenblatt & Gosch, PLLC, Richard Rosenblatt, Greenwood Village, Colorado, for Petitioner

John W. Suthers, Attorney General, Tricia A. Leakey, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

No Appearance for Respondent Thomas W. Costello

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2011.

¶ 1 Petitioner, Communications Workers of America 7717, now known as Communications Workers of America, Local 7750 (employer), seeks review of a final order of the Industrial Claim Appeals Office (Panel) affirming a hearing officer's decision determining that respondent, Thomas W. Costello (claimant), was entitled to an award of unemployment compensation benefits. We affirm the Panel's order.

I. Background

¶ 2 From 2003 until February 2011, claimant worked part time for employer serving as union president. He was supervised by employer's executive board. Claimant also worked full time for another employer (Qwest).

¶ 3 The hearing officer found that when the union wanted claimant to work on union business during times that he would otherwise be working for Qwest, employer paid him the equivalent wage he would have received from Qwest "to make up for the fact that although he was given time off work [by Qwest] to conduct union activities, he was not paid [by Qwest for that time]."

¶ 4 The hearing officer also found that claimant was separated

from this employment when employer merged with another local union chapter, leaving no further available work for claimant. The hearing officer found no persuasive evidence that claimant should be disqualified from receiving benefits based on the reason for the separation, or that employer was exempt from responsibility for paying benefits under the circumstances.

¶ 5 On review to the Panel, employer argued that the money it paid to claimant did not constitute "wages" under the statutory scheme and that, consequently, claimant was not entitled to receive benefits. Employer further argued that claimant was not eligible to receive benefits because he still had his full-time job with Qwest and, therefore, had not suffered any wage loss.

¶ 6 The Panel concluded that the nature of the payments employer made to claimant did not exempt it from responsibility for paying benefits. Regarding claimant's alleged ongoing work for Qwest, the Panel concluded that was an eligibility issue not properly before it. Accordingly, the Panel affirmed the hearing officer's decision.

II. Standards of Review

¶ 7 "We are bound by the hearing officer's findings of evidentiary facts if they are supported by substantial evidence in the record." *Harbert v. Indus. Claim Appeals Office*, 2012 COA 23, ¶ 7. However, we review an agency's conclusions, including its interpretation of statutes, de novo. *See Benuishis v. Indus. Claim Appeals Office*, 195 P.3d 1142, 1145 (Colo. App. 2008); *see also Bell v. Indus. Claim Appeals Office*, 93 P.3d 584, 586 (Colo. App. 2004) (appellate court reviews de novo the Panel's ultimate legal conclusions). We also review de novo the hearing officer's and the Panel's ultimate conclusions of fact. *See Harbert*, ¶ 8; *see also Federico v. Brannan Sand & Gravel Co.*, 788 P.2d 1268, 1272 (Colo. 1990) (ultimate conclusions of fact are conclusions of law or mixed questions of law which determine the parties' rights and liabilities and which are generally phrased in the language of the controlling statute or legal standard).

III. Analysis

¶ 8 Employer contends that the hearing officer and the Panel erred in awarding claimant benefits based on this job separation. Employer continues to assert that an award was improper because

the amounts it paid claimant were not "wages" and because claimant suffered no actual wage loss from the separation. We are not persuaded to disturb the rulings of the hearing officer and the Panel.

A. Employer's Payments to Claimant Were Statutory "Wages"

¶ 9 As a threshold matter, we note that employer is not contending that it was not a statutory "employer" under section 8-70-113, C.R.S. 2011. Nor does employer appear to be arguing specifically that the services claimant provided to the union were not "employment" as broadly defined under section 8-70-115(1)(b), C.R.S. 2011. That section provides that

> service performed by an individual for another shall be deemed to be employment, irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the division that such individual is free from control and direction in the performance of the service, both under his contract for the performance of service and in fact; and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.

¶ 10 Instead, employer contends that payments it made to claimant were not "wages" under the statutory scheme, and that absent payment of such wages, claimant cannot be awarded benefits.

¶ 11 We agree that a claimant must have been paid statutory "wages" in order to receive benefits. *See* § 8-73-102(1)(a), C.R.S. 2011 (providing that eligible unemployed individuals are paid benefits at a rate based on "wages paid for insured work" during a specified period); *see also* § 8-73-104(1), C.R.S. 2011 (providing for computation of "wage credits" based on wages for insured work). However, based on the hearing evidence, we are not persuaded the hearing officer or the Panel erred in concluding that employer's payments to claimant were wages.

¶ 12 Section 8-70-141(1)(a), C.R.S. 2011, defines "wages" as "[a]ll remuneration for personal services." In this context, "services" means actions "done for the benefit or at the command of another." *Magin v. Div. of Emp't*, 899 P.2d 369, 370 (Colo. App. 1995) (quoting *Weld Cnty. Kirby Co. v. Indus. Comm'n*, 676 P.2d 1253, 1256 (Colo. App. 1983)). We must construe the unemployment act liberally to further its remedial and beneficent purposes. *See Colorado Div. of Emp't & Training v. Hewlett*, 777 P.2d 704, 707 (Colo. 1989); *Hopkins v. Indus. Claim Appeals Office*, ___ P.3d ___, ___ (Colo. App. No. 11CA0239, Dec. 22, 2011) (*cert. granted* August 27, 2012).

¶ 13 Here, the undisputed evidence established that claimant provided personal services to employer by performing work as its president. The undisputed evidence further established that employer provided remuneration or payments to claimant. Employer's own witness testified that, to receive the payments from employer, individuals such as claimant had to "fill out a voucher" indicating the amount of time they had worked for the union.

¶ 14 At the hearing, employer's sole witness characterized the payments to claimant as "wages" and also testified that employer reported the payments as wages for tax purposes:

> Hearing Officer: Okay . . . you . . . okay, you may not know this in your position, but my question to you is did the union report wages for the claimant?
>
> Witness: Yes.
>
> Hearing Officer: And why was that?
>
> Witness: Because we . . . we did pay . . . we did . . . we did pay wages and we believed . . . it's a legal responsibility to report those wages.
>
> Hearing Officer: So you paid wages?
> Witness: Yes.

¶ 15 Employer, nevertheless, contends that its payments to claimant were not for the personal services he provided but were,

instead, simply to replace the wages claimant lost because he was not working for Qwest. It relies on evidence indicating that claimant was only paid for his union services if he actually lost time from Qwest.

¶ 16 Employer's assertion that the payments to claimant were solely "wage replacement" and not premised largely on the fact that claimant was providing services to the union ignores the functional reality of the arrangement and simply begs the question of why employer was replacing claimant's lost wages. That employer may not have been obligated to pay claimant in every instance, or for every hour, he provided services, does not alter the fundamental reality that it did pay claimant whenever he performed personal services for the union during his scheduled work hours for Qwest.

¶ 17 Moreover, not treating employer's payments as wages could unfairly penalize claimant if he later became entitled to receive benefits based on a job separation from Qwest. In those circumstances, not treating employer's payments as statutory wages could potentially reduce both claimant's weekly benefit amount and his total amount of available benefits. *See* § 8-73-

102(1)(a) (describing weekly benefit amount formula that is based on "wages paid" in particular quarters of a claimant's base period); *see also* § 8-73-102(2), C.R.S. 2011 (describing alternate weekly benefit formula for certain claimants that is based on "total wages paid" for insured work during base period); § 8-73-104(1) (limiting total benefits available in any "benefit year" to lesser of twenty-six times a claimant's weekly benefit amount, or one-third of a claimant's wage credits paid during base period).

¶ 18 Based on the undisputed evidence that claimant was required to demonstrate that he performed services for the union to receive payment, and that all payments employer made to claimant directly corresponded to actual time he worked for the union, we perceive no error in the conclusion that employer's payments were "for" the personal services claimant provided and, therefore, constituted "wages" under the statutory scheme. *See Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Emps. & Helpers Local No. 695 v. Labor & Indus. Review Comm'n*, 452 N.W.2d 368, 372-73 (Wis. 1990) ("lost time" payments by union to workers for work missed while performing union business were remuneration

for personal services and, hence, "wages" for unemployment purposes); *Int'l Union, United Auto., Aircraft & Agric. Implement Workers of Am., Local 180, C.I.O. v. Indus. Comm'n*, 21 N.W.2d 711, 714 (Wis. 1946) (fact that union paid workers sum fairly equal to amount they would have earned working in their full-time jobs and considered payment as mere reimbursement for lost time in regular employment did not take payments outside definition of "wages" under unemployment act); *see also Commc'ns Workers of Am., Local 3107 v. Florida Indus. Comm'n*, 174 So. 2d 751, 753, 755 (Fla. Dist. Ct. App. 1965) (where workers performed part-time services for union, union's payments to workers based on time lost from their jobs with telephone company were "wages" for unemployment purposes).

¶ 19 Employer relies on *United Steelworkers of America, Local Union 5790 v. Industrial Commission*, 458 S.W.2d 716, 719-20 (Mo. Ct. App. 1970), in which the Missouri Court of Appeals concluded that, for unemployment compensation purposes, a union that paid members who performed union services was not an "employer" of those members. The court also concluded that the amounts paid to

the members were not wages, relying largely on the fact that the union paid the members only for time in which they were losing pay from their regular employment. *Id.*

¶ 20 We decline to follow *United Steelworkers*, for several reasons. First, much of the dispute in that case involved whether an employment relationship existed between the union and its members under Missouri law which, unlike Colorado's scheme, more narrowly defined "employment" as "services performed for wages or under any contract of hire." *Id.* at 720. In contrast, here, as noted, employer does not dispute that it was a statutory "employer" under section 8-70-113, or that claimant's work for the union constituted "service performed by an individual for another," thereby bringing it within Colorado's expansive definition of "employment" under section 8-70-115(1)(b).

¶ 21 Second, in our view, the *United Steelworkers* court failed to sufficiently consider the fact that to receive any payment from the union, members were required to have performed union services. We conclude that this requirement creates a sufficient nexus between the services performed and the payment. *See Drivers,*

Salesmen, 452 N.W.2d at 372-73 (when union stewards took time off from regular work to perform union services, "nexus" between those services and payments was "apparent" such that the payments could be deemed remuneration for the services).

¶ 22 Finally, the *United Steelworkers* decision did not address whether failing to treat the payments as wages could potentially result in a reduced unemployment benefit available to the union members if they became separated from their regular jobs.

B. Claimant's Alleged Lack of Resulting Wage Loss

¶ 23 Employer contends, in the alternative, that even if the payments it made to claimant were statutory "wages," claimant is ineligible to receive benefits because he suffered "no wage loss" upon his job separation as union president.

¶ 24 Insofar as this contention is merely a different way of asserting that employer's payments to claimant were not "wages" under the statutory scheme, we have already addressed and rejected that contention.

¶ 25 To the extent employer is asserting that claimant suffered no wage loss because, following the separation, he either continued

working full time for Qwest, or received disability benefits, we agree with the Panel that these are eligibility issues that were neither litigated, nor addressed and resolved, in this entitlement proceeding. Consequently, those issues are not properly before us on review. *See Debalco Enters., Inc. v. Indus. Claim Appeals Office*, 32 P.3d 621, 624 (Colo. App. 2001) (entitlement and eligibility issues are determined in separate proceedings and should not be intermingled, and issue of whether claimant continued working for new company, and effect of any such employment on unemployment claim, were eligibility issues not properly raised or reviewed in entitlement proceeding appeal).

¶ 26 The Panel's order is affirmed.

JUDGE TAUBMAN and JUDGE VOGT concur.

The Cottrell Clothing Company

v.

Bernard E. Teets, et al.

No. 18,930

139 Colo. 558; 342 P.2d 1016
Supreme Court of Colorado
En Banc

July 6, 1959

Mr. Joseph F. Little, for plaintiff in error.

Mr. Duke W. Dunbar, Attorney General, Mr. Frank E. Hickey, Deputy, Mr. James D. McKevitt, assistant, for defendants in error.

MOORE, Justice.

This cause is before us on writ of error to review the judgment of the district court of the City and County of Denver entered in proceedings which originated before the Executive Director of Employment Security on a claim for unemployment compensation.

The applicant was granted compensation without disqualification before the administrative agency. Upon review in the district court the award of the commission was modified to the extent that the maximum disqualification for benefits, amounting to ten weeks, was imposed upon claimant. The effect of the district court judgment was to make available to claimant a maximum of sixteen weeks compensation, instead of twenty-six weeks to which he would have been entitled except for his alleged misconduct. The employer, The Cottrell Clothing Company, seeks reversal contending that the act authorizing unemployment compensation to an employee who has been discharged for misconduct connected with his work, is unconstitutional.

There is no dispute in the pertinent facts which were before the trial court on stipulation. The applicant, Phillip Downare, was a clothes presser employed by Cottrell. The employer had purchased and installed clothes pressing machinery which Downare refused to use after being directed several times to do so. On the date when he was discharged the employer found five suits on the delivery rack containing alteration marks which the new equipment would have removed had it been used. The suits were not in fit condition to be delivered to customers. Thereupon Downare was discharged. He applied for unemployment compensation and his application was opposed by Cottrell. The claimant, although served with process in the district court action, did not enter an appearance and is not represented in this court.

Pertinent provisions of the Colorado Employment Security Act to which our attention is directed by counsel, are the following:

C.R.S. 1953, 82-1-2, contains the legislative declaration of public policy wherein we find this statement:

"The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves *to be used for the benefit of persons unemployed through no fault of their own.*" (Emphasis supplied.)

This section also uses the term "involuntary unemployment" and states that it is "a subject of general interest and concern which requires appropriate action by the legislature* * *."

Prior to 1957 the law provided that the maximum weekly benefit payments and the maximum period of weekly disqualifications were equal at twenty each. In 1957 the legislature amended C.R.S. '53, 82-4-4 to read in pertinent part as follows:

"Any otherwise eligible individual shall be entitled during any benefit year to a total amount of benefits equal to whichever is the lesser of twenty-six times his weekly benefit amount and one-third of his wage credits for insured work paid during his base period;* * *."

The 1957 amendment to 82-4-9 (1) reads in part as follows:

"(a) An individual shall be disqualified for benefits if the department finds that such individual has* * * left work voluntarily without good cause, or been discharged for misconduct connected with his work* * *."

"(b) Such disqualification shall be not less than one week nor more than ten consecutive weeks in addition to the waiting period,* * *."

C.R.S. '53, 82-7-1, creates the Unemployment Compensation Fund to which "contributions" must be made by employers who come within the provisions of the act. This section concludes with the following language: "All money in the fund shall be commingled and undivided."

C.R.S. '53, 82-6-3, requires that the administrative agency shall "maintain a separate account for each employer and shall credit his account with all contributions paid on his own behalf." After a fixed period of "contributions" to the fund on the part of an employer the amount thereof thereafter depends upon his benefit experience, that is to say, if his turnover of employees is large and numerous claims for compensation are made by his one-time employees, his "contribution," or tax, is higher. If no claims are shown by his "benefit experience" or if they are few, he may conceivably be relieved of further contributions to the fund, so long as required reserves in his account are available.

The complaint filed by the employer in the district court questions the constitutionality of the act which authorizes payment of sixteen weeks unemployment compensation to one who is discharged for misconduct connected with his work. The specific contentions are that the act: (a) deprives the employer of its property without due process of law; (b) authorizes the administrative agency to expend moneys for purposes other than those for which they were intended; (c) grants irrevocable privileges to persons who quit their employment or are discharged for misconduct; (d) impairs the obligation of the contract alleged to exist between the employer and the State of Colorado; (e) permits the taking of private property by the State of Colorado for private use without consent of the owner; (f) allows an expenditure of moneys of the employer without affording it an opportunity to object thereto, or to pursue judicial remedies to restrain such taking; (g) that the act improperly delegates judicial powers to an administrative agency; and (h) that the procedures prescribed by article 5, chapter 82, for filing of claims and the determination thereof, violate the Colorado constitution in that they establish burdensome, expensive and time-consuming procedures which, in effect, nullify and discourage appeals by persons adversely affected by the orders of the administrative agency.

Questions to be Determined.

First: Is the matter of compensation for unemployment a subject so related to the public welfare as to authorize the general assembly, in the exercise of the police power, to enact a law directing the payment of benefits to unemployed persons and levying a tax upon employers to defray the cost thereof?

This question is answered in the affirmative. The line of demarcation between a proper exercise of the police power and an infringement of constitutional guarantees is not always well defined. We deem it advisable to direct attention to some fundamentals in this connection, and to that end, we quote from the opinion in *In Re Interrogatories*, 97 Colo. 587, 52 P.2d 663, as follows:

"Police power, the genesis of the General Assembly's action, is inherent in government, and was well known to the common law. 4 Blackstone's Comm. 162. 'This power* * * has been said to be as broad as the public welfare. It is an inherent attribute of sovereignty with which the state is endowed for the protection and general welfare of its citizens,* * *.' *Rowekamp v. Mercantile-Commerce B. & T. Co.*, 72 F. (2d) 852, 858. (Circuit Court of Appeals, Eighth Circuit). 'All authorities agree that the Constitution presupposes the existence of the police power, and is to be construed with reference to that fact.' *Village of Carthage v. Frederick*, 122 N.Y. 268, 273, 19 Am. S.R. 490, 10 L.R.A. 178. The statute claiming our attention is the expression of that branch of the government having primary authority to determine what is requisite to promote and preserve health, safety and morals. *Smith v. People*, 51 Colo. 270, 117 Pac. 612; II Cooley's Constitutional Limitations (8th Ed.) p. 1231. Unless by its terms it imports evil, or is calculated to operate arbitrarily, oppressively or unreasonably, courts may not void the act. *McLean v. Arkansas*, 211 U.S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315. That in its operation a police measure may increase their labor, decrease the value of their property, or otherwise inconvenience individuals, does not make the act to offend. II Cooley's

Constitutional Limitations (8th Ed.) pp. 1228, 1231. By exercise of inherent police power, the sovereign, purposing to promote public health, may fairly and reasonably restrict the use of property. *Beveridge v. Harper & Turner Oil Tr. Co.*, 168 Okla. 609, 35 P.2d 435. The unrestricted privilege to engage in business or to conduct it as one pleases, is not guaranteed by the Constitution. *Nebbia v. New York*, 291 U.S. 502. 'A large discretion is necessarily vested in the legislature, to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.' II Cooley's Constitutional Limitations (8th Ed.) p. 1231. 'When the subject lies within the power of the state, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome.' *Sproles v. Binford*, 286 U.S. 374, 52 Sup. Ct. 581."

The consequences resulting from widespread unemployment have a very definite relation to the general welfare of the public. Through depressions of the past we have learned at first hand the nature and extent of the problems arising from unemployment, and everyone appreciates its profound influence upon the welfare of the people as a whole. As stated by the Supreme Court of the United States in *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 57 S.C. 877, 109, A.L.R. 1327, the available research material upon the subject shows:

"* * * that unemployment apparently has become a permanent incident of our industrial system; that it varies, in extent and intensity, with fluctuations in the volume of seasonal businesses and with the business cycle. It is dependent, with special and unpredictable manifestations, upon technological changes and advances in methods of manufacture, upon changing demands for manufactured products -- dictated by changes in fashion or the creation of desirable substitutes, and upon the establishment of new sources of competition.

"The evils of the attendant social and economic wastage permeate the entire social structure. Apart from poverty, or a less extreme impairment of the savings which afford the chief protection to the working class against old age and the hazards of illness, a matter of inestimable consequence to society as a whole, and apart from the loss of purchasing power, the legislature could have concluded that unemployment brings in its wake increase in vagrancy and crimes against property, reduction in the number of marriages, deterioration of family life, decline in the birth rate, increase in illegitimate births, impairment of the health of the unemployed and their families and malnutrition of their children.

* * *

"The end being legitimate, the means is for the legislature to choose. When public evils ensue from individual misfortunes or needs, the legislature may strike at the evil at its source. If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals. *Kelly v. Pittsburgh, supra*; *Knights v. Jackson*, 260 U.S. 12, 15; *cf. Mountain Timber Co. v. Washington*, 243 U.S. 219, 239-

240. 'Individual interests are aided only as the common interest is safeguarded.' *See Cochran v. Board of Education*, 281 U.S. 370, 375; *cf. Clark v. Nash*, 198 U.S. 361, 367; *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 608; *Noble State Bank v. Haskell*, 219 U.S. 104, 110."

Second: Does the act here in question violate the specific constitutional provisions to which our attention has been directed by counsel for the employer?

This question is answered in the negative. The main issue raised by the employer and the one chiefly argued by its counsel is that C.R.S. '53, 82-4-9 (1), which limits the disqualification for benefits to a maximum of ten weeks and thereby enables persons "disqualified" from benefits to nevertheless receive them for a period of sixteen weeks, deprives the employer of its property without due process of law. For the purpose of this discussion we assume that the employer, whose future rate of contribution may be increased if his "benefit experience" shows increased claims, has a property interest in the fund. We make it clear that we do not so decide, and again state that the premise is assumed solely for the purpose of discussion. Even so, we hold that there is no denial of due process of law. We deem it sufficient to cite as authority for this conclusion the language of the Supreme Court of the United States in *Carmichael v. Southern Coal Co., supra*, as follows:

"(b) Extension of Benefits. The present scheme of unemployment relief is not subject to any constitutional infirmity, as respondents argue, because it is not limited to the indigent or because it is extended to some less deserving than others, such as those discharged for misconduct. While we may assume that the state could have limited its award of unemployment benefits to the indigent and to those who had not been rightfully discharged from their employment, it was not bound to do so. Poverty is one, but not the only evil consequence of unemployment. Among the benefits sought by relief is the avoidance of destitution, and of the gathering cloud of evils which beset the worker, his family and the community after wages cease and before destitution begins. We are not unaware that industrial workers are not an affluent class, and we cannot say that a scheme for the award of unemployment benefits, to be made only after a substantial 'waiting period' of unemployment, and then only to the extent of half wages and not more than $15 a week for at most 16 weeks a year, does not effect a public purpose, because it does not also set up an elaborate machinery for excluding those from its benefits who are not indigent. Moreover, the state could rightfully decide not to discourage thrift. *Mountain Timber Co. v. Washington, supra*, 240. And as the injurious effects of unemployment are not limited to the unemployed worker, there is scope for legislation to mitigate those effects, even though unemployment results from his discharge for cause."

In the case of *W.H.H. Chamberlin, Inc. v. Andrews, et al.*, 271 N.Y. 1, 2 N.E. (2d) 22, the court, in considering issues similar to those in the instant case, stated:

"Whether or not the Legislature should pass such a law, or whether it will afford the remedy or the relief predicted for it, is a matter for fair argument but not for argument in a court of law. Here we are dealing simply with the power of the Legislature to meet a

growing danger and peril to a large number of our fellow citizens, and we can find nothing in the act itself which is so arbitrary or unreasonable as to show that it deprives any employer of his property without due process of law or denies to him the equal protection of the laws."

We have examined the references to other alleged violations of constitutional provisions and find nothing to justify a declaration that the act in question is unconstitutional.

The judgment of the trial court is affirmed.

The Cottrell Clothing Company

v.

Bernard E. Teets, et al.

No. 18,931

139 Colo. 567; 342 P.2d 1021
Supreme Court of Colorado
En Banc

July 6, 1959

Mr. Joseph F. Little, for plaintiff in error.

Mr. Duke W. Dunbar, Attorney General, Mr. Frank E. Hickey, Deputy, Mr. James D. McKevitt, Assistant, for defendants in error.

MOORE, Justice.

This cause originated before the Executive Director of Employment Security on a claim for unemployment compensation filed by one Judith Ann Ferrendelli.

Proceedings before the administrative agency resulted in an award of full benefits without disqualification. Upon review by the district court the award of full benefits was reversed and the court imposed the maximum disqualification permitted by C.R.S. 1953, 82-4-9 (1), as amended. Thus the unemployment compensation payable to claimant was reduced from twenty-six weeks to sixteen weeks.

The issues of law presented by the record in this case are identical with those determined in cause No. 18,930, decided this date, the only difference being that in the instant case the claimant voluntarily quit work to get married and be with her husband who was not a resident of Denver, whereas in cause No. 18,930 the claimant Downare was discharged from employment for misconduct connected therewith.

The arguments made by counsel for the employer in this case are identical with those presented in cause No. 18,930. Our opinion in that case is decisive of the issues in this cause.

The judgment is affirmed.

Marvin R. Couchman, Jr., Petitioner,

v.

Industrial Commission of the State of Colorado (Ex-officio

Unemployment Compensation Commission of Colorado), and

Martin Marietta Corporation, a Colorado corporation,

Respondents.

No. 73--113.

636 515 P.2d 636; 33 Colo.App. 116

Colorado Court of Appeals,

Div. II.

Oct. 24, 1973.

Betty L. Nordwind, Englewood, for petitioner.

John P. Moore, Atty. Gen., John E. Bush, Deputy Atty. Gen., Robert L. Harris, Asst. Atty. Gen., Denver, for respondents.

PIERCE, Judge.

This is a review from an order of the Industrial Commission denying the petitioner's claim for unemployment compensation benefits. The order of the Commission affirmed the decision of the referee which denied benefits on the ground that 'the claimant is not able and available for full-time work during regular normal working hours due to his restricted availability while attending class (at Arapahoe Community College).' The referee noted in his findings that claimant had been carrying approximately 10 hours of credit per week with some classes scheduled from 9:00 a.m. until 3:00 p.m. on some days. The record also indicates and the referee expressly found that 'for the past several years the claimant has worked the late evening shift from 3:00 p.m. until 11:00 p.m.' The only evidence taken at the hearing before the referee was testimony by the claimant himself to the effect that he was looking for similar 'second shift' work as a machinist; that he had been employed as a machinist working on the second shift for a period of seven to eight years; and that he has since accepted this type of employment.

The issue presented is whether the Industrial Commission correctly interpreted the 'availability' requirement of 1965 Perm.Supp., C.R.S. 1963, 82--4--7(4) where the claimant, although willing and able to work 'full time,' has, for purposes of obtaining a general education, restricted his availability to 'second shift' work. We hold that the evidence in the record before us is insufficient to support the Commission's conclusion, and remand the case to the Commission for further findings of fact.

In Industrial Commission v. Bennett, 166 Colo. 101, 441 P.2d 648, the court stated:

"Availability for work' and 'actively seeking work' are two of the eligibility conditions required to entitle a person to unemployment compensation. . . . Both or either of these conditions could be found to be lacking or restricted by full-time attendance at school, and such a finding would be a lawful basis for disallowing compensation. Inquiry therefore regarding any circumstance, including school attendance, which has a bearing upon eligibility conditions is not only proper but is required in the efficient administration of the Colorado Employment Security Act.'

The court did not rule that a full-time student, by attending classes during the normal working hours of the day, restricts his availability for employment. Rather, the opinion only points out that attending classes in an educational program unrelated to the claimant's employment is a proper consideration in determining the availability issue. Therefore, claimant's status as a student does not in itself make him unavailable for employment within the meaning of the statute. See Redmond v. Industrial Commission, Colo., 509 P.2d 1277, announced October 1, 1973; Colo.App., 509 P.2d 1277; Wiley v. Unemployment Compensation Board of Review, 195 Pa.Super. 256, 171 A.2d 810.

The fact that claimant has restricted his employment to particular hours of the day or to a specific shift must be considered within the context of the particular labor market in which he is seeking employment before a valid conclusion can be reached as to whether he has made himself unavailable for employment. Freeman, Able to Work and Available for Work, 55 Yale L.J. 123. Here, the Commission made no attempt to determine the extent of the job market open to claimant within the limits of his personally-imposed restrictions.

A determination of the availability for employment is one for which an all-inclusive rule cannot be stated, but rather must be made within the context of the factual situation presented by each case. Texas Employment Commission v. Hays, 360 S.W.2d 525 (Tex.). In the case before us, it is clear that claimant has subjected himself to a full voluntary and continuous exposure to the second shift job market. Upon obtaining additional information as to the existing condition of that particular job market, the Commission will then be in a position to determine whether or not the second shift job market provided sufficient job opportunities and reasonable prospects of suitable work for claimant's employment. See Industrial Commission v. Bennett, supra; Comment, Unemployment Insurance in Colorado--Eligibility and Disqualification, 25 Rocky Mt. L.Rev. 180.

The order of the Commission is set aside and the cause is remanded for further proceedings not inconsistent with this opinion.

Coyte and Ruland, JJ., concur.

Bruce M. Davis, Petitioner,

v.

The Industrial Claim Appeals Office of the State of Colorado

and Storage Technology Corporation, Respondents.

No. 95CA0326.

903 P.2d 1243

Colorado Court of Appeals,

Div. II.

Aug. 24, 1995.

Cornelius & Fisher, L.L.C., Gary A. Fisher, Boulder, for petitioner.

Gale A. Norton, Atty. Gen., Stephen K. ErkenBrack, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Kathleen Butler Denman, Asst. Atty. Gen., Denver, for respondent Industrial Claim Appeals Office.

Dwight C. Seeley, Louisville, for respondent Storage Technology Corp.

JONES, Judge.

Petitioner, Bruce M. Davis (claimant), seeks review of a final order of the Industrial Claim Appeals Panel (Panel) which disqualified him from the receipt of unemployment compensation benefits. We affirm.

The evidentiary facts are subject to little dispute. Claimant was discharged as a result of an incident which occurred in the employer's business lobby. Claimant had gone to the lobby to inform the security guard that a video camera was to be delivered for work purposes. Claimant later admitted that, when the security guard questioned claimant about whether he had proper authorization to bring the camera into the building, he became angry and upset. As found by the referee, claimant responded with a remark to the security guard that included a four-letter-word obscenity. Claimant apologized to the security guard shortly thereafter.

Later that afternoon, a co-worker who became aware of the incident informed claimant's supervisor about it. The supervisor then questioned the security guard, who informed him that she did not wish to pursue the matter or cause trouble for the claimant.

Sometime later, a visitor who had witnessed the incident wrote a letter to the chief executive officer of the company, complaining about claimant's conduct and quoting the specific language claimant used.

In an employee handbook provided to all employees upon their hiring, use of abusive language to fellow employees, customers, or to the general public is set forth as a major infraction which could warrant termination. Also, prior to this incident, claimant had been advised that his "use of abusive language" violated this standard of conduct and would not be tolerated, and he had been reprimanded for being excessively "vocal" in his disagreement with the organization of a project. Consequently, when supervisory representatives of the employer learned more completely about the facts of this incident from the visitor's letter, claimant was put on suspension and eventually terminated for violation of the company policy concerning use of abusive language.

Based on these findings, the hearing officer determined that claimant was aware of the standards of behavior he was expected to follow and concluded that claimant's behavior was "offensive," that he was responsible for his separation, and that he should be disqualified from the receipt of benefits pursuant to § 8-73-108(5)(e)(XIV), C.R.S. (1986 Repl. Vol. 3B). The Panel affirmed.

Claimant contends that the hearing officer failed properly to apply an objective standard in determining whether his behavior should disqualify him from the receipt of benefits. We disagree.

Section 8-73-108(5)(e)(XIV) provides for a claimant to be disqualified from the receipt of benefits if such claimant engages in rude, insolent, or offensive behavior not reasonably to be countenanced by a customer, supervisor, or fellow worker.

We have held in other cases involving entitlement to benefits that an objective standard is the appropriate measure for determining entitlement. See Rose Medical Center Hospital Ass'n. v. Industrial Claim Appeals Office, 757 P.2d 1173 (Colo. App. 1988) [concerning deliberate disobedience to reasonable instruction of supervisor pursuant to § 8-73-108(5)(e)(VI), C.R.S. (1986 Repl. Vol. 3B)]; see also Wargon v. Industrial Claim Appeals Office, 787 P.2d 668 (Colo. App. 1990) [concerning whether change in working conditions is substantial and, if so, whether substantial change is substantially less favorable to worker pursuant to § 8-73-108(5)(e)(I), C.R.S. (1986 Repl. Vol. 3B)]. We now hold that an objective standard is also the proper standard for determining whether a claimant has engaged in disqualifying behavior under § 8-73-108(5)(e)(XIV), C.R.S. (1986 Repl. Vol. 3B).

Thus, in assessing the reasonableness of an employer's termination of an employee for behavior implicating § 8-73-108(5)(e)(XIV), the Panel must consider the facts and circumstances of the individual case to determine, in the exercise of its independent judgment, whether a reasonable person in the position of a customer, supervisor, or fellow worker would have considered the employee's behavior to have been rude, insolent, or offensive such as not reasonably to be countenanced.

Claimant argues that application of the objective standard pursuant to § 8-73-108(5)(e)(XIV) requires two evidentiary findings here: that claimant "intended" to offend his co-worker and that his co-worker actually was offended. Since these two findings were not made by the hearing officer, claimant argues that he may not be disqualified under this subsection.

However, contrary to claimant's assertions, a requirement that these two findings be made before a claimant could be disqualified under § 8-73-108(5)(e)(XIV) would constitute the imposition of a subjective, rather than an objective, test for the application of this subsection. Rather, in assessing the evidence here pursuant to an objective standard to determine whether a claimant should be disqualified pursuant to this subsection, the issue is whether a reasonable person in the position of the fellow worker and others would have found claimant's action to be so rude, insolent, or offensive as not to be countenanced.

The hearing officer found that claimant's language and conduct were offensive. Further, we agree with the hearing officer's implicit conclusion that a reasonable person in the position of the security guard, and those within hearing range of the security guard, need not have countenanced the claimant's language and behavior. Thus, the hearing officer did not err in concluding that claimant was responsible for his separation and should be disqualified from the receipt of benefits under § 8-73-108(5)(e)(XIV). See Olsgard v. Industrial Commission, 190 Colo. 472, 548 P.2d 910 (1976).

We further reject claimant's argument that the hearing officer improperly attempted to disqualify him for violation of a company policy pursuant to § 8-73-108(5)(e)(VII), C.R.S. (1986 Repl. Vol. 3B) without making the requisite finding of serious damage. Any findings concerning claimant's knowledge of and violation of the company policy concerning acceptable behavior were made in the context of determining that claimant's behavior did not reasonably need to be condoned and warranted a disqualification pursuant to § 8-73-108(5)(e)(XIV).

Accordingly, the Panel's order is affirmed.

Criswell and Casebolt, JJ., concur.

John E. Davis, Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado; The Colorado Division of Employment and

Training; and Dependable Cleaners &

Shirt Laundry, Respondents.

No. 98CA2243.

982 P.2d 330

Colorado Court of Appeals,

Div. I.

May 27, 1999.

William E. Benjamin, Boulder, Colorado, for Petitioner.

Gale A. Norton, Attorney General, Martha Phillips Allbright, Chief Deputy Attorney General, Richard A. Westfall, Solicitor General, Jeannette Walker Kornreich, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office.

Beimford & Gleason, P.C., Richard J. Gleason, Denver, Colorado, for Respondent Dependable Cleaners & Shirt Laundry.

METZGER, Judge.

In this unemployment compensation case, petitioner, John E. Davis (claimant), seeks review of a final order of the Industrial Claim Appeals Office (Panel) which dismissed his administrative appeal from a hearing officer's adverse decision. Claimant's administrative appeal to the Panel was not timely filed, and the Panel ruled that good cause had not been shown for permitting the untimely appeal. We set aside the order and remand for further proceedings.

Claimant was employed part-time as a presser for respondent-employer, Dependable Cleaners and Shirt Laundry. Because he refused to take lunch breaks (after not having done so during his previous six years of employment), he was forced to resign.

Claimant then applied for unemployment benefits. A deputy of the Division of Employment and Training issued a decision disqualifying him from benefits pursuant to § 8-73-108(5)(e)(VI), C.R.S. 1998. The decision stated:

You were discharged for deliberate disobedience of a reasonable instruction. The instruction was normal for the job and was issued by proper authority. It is determined that you are responsible for the separation and a disqualification is being imposed.

The maximum benefits have been reduced by the amount attributable to this employment and you cannot be paid benefits for ten (10) weeks, from 08/09/98 through 10/17/98. After this time, you may claim any remaining benefits if you continue to meet all weekly eligibility requirements. The balance of your claim as of this mailing date is $152.00.

This decision becomes final unless a written appeal is filed within fifteen (15) calendar days from the 'date mailed' above. If you file an appeal on this decision, continue to mail your claim forms as instructed while the appeal is being processed.

Please see reverse side of this form for appeal information.

One of the paragraphs on the reverse side concerned filing a late appeal:

Appeals submitted beyond the 15-day limit must state the reason(s) why the appeal is late and the facts supporting the reasons for acceptance of appeal. If you fail to follow these steps, your appeal will be dismissed and no file material will be sent.

Claimant, pro se, timely appealed that decision. After a hearing, the referee determined claimant should be disqualified from receiving benefits but gave a different reason, i.e., dissatisfaction with standard working conditions pursuant to § 8-73-108(5)(e)(I), C.R.S. 1998. That decision stated, in pertinent part:

DECISION: It is determined that the claimant is responsible for the separation from this employment, and a disqualification is issued under § 8-73-108(5)(e)(I), C.R.S. Subject to the maximum amount permitted by federal law, the claimant's maximum benefits payable shall be reduced by the benefits attributable to this employer on this claim and/or any future claim. In addition, if this employment was the claimant's last employment prior to filing the initial or additional claim, there shall be a 10-week postponement of any benefits remaining payable. The referee modifies the deputy's decision and, as modified, affirms.

After an intervening statement concerning a claimant's possible liability for repayment of benefits, there appear two printed paragraphs under the heading of Appeal Rights. The first of these states as follows:

Within fifteen calendar days from the date mailed the interested parties may appeal this decision to the Industrial Claim Appeals Office (ICAO) .... (emphasis added)

The second paragraph sets out the procedures to be followed if the appealing party had failed to attend the hearing.

In contrast to the advisement in the deputy's decision about the effect of not timely appealing an adverse decision, no statement on this point appears in the "REFEREE'S DECISION."

Claimant, by counsel, appealed the referee's decision 19 days after it was issued, thus making his appeal four days late. His attorney stated that, based on the 10-week postponement language in the deputy's decision, claimant had believed he would begin receiving benefits after 10 weeks had elapsed from the filing of his claim. After his expected benefits failed to arrive, a customer service representative of the division advised claimant that he had no remaining benefits unless he filed an appeal. Claimant immediately contacted counsel and filed an appeal the next business day. Claimant requested that he be granted leave to appeal because "the appeal time has so recently passed ... that no party would be prejudiced," and because he was misled by the language concerning the 10-week delay.

Concluding that claimant's appeal was untimely, the Panel dismissed it. Applying the factors in Department of Labor and Employment Regulation 12.1.8, 7 Code Colo. Reg. 1101-2, the Panel found that, while the four-day delay in filing the appeal was not substantial, and while "there is no evidence that any other interested party has been prejudiced ... the language of the decisions was sufficiently clear to have reasonably informed the claimant of the adverse consequences of the disqualification. Thus, there was no administrative error and the claimant did not act in a reasonably prudent manner in failing to take timely action to contest the hearing officer's decision."

On review, claimant contends the Panel erred in refusing "to find good cause for a late appeal due to the ambiguous and unclear advisements set forth in the referee's decision." We agree.

As pertinent here, we may set aside the Panel's decision only if we determine that the decision is erroneous as a matter of law. See § 8-74-107(6)(d), C.R.S. 1998. Regulation 12.1.8 outlines the substantive guidelines for the Panel in determining whether a party has shown good cause for failing to file a timely appeal from a referee's decision. Ambiguous advisements contained in administrative rulings concerning a party's rights and need to appeal may constitute "administrative error by the Division" pursuant to Regulation 12.1.8 if the language of the advisement would be confusing to a reasonable person in the claimant's position and if it may have influenced the untimeliness of the action taken. See Marquez v. Industrial Claim Appeals Office, 868 P.2d 1175 (Colo. App.1994).

For these orders to constitute adequate notice, they should not be misleading in any material respect. Scofield v. Industrial Commission, 697 P.2d 815 (Colo. App.1985).

Here, the referee's decision does not clearly set out the effect of the disqualification determination on claimant's future eligibility for benefits. Instead of advising him specifically that he is disqualified from receiving 25 of his 26 weeks of benefits, the language used in the decision, as quoted above, merely references in general terms the limitations of federal law and the benefits to be reduced.

Additionally, the decision did not advise claimant that he was disqualified from receiving all but one week of benefits for the entire benefit year, referencing instead a "10-week postponement." This would seem to suggest to a reasonable person that benefits would begin to be paid after 10 weeks had elapsed.

Consequently, we hold the technical and confusing nature of the advisements in the referee's decision rendered them ambiguous. Cf. Hart v. Industrial Claim Appeals Office, 914 P.2d 406 (Colo. App.1995). These ambiguities, concerning the amount and timing of benefits, constituted "administrative error" under Regulation 12.1.8. Thus, the Panel erred in finding that the language of the advisements was "sufficiently clear."

The Panel generally has discretion to weigh the various factors in Regulation 12.1.8 to determine whether a claimant has shown good cause for an untimely appeal. Here, the Panel concluded that, while the other factors in the regulation would favor allowing a late appeal, they did not "outweigh the absence of any reasonable justification [of ambiguous notice] for the claimant's failure to take timely action." Because we have determined that that conclusion constituted error, we hold good cause has been shown for the untimely appeal.

The order is set aside and the cause is remanded for further proceedings on claimant's appeal of the denial of benefits.

Judge Taubman and Judge Casebolt concur.

The Denver Post Corporation, a Colorado corporation, Petitioner,

v.

Industrial Commission of the State of Colorado, (Ex-Officio

Unemployment Compensation Commission of Colorado),

and Harry H. Olsen, Respondents.

No. 83CA0212.

677 P.2d 436

Colorado Court of Appeals,

Div. II.

Jan. 5, 1984.

Eiberger, Stacy & Smith, Raymond W. Martin, Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Alice Parker, Asst. Atty. Gen., Denver, for respondent Industrial Com'n.

Harry S. Bernstein, Denver, for respondent Harry H. Olsen.

BERMAN, Judge.

The Denver Post Corporation (employer) seeks review of the final order of the Industrial Commission only insofar as it awards Harry H. Olsen (claimant) a full award of unemployment benefits. We set aside that portion of the order appealed herein.

The following facts are undisputed. Claimant was employed by the Post as a printer in the composing room from 1967 until he resigned effective December 31, 1981. Claimant was a member of Denver Typographical Union No. 49 which was a party to an agreement with the Post dated April 1, 1979. A provision of this agreement, referred to as the "attrition clause," was applicable to claimant and provided in pertinent part that:

"In order to provide security to the employees of The Denver Post and to provide a reasonable transition from present composition systems, the parties make the following agreements:

It is agreed that ... Journeymen with a priority date on or before August 5, 1972 ... shall not lose their situations unless forced to vacate same through retirement, resignation,

death or discharge for cause. It is agreed, therefore, that in exchange for this Attrition Agreement, the Publisher may use such equipment and processes in a manner which, in the Publisher's judgment, best suits the Publisher's operation."

In the latter part of 1981, the Post offered to buy out the rights of up to 40 composing room employees under the attrition clause by way of an agreement entitled Job Separation Plan. The Plan offered employees who accepted the Plan the option of being paid cash in a lump sum or in installments in return for relinquishment of the employees' rights under the clause and for their resignation, to be effective no later than December 31, 1981. Claimant elected to participate in the Plan and received a lump sum payment of $25,000 cash in January 1982, in accordance with the option he selected.

The Post's personnel director testified that the Plan was offered to the entire membership of the local, that acceptance of the Plan was voluntary, and that if more than 40 employees indicated a desire to accept the Plan, there was a procedure to determine which 40 employees would be permitted to participate. The personnel director testified further that the Post was entirely satisfied with claimant's work, and that claimant would have retained his job had he elected not to accept the Plan.

Claimant indicated his concurrence with the facts as presented by the personnel director, and acknowledged that he had voluntarily accepted the Plan. He testified he thought that he had another job waiting, but that it failed to materialize.

The decision of the deputy awarding claimant full benefits was reversed by the order of the referee which found that claimant's benefits should be reduced pursuant to Sec. 8-73-108(8), C.R.S.1973 (1982 Cum.Supp.) (quitting for personal reasons). The Commission reversed the order of the referee finding there was no showing that claimant was at fault in his separation, and that he was entitled to a full award of benefits pursuant to Sec. 8-73-108(1)(a), C.R.S.1973 (1982 Cum.Supp.).

The employer contends that the Commission erred because this determination is not supported by the evidence. We agree.

Where, as here, there is no material conflict in the evidence before the Industrial Commission, the reviewing court may reach its own conclusions, and is not bound by the findings of fact of the Commission. Industrial Commission v. Emerson Western Co., 149 Colo. 529, 369 P.2d 791 (1962).

Unemployment compensation is intended for the benefit of persons involuntarily unemployed through no fault of their own. International Typographical Union v. Industrial Commission, 44 Colo.App. 29, 609 P.2d 634 (1980); Sec. 8-70-102, C.R.S.1973. The word "fault" as used in the Act is not limited to something worthy of censure but must be construed as meaning failure or volition. City & County of Denver v. Industrial Commission, 666 P.2d 160 (Colo.App.1983).

The Commission's finding that claimant had to surrender his job and his rights under the attrition clause is correct, but only after he accepted the Job Separation Plan. Until that time, claimant could have rejected the Plan and retained his job. The undisputed evidence discloses that claimant for his own reasons elected to participate in the Plan and that he was paid in full. Claimant's separation from employment was not involuntary. See International Typographical Union v. Industrial Commission, supra.

Attached to claimant's brief on appeal is an exhibit which is characterized as evidence that claimant did not voluntarily quit his job. This document was not submitted to the Division or to the Commission, and we will not consider it for the first time on appeal. See City of Aurora v. Aurora Firefighters' Protective Ass'n, 193 Colo. 437, 566 P.2d 1356 (1977).

The order is set aside only insofar as it provides for a full award of benefits, and the cause is remanded with directions to the Commission to enter an order pursuant to Sec. 8-73-108(8), C.R.S.1973 (1982 Cum.Supp.) denying claimant benefits attributable to the employer, subject to the maximum reduction consistent with federal law.

Kelly and Babcock, JJ., concur.

The Denver Post, Inc., a Colorado Corporation, Petitioner,

v.

Department of Labor and Employment, Industrial Commission of

the State of Colorado (Ex-Officio Unemployment Compensation

Commission of Colorado), and John A. Abell, et al.,

Respondents.

No. C-1738.

199 Colo. 466, 610 P.2d 1075

Supreme Court of Colorado,

En Banc.

May 12, 1980.

Eiberger, Stacy & Smith, Perry L. Goorman, Carl F. Eiberger, Denver, for petitioner.

J. D. MacFarlane, Atty. Gen., Richard F. Hennessey, Deputy Atty. Gen., Edward G. Donovan, Sol. Gen., David Aschkinasi, Asst. Atty. Gen., Denver, Human Resources Section, for respondents.

LEE, Justice.

Certiorari was granted to review the decision of the court of appeals in Denver Post v. Dep't of Labor, 41 Colo.App. 275, 586 P.2d 1342 (1978), which affirmed the holding of the Industrial Commission of Colorado (commission) that thirty-seven claimants for unemployment compensation benefits were unemployed, either partially or totally, within the meaning of section 8-73-108(1), C.R.S. 1973. We modify the holding of the court of appeals.

This proceeding involves thirty-seven consolidated claims for unemployment compensation benefits by "substitute" printers and stereotypers employed by the Post. Although considered employees, who receive employee benefits of medical and life insurance and accrued vacation allowances,1 the substitutes work only on a day-to-day, shift-by-shift basis.

Substitute printers get work in one of two ways: (1) "office hire" -- the need of the Post for extra printers on a given shift is filled on the basis of seniority from the substitute printers on the premises at the beginning of the shift; or (2) "personal hire" -- a printer

who is employed for a particular shift can directly designate a substitute without regard to that substitute's seniority.

Substitute stereotypers get work in the following manner: the Post notifies the stereotypers' union of its need for substitutes; the union then fills this need first from its regulars and then from its citywide substitute list on the basis of seniority; and stereotypers are informed by the union, in advance of the work shift, that work is available.

I.

The substitutes, who claimed unemployment benefits for the days when they did not work, assert that they were either partially or totally unemployed during the periods at issue. The commission and the court of appeals agreed with their assertion. The Post argues that the substitutes, because of their unique employment relationship with the Post, were not unemployed within the meaning of the Colorado Employment Security Act, section 8-70-101, et seq., C.R.S. 1973 (the act). Since their status as substitutes was constant throughout the period at issue, the Post asserts that they were never partially or totally unemployed. We agree with the Post's assertion that the substitutes were never totally unemployed.

The act specifically defines the terms "partially employed" and "totally unemployed." A person is "partially employed" whose "wages payable to him by his regular employer for any week of less than full-time work are less than the weekly benefit amount he would be entitled to receive if totally unemployed and eligible . . . ." Section 8-70-103(18), C.R.S. 1973.

One is "totally unemployed" "who performs no services in any week with respect to which no wages are payable to him. Should such week occur within an established payroll period in which the individual is not totally separated from his regular employer, he shall be deemed not totally unemployed, but partially unemployed, as defined in subsection (18) of this section, and subject to the conditions pertaining to partial unemployment." Section 8-70-103(21), C.R.S. 1973. (Emphasis added.) Subsection (21) contemplates that a "partially employed" worker need not be "totally separated from his regular employer."

The court of appeals held that "the question of whether a claimant is unemployed in any particular week is a purely mathematical inquiry: If he performs no services and receives no compensation, then he is totally unemployed . . . ." Denver Post v. Dep't of Labor, supra. Accord, Trujillo v. Indust. Comm'n, Colo.App., 594 P.2d 1065 (1979).

Section 8-70-103(21), however, requires a two-step analysis in determining the employment status of a claimant, rather than the single question posed by the court of appeals. The inquiry into whether the claimant performed services and received compensation in any particular week must be accompanied by a second inquiry: Was the claimant "totally separated" from his regular employer during the established payroll

period? Even though the claimant performed no services in a week with respect to which no wages were payable to him, if he was not totally separated from his regular employer during the payroll period, then under subsection (21) he was only partially unemployed and subject to the regulations governing partial unemployment.

Because the parties agree that the claimants continued to receive employee benefits during the periods for which they now claim unemployment compensation, the claimants were never separated from employment within the meaning of the statute. The Post's reliance on Mountain States Telephone & Telegraph Co. v. Dep't of Labor, 38 Colo.App. 298, 559 P.2d 252 (1976), is thus irrelevant to the facts of this case.

The Post also argues, however, that because the substitutes received employee benefits medical, life, sickness, and accident insurance, and pension contributions they were not even partially unemployed but rather were totally employed during the periods at issue. We do not agree. Employee benefits such as those provided by the Post are not indicative of an employee's unemployment status under the act. Receipt of such benefits does not constitute wages for purposes of the act. See section 8-70-103(22)(a) and (b)(I), C.R.S. 1973.

II.

We agree with the conclusion of the court of appeals that the test applied by the Industrial Commission to determine eligibility for benefits failed to comply with the mandate of section 8-73-107(1)(g), C.R.S. 1973. The commission has an obligation to determine whether a claimant is "able to work and is available for all work deemed suitable . . .," as provided in section 8-73-107(1)(c), and whether the claimant was "actively seeking work . . .," as provided in section 8-73-107(1)(g), C.R.S. 1973. Such a determination "must be made within the context of the factual situation presented by each case." Couchman v. Indust. Comm., 33 Colo.App. 116, 515 P.2d 636 (1973). (Emphasis added.) Accord, Medina v. Indust. Comm., 38 Colo.App. 256, 554 P.2d 1360 (1973). We agree with the statement of the court of appeals that "(t)he Commission cannot short-circuit this requirement of a case-by-case eligibility finding by adopting 'standards' or 'guidelines' for particular groups of cases." Denver Post v. Dep't of Labor, supra. We hold that the terms "able to work," "available for all work deemed suitable," and "actively seeking work" constitute sufficient guidelines to enable the commission to properly determine the eligibility of one seeking unemployment compensation.

We find no merit to petitioner's argument relating to alleged improper ex parte discussions between certain union officers and members or staff of the commission.

The cause is returned to the court of appeals with directions to remand to the Industrial Commission to conduct further hearings in accordance with the views expressed herein.

Rovira, J., does not participate.

Footnotes

1. Employees are entitled to one day of vacation for every twenty-five days they work during the year. Under the facts here before us, substitutes apparently did not receive vacation credits for days when they did not work. See Ind. Comm. v. Sirokman, 134 Colo. 481, 306 P.2d 669 (1957).

Denver Public Schools, Petitioner,

v.

Industrial Commission of the State of Colorado, (Ex-Officio

Unemployment Compensation of Colorado), and

Lenore Krinsky, Respondents.

No. 81CA0464.

644 P.2d 83, 3 Ed. Law Rep. 1131

Colorado Court of Appeals,

Div. II.

Jan. 21, 1982.

Rehearing Denied Feb. 11, 1982.

Good & Stettner, P. C., Martin Semple, Denver, for petitioner.

J. D. MacFarlane, Atty. Gen., Richard F. Hennessey, Deputy Atty. Gen., Mary J. Mullarkey, Sol. Gen., Alice L. Parker, Asst. Atty. Gen., Denver, for respondents.

Lenore Krinsky, pro se.

VAN CISE, Judge.

Lenore Krinsky was employed as a substitute teacher by the Denver Public Schools (DPS) and by other school districts in the Denver metropolitan area during the 1979-80 school year. At the end of the school year, she applied for unemployment compensation. The Industrial Commission found that there was "insufficient evidence to support a determination that the claimant had reasonable assurance of reemployment with the interested employer," and ordered that claimant had established her eligibility for a full award of unemployment compensation benefits for the period from the end of the school year through August 24, 1980 (the day before she resigned from her job with DPS to take a full time job with another school district). DPS petitions for review of this order. We set aside the order.

The relevant section of the unemployment insurance statute is s 8-73-107(3)(a), C.R.S.1973, which provides in pertinent part:

"With respect to services in an instructional ... capacity for an educational institution, compensation shall not be payable based on such service for any week commencing during the period between two successive academic years or terms ... to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for the educational institution in the second of such academic years or terms." (emphasis supplied)

The evidence in the record is that, at the end of the school year, claimant expressed a desire to be reemployed as a substitute teacher for the following school year. She testified that there was a mutual understanding that, in the event she did not obtain a contract as a full-time teacher, she would be available to substitute, and she was verbally assured that she would remain on the active substitute list and could return in the fall unless DPS was notified otherwise. Also, she received from DPS a reasonable assurance form which indicated that her name would be on the substitute teacher list for the fall term. DPS contends this is sufficient evidence of "reasonable assurance" of employment for a substitute teacher. We agree with DPS.

In Herrera v. Industrial Commission, 197 Colo. 23, 593 P.2d 329 (1979), our Supreme Court affirmed a denial of benefits to a DPS food service worker who had sought unemployment compensation for the period between two school terms. The court held that a "reasonable assurance" exists when there is "a written, verbal, or implied agreement that the employee will perform services in the same capacity during the ensuing academic year or term." The only evidence to establish such an agreement in Herrera was the employee's expressed intent to work for DPS and a signed form from DPS stating an intent to rehire the employee for the coming term "depending on continued need." Although Herrera dealt with a federal statute, the pertinent statutory language is identical and the court's rationale is applicable and dispositive of the issue on this appeal.

Therefore, here, the Commission placed an unreasonable burden on DPS in dealing with substitute teachers by its ruling that:

"Before an individual is disallowed on the basis of having a reasonable assurance, it must be shown through competent evidence that the claimant will have a reasonable assurance of actually working ..." (emphasis supplied)

The Commission's finding that there did not exist a reasonable assurance of reemployment or "reasonable assurance of actually working" is not supported by the evidence, and is in direct conflict with Herrera v. Industrial Commission, supra. See also Board of County Commissioners v. Martinez, 43 Colo.App. 322, 602 P.2d 911 (1979); Milkowski v. Illinois Department of Labor, 82 Ill.App.3d 220, 402 N.E.2d 646 (1980); Ellman v. Pennsylvania Unemployment Compensation Board, 407 A.2d 478 (Pa.Cmwlth.1979).

The order is set aside, and the cause is remanded with directions to disallow benefits on this portion of the claim.

Enoch, C. J., and Kelly, J., concur.

Division of Employment and Training, Petitioner,

v.

Industrial Commission of the State of Colorado, and

Clifford Chacon, Respondents

No. 84CA1402

706 P.2d 433

Colorado Court of Appeals

Div. I.

August 8, 1985

Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General, Christa D. Taylor, Assistant Attorney General, Denver, Colorado, Attorneys for Petitioner.

Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General, James R. Riley, Jr., Assistant Attorney General, Denver, Colorado, Attorneys for Respondent Industrial Commission.

No appearance for Respondent Clifford Chacon.

PIERCE, Judge.

The Division of Employment and Training (Division) seeks review of a final order of the Industrial Commission determining that the Division may not impose penalties upon a claimant under the circumstances of this case. The Division also seeks review of the Commission's determination that the Division could collect the unemployment compensation overpayment in this case only by offsetting future benefits. We set aside the order and remand for further proceedings.

The factual background is undisputed. Clifford Chacon (claimant) made a claim for unemployment compensation benefits on December 13, 1982 after his employment had been terminated. While receiving unemployment benefits he failed to report 18.46 hours of employment. He testified that he filled out the unemployment compensation form on a Thursday and mailed it on the following Sunday. During the intervening period claimant worked on a temporary basis for his former employer. When the overpayment was discovered the Division assessed claimant the amount of the overpayment of

unemployment benefits, a monetary penalty, and disqualified him from receiving future benefits for four weeks.

Claimant sought review of this order on the grounds that the four week disqualification was "too harsh." The Industrial Commission disallowed the penalties and limited the Division's collection of the overpayment.

I.

The Division first contends that the Commission erred in determining that the Division must prove a claimant's specific intent in order to assess penalties. The Division's position is that it need only establish the fact of a false representation or failure to disclose a material fact. We do not agree with this contention.

The applicable statutory provisions then in effect, currently codified in § 8-81-101(4)(a)(II), C.R.S. (1984 Cum. Supp.), allowed for imposition of penalties upon any person who received benefits to which he was not entitled. It did not contain an explicit statement of the culpable mental state required for imposition of these penalties. In such instances of legislative silence, the requisite mental state may be implied from the statute. People v. Moore, 674 P.2d 354 (Colo. 1984).

The Division's contention that intent need not be established is contrary to the holding in Industrial Commission v. Emerson Western Co., 149 Colo. 529, 369 P.2d 791 (1962), which established that in order for the Division to impose penalties upon an employer, pursuant to similar statutory provisions, the employer's intent to falsify must be shown. Further, the use of the word "willful" in the statute indicates that a failure to disclose a material fact must be accompanied by a culpable mental state. Section 18-1-501, C.R.S. (1978 Repl. Vol. 8).

Equally erroneous is the Commission's contention that the requisite culpable mental state is one of "specific intent." This is the highest degree of mental culpability, and proof thereof is normally necessitated only when a statute requires that the proscribed conduct be performed "intentionally" or "with intent." Unlike § 8-81-101(1)(a), C.R.S. (1984 Cum. Supp.) which provides for criminal sanctions where the proscribed conduct is made "with intent to defraud," no indication exists in § 8-81-101(4)(a)(II) that the legislature intended that administrative penalties be imposed only upon proof of the claimant's specific intent.

Receiving benefits by reason of "false representation or willful failure to disclose a material fact," may be analogized to making a "false representation." The case law interpreting the making of a "false representation" requires that the representation be made knowing it to be false or with an awareness that the maker did not know whether it was true or false. Sodal v. French, 35 Colo. App. 16, 531 P.2d 972 (1974), aff'd sub nom. Slack v. Sodal, 190 Colo. 411, 547 P.2d 923 (1976); CJI-Civ 2d 19:1 (1980).

Based on these authorities, the above reasoning, and the applicable statutory language, we conclude that the culpable mental state which must be established by the Division pursuant to § 8-81-101(4)(a)(II) is "knowingly." A person acts "knowingly" with respect to the proscribed conduct "when he is aware that his conduct is of such nature," and a person acts "knowingly" with respect to a result of his conduct when he is aware that his conduct is practically certain to cause the result. Section 18-1-501, C.R.S. (1978 Repl. Vol. 8).

Although we agree with the Division that the Commission required proof of an inappropriate culpable mental state, we do not agree with its further contention that the requisite culpable mental state may be presumed from proof of the act itself. Where, as here, proscribed conduct consists of an act combined with a culpable mental state, the culpable mental state is just as much an element of the proscribed conduct as is the act. Although a culpable mental state may ordinarily be inferred from circumstantial evidence, proof of the commission of the act does not create a presumption that the requisite mental state existed. People v. Braly, 187 Colo. 324, 532 P.2d 325 (1975); Industrial Commission v. Emerson Western Co., supra.

II.

The Division also contends that the Commission erred in determining that the Division could collect the unemployment compensation overpayment in this case only by offsetting future benefits because the Division had not made a determination whether direct repayment would not be inequitable. We agree with the Division.

The statutory provisions then in effect, Colo. Sess. Laws 1979, ch. 67, § 8-81-101(4)(a)(I) and (II) at 355, provided that, where a claimant received benefits to which he was not entitled "other than by reason of his false representation or willful failure to disclose a material fact," he was liable to repay the overpayment to the Division "if such repayment would not be inequitable."

Thus, when the Commission overruled the Division's determination and concluded that the overpayments were not received through the fault of the claimant, the Commission should have made a determination regarding inequitability or remanded the case to the Division for such a determination. See Schmidt v. Industrial Commission, 42 Colo. App. 253, 600 P.2d 76 (1979).

The order is set aside and the cause is remanded to the Industrial Commission for such other proceedings as it may deem appropriate and entry of an order in accordance with the views expressed herein.

Judge Van Cise and Judge Sternberg, concur.

Division of Employment and Training, Petitioner,

v.

Slawomir Turynski, Jan Plesniak, Kazimierz Kozak, and Industrial

Commission (Ex-Officio Unemployment Compensation

Commission of Colorado), Respondents

No. 85SC240

735 P.2d 469

Supreme Court of Colorado,

En Banc.

April 6, 1987.

Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General, Christa D. Taylor, Assistant Attorney General, Attorneys for Petitioner.

Robert G. Heiserman, Rebecca P. Burdette, Attorneys for Respondent Kozak.

No appearance for Respondents Turynski and Plesniak.

DUBOFSKY, Justice.

We granted certiorari to review the judgment of the court of appeals in Division of Employment and Training v. Industrial Commission, 705 P.2d 1022 (Colo. App. 1985), involving the eligibility for unemployment insurance benefits of three Polish nationals whose petitions for political asylum in this country were pending before the United States Immigration and Naturalization Service (INS). The INS had authorized the three claimants to seek employment at the time they earned the wage credits required for unemployment compensation eligibility. The Division of Employment and Training (the division) denied the claimants' requests for unemployment benefits. The Industrial Commission (the commission) ruled in favor of the claimants and reversed the division's denial. The court of appeals determined that the claimants were "permanently residing in the United States under color of law" during the base periods used to determine eligibility for unemployment compensation under section 8-73-107(7)(a), 3 C.R.S. (1984 Supp.), and that they therefore were entitled to benefits. We affirm the judgment of the court of appeals.

I.

Slawomir Turynski, Jan Plesniak, and Kazimierz Kozak, citizens of Poland, entered the United States as visitors-for-pleasure with "B-2" visas on November 27, 1980, June 23, 1981, and March 30, 1977, respectively. Turynski and Plesniak requested and received extensions of their "B-2" status from the INS until February 9, 1982, the date they applied for asylum. Kozak failed to request an extension of his visa but remained in the United States. The INS commenced deportation proceedings against him. Kozak applied for asylum as an affirmative defense to deportation on December 3, 1980. The three petitions for asylum have yet to be adjudicated, and the United States Attorney General has granted Polish nationals "extended voluntary departure," which suspends deportation proceedings indefinitely.1 The INS granted the three claimants work authorization after they applied for asylum.

Turynski and Plesniak worked for a Colorado employer while under the "B-2" status and after the date they applied for asylum. Their employment was terminated on October 8, 1982. They applied for unemployment benefits based on wages earned during the entire period they were employed. Kozak's employment ended on January 11, 1983. He claimed benefits based on wages earned only after he applied for asylum.

The division initially paid all three claims. Later the division denied the claims and ruled that the claimants were liable for overpayment of benefits to which they were not entitled because there is no implied permanency in the residence of applicants for political asylum and thus the claimants did not qualify as aliens "permanently residing in the United States under color of law." The commission reversed the division's decision on the grounds that the claimants intended to become permanent residents and the INS repeatedly granted them work extensions sufficient to bring them within the "permanently residing in the United States under color of law" criteria of section 8-73-107(7)(a), 3 C.R.S. (1984 Supp.). The court of appeals, relying on its decision in Arteaga v. Industrial Com'n of State, 703 P.2d 654 (Colo. App. 1985), affirmed the commission's ruling. The court noted that all three claimants had applied for asylum, had established permanent homes in the United States, and had obtained leave to stay and work in the country while their applications were pending. Moreover, because of the political situation in Poland, the federal government had placed a moratorium on the forced departure of Polish nationals illegally present in this country. The court concluded that each claimant was eligible for unemployment benefits based on wages earned during any lawfully accrued eligibility period.

II.

In Industrial Commission v. Arteaga, 735 P.2d 473 (Colo. 1987), we summarized the purposes of the Colorado Employment Security Act (CESA) and the Federal Unemployment Tax Act (FUTA) and the eligibility requirements under both statutes for the payment of unemployment compensation to aliens. Section 8-73-107(7)(a), 3 C.R.S. (1984 Supp.) and 26 U.S.C. § 3304 (a)(14)(A) (1976). Section 3304(a)(14)(A) provides:

Compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed (including an alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act), ...2

Whether the claimants were persons "permanently residing in the United States under color of law" is the issue before us.

We defined "permanently residing in the United States under color of law" in Industrial Commission v. Arteaga based on a definition of "permanent" in the Immigration and Nationality Act and a definition of "under color of law" in Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947, 98 S. Ct. 1532, 55 L. Ed. 2d 545 (1978). "Permanent" means "a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law." 8 U.S.C. § 1101 (a)(31) (1976). "Temporary" applies to aliens who have no intention of abandoning their foreign residence, including tourists, students, and temporary workers and teachers. See 8 U.S.C. § 1101 (a)(15)(B), (F), (H) and (J) (1970 & Supp. 1986). "Under color of law" was defined in Holley, 553 F.2d at 849-50, as meaning:

that which an official does by virtue of power, as well as what he does by virtue of right. The phrase encircles the law, its shadows, and its penumbra. When an administrative agency or a legislative body uses the phrase "under color of law" it deliberately sanctions the inclusion of cases that are, in strict terms, outside the law but are near the border.

The division, in arguing that "permanently residing in the United States under color of law" does not apply to these claimants, relies on Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985). Sudomir addressed aliens' eligibility for Aid to Families with Dependent Children under 42 U.S.C. § 602 (a)(33) (1982), which contains "permanently residing" language identical to that in the state and federal unemployment statutes. The court in Sudomir concluded that:

the [Health and Human Services] Secretary's assertion that Congress never intended to extend welfare benefits to aliens whose presence in the United States is unlawful and whose sole claim to entitlement rests on their filing applications for asylum with the INS is reasonable and, accordingly, permissible.

Id. at 1464. The court found that the claimants were present "under color of law" but denied benefits because they were not "permanently residing in the United States." Id. at 1461. The court reasoned that the definition of "permanent" provided in 8 U.S.C. § 1101 (a)(31) did not embrace "transitory, inchoate, or temporary relationships." Id. at 1462.

The court held that asylum applicants occupy an inchoate status because their presence in this country is merely tolerated pending processing of their application. Id.3

Sudomir does not provide authority, however, for resolving the issues in this case in the division's favor. The court in Sudomir specifically noted that the INS had not granted any of the named plaintiffs in that case authority to work. Id. at 1458. The court also noted that the Secretary of Health and Human Services viewed aliens who had been granted indefinite stays of deportation under 8 C.F.R. § 243.4 (1985)4 or extensions of voluntary departure under 8 C.F.R. §§ 242.5(a) (2) -(3) and 244.2 (1985) as eligible for AFDC benefits. Id. at 1460. Finally, the court distinguished the legislative intent behind section 3304(a)(14)(A), which it interpreted as allowing unemployment benefits to aliens who are lawfully present to work in the United States for temporary periods from the legislative history behind the allocation of AFDC benefits. Id. at 1464. Sudomir does not apply to applicants for asylum who seek unemployment compensation benefits, to applicants for asylum who are lawfully present to work, or to applicants for asylum who are covered by a policy of extended voluntary departure.

Several state courts have determined that applicants for asylum qualify as persons "permanently residing in the United States under color of law" and are thus eligible for unemployment benefits. Vazquez v. Rev. Bd. of Ind. Emp. Sec. Div., 487 N.E.2d 171 (Ind. App. 1985); Vespremi v. Giles, 68 Ohio App. 2d 91, 427 N.E.2d 30 (1980); Gillar v. Employment Division, 300 Ore. 672, 717 P.2d 131 (Or. 1986) (renewing asylum request before immigration judge in a deportation proceeding is sufficient to qualify claimant for unemployment "under color of law"). See also Ibarra v. Texas Employment Commission, 645 F. Supp. 1060 (E.D. Tex. 1986) (settled by consent decree). But see Zurmati v. McMahon, 180 Cal. App. 3d 164, 225 Cal. Rptr. 374 (Cal. App. 1986) (Sudomir followed; asylum applicant denied unemployment benefits). In the case before us we need not resolve whether an applicant for asylum who has not been granted work authorization by the INS or who does not qualify for extended voluntary departure status is entitled to unemployment compensation benefits.

In Arteaga, we concluded that unemployment claimants who had earned sufficient work credits after they had filed petitions for immediate relative status and while they had authorization from the INS to work were eligible for unemployment compensation. We based that determination on our understanding of American immigration policy, the purpose of unemployment compensation, the source of the funds providing unemployment compensation benefits, and the public policy implications were we to hold the claimants were not entitled to unemployment compensation. We see no reason to exclude the claimants here, who are members of a nationality group that has been granted extended voluntary departure status by the INS and who had received authorization to work when they obtained employment and earned wage credits, from eligibility for unemployment compensation benefits. They should have received wage credits entitling them to unemployment compensation eligibility for the period of time during which they qualified for extended voluntary departure and had authorization to work.

Judgment affirmed.5

Justice Rovira dissenting:

For the reasons set out in my dissent in Industrial Commission v. Arteaga, 735 P.2d 473 (Colo. 1987), I respectfully dissent.

I am authorized to state that Justice Vollack joins in this dissent.

Footnotes

1. The term "extended voluntary departure" describes an immigration status subject to the United States Attorney General's discretion, based on circumstances of foreign and domestic policy, to grant a temporary suspension of deportation proceedings to members of a particular class of aliens who are in the United States illegally. Hotel & Restaurant Employees Union, Local 25 v. Smith, 594 F. Supp. 502 (D.C.D.C. 1984). See also Comment, Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States, 47 U. Pitt. L. Rev. 295 at 309-314 (1985). During the past 25 years, for varying periods of time, nationals from Cuba, the Dominican Republic, Czechoslovakia, Chile, Cambodia, Vietnam, Laos, Lebanon, Ethiopia, Uganda, Iran, Nicaragua and Poland have received extended voluntary departure status. Id. at 310 n. 92. The current INS policy not to initiate deportation proceedings against Polish nationals has been in effect since December 23, 1981. INS Central Office Wires 243.10-P 12/23/81 - 12/23/86. Once a class is granted extended voluntary departure, individual determination of eligibility to remain in the United States for an alien in that class is not required. Since October 24, 1986, under 8 C.F.R. § 109.1(a)(7) the INS has granted employment authorization automatically to any alien "who is a member of a nationality group who has been granted blanket extended voluntary departure." See 51 Fed. Reg. 44,782 (1986).

2. Section 8-73-107(7)(a), 3 C.R.S. (1984 Supp.) is identical to section 3304(a)(14)(A) except that section 8-73-107(7)(a) refers to "benefits" payable instead of "compensation" payable.

3. The dissenting judge in Sudomir v. McMahon, 767 F.2d at 1467-68 (9th Cir. 1985) (Canby, J., dissenting), disagreed with the conclusion that asylum applicants were not "permanent residents" on the ground that federal law allows applications for asylum by "those who cannot or will not return to their own countries 'because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.' 8 U.S.C. § 1101 (a)(42)," and that processing applications for asylum takes the INS from three to six years. Id.

4. The INS generally does not commence deportation proceedings until after an application for asylum has been denied. 8 C.F.R. § 208.8(f)(4) (1987) (giving the district director discretion to grant voluntary departure or to commence deportation proceedings upon the denial of an applicant's request for asylum).

5. Claimant Kozak requests that this court grant him costs. Kozak contends that the division, by appealing the industrial commission's award of benefits to the court of

appeals and by petitioning for certiorari from the court of appeals' affirmance of the commission ruling, has waived immunity and caused the claimant to incur high costs. C.A.R. 39(a) provides that if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered. C.A.R. 39(b) provides that in cases involving a state agency, if an award of costs against the state is authorized by law, costs shall be awarded in accordance with C.A.R. 39(a).

The question, then, is whether an award of costs against the state is authorized by law. Section 8-80-102, 3B C.R.S. (1986) in relevant part provides, "No . . . . suit [shall be] brought for attorneys fees . . . . for services rendered for the collection of any individual's claim for benefits." The same section provides for payment of the costs of preparing a transcript of the referee's decision if a party wishes to appeal to the commission, but the statute does not address payment of costs in the appellate courts. In Lee v. Colorado Dept. of Health, 718 P.2d 221 (Colo. 1986), we upheld an assessment of costs by the trial court against a state agency where the prevailing party recovered damages for personal injuries from the agency. We ruled that, in light of the general rule that a prevailing party may recover costs unless a statute or rule specifically prohibits such an award, the fact that the relevant statute does not expressly provide for an assessment of costs will not prevent collection of costs from a public entity in connection with a judgment entered against it. Id., 718 P.2d at 228-229. See also Weld County Bd. of County Com'rs v. Slovek, 723 P.2d 1309, 1313-1314 (1986). We conclude that if Kozak files the proper documentation under C.A.R. 39(d) with the clerk of this court in a timely manner he shall be entitled to have his costs on appeal in this court inserted in the mandate.

Luis Duenas-Rodriguez

v.

The Industrial Commission of the State of Colorado, Ex-Officio

Unemployment Compensation Commission of Colorado, and

Colorado State Division of Employment and Training

No. 79SA96

199 Colo. 95; 606 P.2d 437

Supreme Court of Colorado,

En Banc.

January 21, 1980.

Henry C. Frey, for petitioner-appellant.

J. D. MacFarlane, Attorney General, David W. Robbins, Deputy, Edward G. Donovan, Solicitor General, Ann Sayvetz, Assistant Attorney General, Human Resources Section, for respondents-appellees.

LEE , Justice.

This is an appeal from an order of the Industrial Commission of the State of Colorado holding that appellant, Luis Duenas-Rodriguez, was overpaid $2,242 in unemployment compensation benefits. During the time appellant received those benefits, from January 7, 1975, through January 1, 1977, he was illegally residing in the United States.

At the hearing, the referee for the Colorado Department of Labor and Employment, Division of Employment and Training, heard evidence and held that because of appellant's illegal alien status he was not legally "available for work" during that period. The Industrial Commission agreed, and ordered that the overpayment be offset against future benefits for which appellant may become eligible.1 We affirm the order of the Commission.

I.

Appellant argues that he was entitled to receive the unemployment benefits at issue here since, during the time he received them, there was no federal or state law prohibiting receipt of unemployment benefits by illegal aliens.2 Such law did not come into effect in Colorado until July 7, 1977.3

Although no specific statute prohibiting the payment of unemployment compensation benefits to illegal aliens existed at the time appellant collected such benefits, appellant did not necessarily qualify for benefits. Section 8-73-107(1)(c), C.R.S. 1973, required that, to qualify for unemployment benefits, an applicant be "available for all work . . . ."

A determination of an individual's availability for employment "is one for which an all-inclusive rule cannot be stated, but rather must be made within the context of the factual situation presented by each case." Couchman v. Indust. Comm., 33 Colo. App. 116, 515 P.2d 636 (1973). The burden of proof is on the employee to establish eligibility for unemployment benefits. Denver Symph. Ass'n v. Indust. Comm., 34 Colo. App. 343, 526 P.2d 685 (1974).

Appellant testified that he entered this country eight or nine years prior to commencement of this action in 1978. He married a United States citizen in November 1976, and in January 1977 he received his alien registration card, permitting him to remain in this country and authorizing his employment here. Until that time, however, he was here illegally.

Appellant contends that his illegal status is irrelevant to the issue of availability for work, and that the only question is whether, at the time he collected the benefits, he was physically able to work. Since he was physically capable of working, appellant asserts that he was qualified to receive benefits under section 8-73-107(1)(c).

The courts have consistently held that aliens who enter the United States on nonimmigrant visas and aliens who enter illegally have no constitutional right to work. See Pilapil v. Immigration and Naturalization Service, 424 F.2d 6 (10th Cir. 1970); Ojeda-Vinales v. Immigration & Naturalization Serv., 523 F.2d 286 (2d. Cir. 1975); Zapata v. Levine, 50 App. Div. 2d 681, 375 N.Y.S.2d 424 (1975). An illegal alien is also subject to deportation. 8 U.S.C. § 1251 (1976).

Such an individual is legally unable to work,4 and "legal inability to work is as disqualifying as physical inability to work." Pinilla v. Bd. of Rev. In Dept. of L. & I., 155 N.J. Super. 307, 382 A.2d 921 (1978). Accord, Alonso v. State, 50 Cal. App. 3d 242, 123 Cal. Rptr. 536 (1975), cert. denied 425 U.S. 903, 96 S.Ct. 1492, 47 L.Ed.2d 752 (1976); Zapata v. Levine, supra. See Annot., 87 A.L.R.3d 694 (1978). Thus, appellant, who was legally unavailable for work, did not qualify for benefits under section 8-73-107(1)(c).

In addressing the issue before us -- whether an illegal alien is entitled to unemployment compensation benefits -- the California Court of Appeals concluded that "[t]o allow an illegal alien to collect unemployment benefits would reward him for his illegal entry into this county. In essence, his entry into this country is fraudulent, and as such he should not be allowed to profit from the illegal act." Alonso v. State, supra. We agree with this reasoning.

II.

Appellant also challenges the Industrial Commission's conclusion that it would not be against equity and good conscience to offset the amount he was held to have been overpaid ($2,242) against future unemployment benefits to which he might become entitled.5

The authority of the Commission to collect sums paid to individuals who were not entitled to such payments is defined in section 8-81-101(4)(a), C.R.S. 1973. The statute reads in pertinent part:

"Any person who has received any sum as benefits under articles 70 to 82 of this title to which he was not entitled other than by reason of his false representation or willful failure to disclose a material fact, if so found by the division, shall be liable to repay such amount to the division for the fund or to have future benefits to which he may become entitled cancelled to offset such overpayment if such recovery would not, in the opinion of the division, be against equity and good conscience. The division may waive the recovery or adjustment of all or part of the amount of any such overpayment which it finds to be noncollectible, or the recovery or adjustment of which it finds to be administratively impracticable." (Emphasis added.)

When appellant initially claimed unemployment benefits, he was assisted in filling out the forms by another applicant. Appellant does not speak or write English. The man who assisted him did not ask if appellant was a United States citizen, but merely checked the box on the application form indicating that appellant was a citizen. It was not until appellant reapplied for benefits in 1977 that he was requested to submit evidence of citizenship, which he was unable to do.

After hearing testimony, the referee found that appellant did not willfully misrepresent his citizenship status, and thus should not be subject to a 10% penalty. The referee held, however, that the $2,242 in benefits received by appellant must be repaid.

The Industrial Commission agreed that imposition of a penalty in this case would be inappropriate. It also concluded, after reviewing all the evidence, that "it would be against equity and good conscience to require repayment by the claimant, but that it would not be against equity and good conscience to offset the overpayment against future benefits to which the claimant may become eligible."

The phrase "equity and good conscience" is "an elastic expression . . . ." City of Leadville v. Sewer Co., 47 Colo. 118, 107 P. 801 (1909) (Gabbert, J., dissenting). This same statutory phrase has been held to be "language of unusual generality" which "anticipate[s] that the trier of fact, instead of attempting to channelize his decision within rigid and specific rules, will draw upon precepts of justice and morality as the basis for his ruling." Gilles v. Department of Human Resources Develop., 11 Cal. 3d 313, 521 P.2d 110, 113 Cal. Rptr. 374 (1974) (discussing language in the Unemployment Insurance Code of California).

It was there noted that the reference to "equity and good conscience" has its probable source in section 204 of the Social Security Act, 42 U.S.C. § 404 (1974). For purposes of that act, the phrase is defined in 20 C.F.R. 404.509 (1979):

"'Against equity and good conscience' means that adjustment or recovery of an incorrect payment . . . will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right . . . or changed his position for the worse . . . . In reaching such a determination, the individual's financial circumstances are irrelevant."

Although we are not bound by that definition, we consider it indicative of the generally understood meaning of "equity and good conscience."

In the case here before us, appellant presented no evidence that he relinquished any valuable right or changed his position for the worse because he received unemployment benefits. Indeed, as an illegal alien, he was not legally entitled to work in this country at the time he was receiving benefits to compensate him for being unemployed. We find no equitable reason for allowing appellant to avoid future setoffs, as ordered by the Commission.

III.

Appellant finally argues that section 8-81-101(4)(a), C.R.S. 1973, is unconstitutional in that the Industrial Commission had not promulgated rules and regulations to spell out what standards and considerations are to be applied in deciding whether it would be against equity and good conscience to recover unemployment benefits where such benefits are found to have been overpaid. Appellant relies on Elizondo v. Motor Veh. Div., 194 Colo. 113, 570 P.2d 518 (1977).

In Elizondo, the court held that section 42-2-123(11), C.R.S. 1973, providing for probationary drivers' licenses, was unconstitutional as applied by the Department of Revenue, Motor Vehicle Division. The statute authorizes the division to adopt specific rules and regulations to limit the exercise of discretion by individual hearing officers in granting or denying probationary drivers' licenses. The division had failed to promulgate such rules.

The rationale in Elizondo is not applicable to section 8-81-101(4)(a). The General Assembly did provide guidelines for application of the penalty provisions of that statute. The Commission was directed to apply the principles of equity in determining whether improperly paid benefits were to be repaid or set off against future benefits.

The Commission is not required to take evidence in addition to that taken by the referee, but may base its decision "on the basis of the evidence previously submitted in such case. . . ." Section 8-74-105, C.R.S. 1973. The order of the Commission was issued after it had "reviewed the entire file," including all the evidence presented at the hearing before the referee. Based on that record, the Commission applied the principles of equity and good

conscience in reaching its decision. We find ample evidence to support that decision. See Allmendinger v. Industrial Comm., 40 Colo. App. 210, 571 P.2d 741 (1977); Morrison Bar v. Ind. Comm., 138 Colo. 16, 328 P.2d 1076 (1958); Ward & Co. v. Industrial Comm., 128 Colo. 465, 263 P.2d 817 (1953).

The cause is remanded to the Industrial Commission with directions to reduce the offset by $190, to $2,052. In all other respects, the order is affirmed.

Footnotes

1. In February 1977, appellant married a United States citizen and became a resident alien, entitled to collect unemployment compensation benefits. On appeal, the Commission concedes that appellant became legally available for work in February 1977, and thus is entitled to reduce the $2,242 overpayment by $190, the amount of benefits he received in February 1977. The Commission now submits that its final order requiring an offset of $2,242 should be modified to require an offset of $2,052.

2. But see, 8 C.F.R. § 214.1(c) (1975) & (1976), providing that a nonimmigrant "may not engage in any employment unless he has been accorded a nonimmigrant classification which authorizes employment or he has been granted permission to engage in employment . . . ."

3. Section 8-73-107(7), C.R.S. 1973 (1978 Supp.), prohibiting the payment of unemployment benefits to aliens not lawfully admitted for permanent residence in the United States. This amendment was in response to the Federal Unemployment Tax Act, 26 U.S.C. § 3304 (a)(14)(A) (1976) (effective "with respect to certifications of States for 1978 and subsequent years . . . ." 26 U.S.C. § 3304 (a)(14)(A), at p. (886).

4. See 8 C.F.R. § 214.1(c) (1976); 26 U.S.C. § 3306 (c)(18) (1976), Unemployment Tax Act.

5. But see footnote 1.

James F. ECKART, Petitioner,
v.
The INDUSTRIAL CLAIM APPEALS OFFICE OF the STATE of COLORADO, DIVISION of EMPLOYMENT AND TRAINING and Boulder Yellow Cab, Inc., Respondents.

No. 88CA1727.

775 P.2d 97
Colorado Court of Appeals,
Div. II.

May 18, 1989.

Unemployment compensation claimant sought review of final order of the Industrial Claim Appeals Office which disqualified him from the receipt of unemployment compensation benefits. The Court of Appeals, Fischbach, J., held that the direct cause of the claimant's separation from employment was his dissatisfaction with standard working conditions and thus claimant was not entitled to unemployment compensation benefits despite previously being asked to commit illegal acts.

Affirmed.

William E. Benjamin, Boulder, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Karen E. Leather, Asst. Atty. Gen., Denver, for respondents Industrial Claim Appeals Office and Div. of Employment and Training.

No Appearance for respondent Boulder Yellow Cab, Inc.

FISCHBACH, Judge. (FN*)

James F. Eckart, claimant, seeks review of a final order of the Industrial Claim Appeals Office (Panel) which disqualified him from the receipt of unemployment compensation benefits. In denying benefits, the Panel applied Sec. 8 73 108(5)(e)(I), C.R.S. (1986 Repl. Vol. 3B) because it found that claimant had quit as a result of his dissatisfaction with standard working conditions. Claimant challenges that finding. We affirm.

Claimant quit his employment as a mechanic for Boulder Yellow Cab (employer). At the hearing, claimant testified that he was unhappy with many aspects of his working conditions, which were causing him substantial stress. These included the loss of some of his benefits during the prior seven years, the pressure of maintaining an aging taxi fleet with used parts, the fact that he had been asked by management to change license plates from one taxi to another, which he had done, and the inconvenience of a temporary change in his working hours.

Approximately two weeks before he quit, claimant received a formal warning letter from his supervisor because a cab driver reported that claimant was being uncooperative in fixing his cab. Claimant denied this and was unhappy with the letter. About a week before he quit, claimant told his supervisor he was looking for another job. However, claimant had threatened to quit before.

The Friday before he quit claimant spoke to a member of the Board of Directors of the cab co op and complained about the lack of adequate parts, his new hours, and the condition of the fleet vehicles. He did not mention being asked to change license plates. When the Board member told him that nothing could be done to help him, he threatened to quit. The Board member advised him to reconsider, but on the following Monday, claimant, without giving any reasons, told the manager of the Denver office that he was quitting.

On these undisputed facts, the hearing officer found that claimant resigned, not because of prior incidents involving license plates, but because of dissatisfaction with the working conditions and therefore disqualified claimant from the receipt of benefits. The Panel affirmed.

Claimant contends that the Panel erred in not awarding him benefits pursuant to Sec. 8 73 108(4)(1), C.R.S. (1986 Repl. Vol. 3B). We disagree.

Section 8 73 108(4), C.R.S. (1986 Repl. Vol. 3B), provides:

"An individual separated from a job shall be given a full award of benefits if any of the following reasons and pertinent conditions related thereto are determined by the division to have existed....

"(1) Being instructed or requested to perform a service or commit an act which is in violation of an ordinance or statute...." (emphasis added).

Here, the hearing officer found that employer, approximately six times in the prior ten years, had requested that claimant change the license plates from one taxi to another, and claimant had done so. Claimant argues that because this activity was a violation of Sec. 42 3 122, C.R.S. (1984 Repl. Vol. 17), and was found to have "existed," the hearing officer was required to award him benefits pursuant to Sec. 8 73 108(4)(1). Implicit in claimant's argument is the contention that such award is mandated regardless of whether it was actually a motivating factor for his separation. We do not so construe Sec. 8 73 108(4).

Our construction of Sec. 8 73 108(4), C.R.S. (1986 Repl. Vol. 3B) is integrally related to the policies, general principles, and legislative intent of the Colorado Employment Security Act. The legislative intent behind the act is that unemployment benefits are to be awarded to those eligible individuals who are unemployed through no fault of their own. ***Zelingers v. Industrial Commission, 679 P.2d 608 (Colo. App.1984)***

Thus, the General Assembly has determined that although a person has the right to leave a job for any reason, the circumstances of his separation shall be considered in determining his entitlement to and the amount of benefits. Certain acts of employees which are the sole direct and proximate, or motivating cause of their unemployment may result in such individuals being disqualified from receiving benefits. See Sec. 8 73 108(1), C.R.S. (1986 Repl. Vol. 3B); ***Colorado State Judicial Department v. Industrial Commission, 630 P.2d 102 (Colo. App.1981)*** .

A claimant's entitlement to benefits, therefore, is determined by the reason for his separation from employment, which is a matter to be resolved by the trier of fact. See Mohawk Data Sciences Corp. v. Industrial Commission, 660 P.2d 922 (Colo. App.1983); Stavros v. Industrial Commission, 631 P.2d 1192 (Colo. App.1981); Sec. 8 73 108(4), C.R.S. (1986 Repl. Vol. 3B). When ascertaining the reason for separation, the trier of fact must evaluate the totality of the evidence and determine the motivating factors in the employee's separation and then determine whether, based upon those factors, claimant is entitled to, or disqualified from, the receipt of benefits. See Sec. 8 73 108(1), C.R.S. (1986 Repl. Vol. 3B); cf. Zelingers v. Industrial Commission, supra; Albaitis v. Industrial Commission, 44 Colo. App. 55, 609 P.2d 1118 (1980).

In light of these policies, we construe the statutory language at issue to mean that, before awarding benefits to a claimant, a hearing officer must not only determine that one of the qualifying reasons or conditions existed, but also that the qualifying reason or condition was a direct and proximate, or motivating factor in claimant's separation.

The hearing officer here did find that employer at various times had requested that claimant switch the license plates on two taxi cabs. However, the evidence was equivocal as to whether the request to switch the license plates was a motivating factor in claimant's decision to quit. On the totality of the evidence, the hearing officer concluded that claimant's general dissatisfaction with working conditions, and not the license plate switching, was the essential motivation for him to quit. That conclusion is sustainable under the evidence presented and, accordingly, is binding on review. ***Musgrave v. Eben Ezer Lutheran Institute, 731 P.2d 142 (Colo. App.1986)*** .

We here interpret Sec. 8 73 108(4) to require that an existing qualifying reason or condition be a direct or proximate cause of an employee's separation from employment in order that he be entitled to benefits. In so doing, we acknowledge that there may be more than one direct or proximate cause of separation. Therefore, we do not necessarily disagree with claimant's argument that, if an employee separates from employment for several "reasons" and any of the "reasons" might support an award of benefits, then he is entitled to benefits even if other "reasons" for separation would support a disqualification of benefits. See Hewlett v. Colorado Division of Employment & Training, 753 P.2d 791 (Colo. App.1987). Claimant's argument is inapposite here, however, because the hearing officer properly determined that the request to change the license plate was not a proximate or motivating "reason" for his separation.

Although we affirm the conclusion of the hearing officer, we do agree with claimant's assertion that the provisions of Sec. 8 73 108(4)(1), C.R.S. (1986 Repl. Vol. 3B) do not mandate that a claimant must give notice to an employer that he intends to quit because he has been requested to perform an illegal act. However, we disagree with claimant's assertion that the hearing officer imposed such a requirement on claimant. The hearing officer's findings as to the lack of any complaints by claimant to management concerning the switching of licenses properly went to the weight and credibility to be accorded to his assertion that being asked to do so was a motivating cause of his separation.

Also, we reject claimant's contention that the Panel engaged in initial fact finding in its order. The Panel simply restated the obvious conclusion that the hearing officer accorded less weight and credibility to claimant's testimony that switching license plates was a direct cause of his separation than it did to the testimony concerning claimant's other reasons for separation. See Clark v. Colorado State University, 762 P.2d 698 (Colo.App.1988).

Order affirmed.

SMITH and STERNBERG, JJ., concur.

FN* Known as Janice B. Davidson.

Electronic Fab Technology Corporation, Petitioner,

v.

Arletta S. Wood; Colorado Department of Labor and Employment,

Division of Employment and Training and the

Industrial Claim Appeals Office of the

State of Colorado, Respondents.

No. 87CA0804.

749 P.2d 470

Colorado Court of Appeals,

Div. II.

Dec. 24, 1987.

Perry L. Goorman, Englewood, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Aurora Ruiz-Hernandez, Asst. Atty. Gen., Denver, for respondents Dept. of Labor & Employment and Industrial Claim Appeals Office.

No appearance for respondent Arletta S. Wood.

SMITH, Judge.

Electronic Fab Technology Corporation, employer, seeks review of a final order of the Industrial Claim Appeals Office (Panel) which awarded unemployment benefits to claimant, Arletta S. Wood. We affirm.

Claimant resigned her position as employer's manufacturing supervisor. The Panel found that claimant quit as a result of health problems caused primarily by an extremely heavy work load. The Panel concluded that claimant was not at fault for her separation because she was physically and mentally unable to perform the heavy work load and awarded full benefits pursuant to Sec. 8-73-108(4)(j), C.R.S. (1986 Repl.Vol. 3B).

On review, employer contends that the Panel's findings and conclusions are not supported by substantial evidence. We disagree.

Here, claimant testified that she had been overworked for at least a year, that she had periodically voiced concerns over the workload and her health to employer, that employer's attempts to remedy the workload through additional personnel and a computer system were unsuccessful, that for several months prior to her resignation she had been under her doctor's care for work-related anxiety and headaches, and that, in compliance with her physician's recommendation, she quit for health reasons.

Employer's representatives, testified, however, that although they knew claimant had suffered from a work overload months earlier, they assumed the problems had been alleviated because claimant had not made further complaints after receiving computer and personnel support. They further testified that they knew claimant had seen her physician several times in the months prior to resigning but claimant never explained to them the extent of her health problem or its alleged causal relationship to work. Consequently, claimant's resignation, based on health-related reasons, was a surprise.

After reviewing the testimony, we conclude that since there is substantial, albeit conflicting, evidence supporting the Panel's findings, we will not disturb them on review. See In re Claim of Krantz v. Kelran Constructors, Inc., 669 P.2d 1049 (Colo.App.1983).

Relying on Shaw v. Valdez, 819 F.2d 965 (10th Cir.1987), employer further contends that it was denied due process because it was not given notice of an opportunity to develop or present evidence on whether claimant's physical or mental inability to perform her job was the result of "insufficient educational attainment or inadequate occupational or professional skills." We disagree.

Pursuant to Sec. 8-73-108(4)(j), an individual may be awarded benefits for "being physically or mentally unable to perform the work or unqualified to perform the work as a result of insufficient educational attainment or inadequate occupational or professional skills." Implicit in employer's contention is the issue whether the qualifying phrase "as a result of insufficient educational or inadequate occupational or professional skills" modifies only the phrase "unqualified to perform the work" or whether it also modifies the phrase "being physically or mentally unable to perform the work."

Generally, a statute is to be construed as a whole to give consistent, harmonious and sensible effect to all its parts. See Colorado Department of Social Services v. Board of County Commissioners, 697 P.2d 1 (Colo.1985). Educational, occupational, and professional skills are normally tied to an individual's qualifications to perform a job. Therefore, we conclude that this statute was written in the disjunctive and that the qualifying phrase modifies only the phrase "unqualified to perform the work." Consequently, we hold that, pursuant to Sec. 8-73-104(4)(j), an individual may be awarded benefits either when the individual is physically or mentally unable to perform the work or when the individual is not qualified to perform the work because of insufficient learned skills.

Here, there was evidence to support the findings and conclusion that claimant was physically or mentally unable to perform her work for health-related reasons. Therefore,

we conclude that the second qualifying provision of Sec. 8-7308(4)(j) was inapplicable and that no finding concerning it was necessary. Consequently, we find no merit in claimant's due process argument.

Employer also contends that the Panel erred in not disqualifying claimant pursuant to Sec. 8-73-108(4)(b)(I), C.R.S. (1986 Repl.Vol. 3B). We disagree. Even if we assume that there was evidence to support the application of this section, since the Panel's decision to apply Sec. 8-73-108(4)(j) was supported by substantial evidence, it will not be disturbed on review. See Mohawk Data Sciences Corp. v. Industrial Commission, 660 P.2d 922 (Colo.App.1983).

Order affirmed.

Van Cise and Kelly, JJ., concur.

Octavio T. Escamilla, Petitioner,

v.

Industrial Commission of the State of Colorado (Ex-Officio

Unemployment Compensation Commission); Colorado

Division of Employment; and Mercury

Management St., Inc.,

Respondents.

No. 83CA0172.

670 P.2d 815

Colorado Court of Appeals,

Div. III.

Sept. 15, 1983.

Charles B. Dillion, Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Deputy Atty. Gen., Richard H. Forman, Sp. Asst. Atty. Gen., Alice Parker, Asst. Atty. Gen., Denver, for respondents.

BERMAN, Judge.

Claimant, Octavio T. Escamilla, seeks review of an order of the Industrial Commission denying him unemployment benefits under Sec. 8-73-108(9)(a)(XX), C.R.S.1973 (1982 Cum.Supp.). We set aside the order of the Industrial Commission and remand for further proceedings.

Claimant was discharged from his position as supervisor for a janitorial service at Stapleton International Airport. At the hearing before the referee, the project manager testified that he had terminated claimant for fighting on the job when it was brought to his attention that claimant and his girlfriend, a fellow employee, had been involved in an argument which involved pushing and shoving in a public area. The manager testified that he learned of the incident from the lead supervisor who had "hear[d] some argument going on." He testified that subsequently several employees who had witnessed the event told him that there "was quite a scene up on the floor that night." The manager stated that after an altercation eighteen months before he had warned claimant that a second incident could be cause for termination.

Claimant testified that his girlfriend had become ill, and asked him to take her home before the shift ended. When he refused she began to shout, push, and slap him. He stated that he finally took her home at the direction of the lead supervisor, returned, and finished his shift before he was terminated.

The referee found that the claimant had been involved in an altercation. However, he further found that the employer acted precipitously in discharging claimant since the prior warning had occurred one and a half years before. He, therefore, granted claimant full benefits.

The Industrial Commission found that the claimant had engaged in an altercation with another worker, but made no finding as to the extent of his participation. The Commission reversed the referee, finding that the prior warning was adequate, and the employer was not required to give claimant another opportunity to conform to the required standard. The Commission concluded that claimant had been discharged for failure to meet job performance standards and accordingly disqualified him from the receipt of benefits. See Sec. 8-73-108(9)(a)(XX), C.R.S. 1973 (1982 Cum.Supp.).

Claimant contends that there is insufficient evidence in the record that he actively engaged in the altercation which led to his termination to support a denial of benefits, and that he is entitled to benefits since the record reflects that he was discharged through no fault of his own. We agree.

The question of whether an employee is eligible for unemployment benefits when he has been discharged for involvement in an altercation during which he was not the aggressor has been addressed only in an unpublished opinion of this court. In re Claim of Altman v. Industrial Commission, (Colo.App. No. 76-643, ann'd March 3, 1977) (not selected for official publication). In Altman, this court held that: "Where an employee acts to defend himself against an unprovoked assault by a co-employee, he may not be deemed, for unemployment compensation purposes, to have violated a company rule which prohibits fighting or disturbances on the employer's premises." See Denver v. Industrial Commission, 666 P.2d 160 (Colo.App.1983) (volitional act by employee necessary for him to be found at fault for his termination).

Here, although it appears there was no written company rule against fighting, the claimant had been warned that, if involved in another fight, he could be discharged. However, there is no evidence in the record that claimant actively engaged in the altercation. To the contrary, the record reveals that the claimant was attacked by his girlfriend but did nothing in retaliation. Hence, because the evidence is uncontradicted that claimant acted only to defend himself against an unprovoked assault by a co-employee, he cannot be denied unemployment benefits.

The order is set aside and the cause is remanded for entry of an order granting full unemployment benefits under Sec. 8-73-108(1)(a), C.R.S.1973 (1982 Cum.Supp.).

Kelly and Tursi, JJ., concur.

Manuel FEDERICO; Ronald E. Baird; Dean A. Cummings; Richard L. Goodnight; James A. Hall; Lee Higginbotham; Larry H. Humbler; Gale L. Donnelly; Elery H. Mefford; Donald K. Mefford; John A. Lauro; Floyd J. Mansfield; Theodore Jimenez; Leonard H. Johnson; Richard W. Lanter; Orson J. Matteson; Dorlin M. Thompson; Barry J. Todd; Harvey A. Williams; Jose E. Romo; Robert L. Saul; Joseph H. Marcus; Larry E. Owen; Ronald L. Owen; Rudolph L. Palomino; David Scheibley; Louis Siefford; George S. Sims; Ronald W. Stockley; and Eugene Romero,
Petitioners/Cross Respondents,
v.
BRANNAN SAND & GRAVEL CO., Respondent/Cross Petitioner,
and
The Industrial Claim Appeals Office of the State of Colorado and the Division of Employment and Training for the Colorado Department of Labor and Employment; and Pedro Leal, Respondents/Cross Respondents.

No. 88SC587.

788 P.2d 1268
Supreme Court of Colorado,
En Banc.

March 19, 1990.

Unemployment compensation claimant sought determination of eligibility for benefits. The Industrial Claim Appeals Panel overturned findings of hearing officer denying benefits and employer petitioned for review. The Court of Appeals, 762 P.2d 771, set order aside and remanded. Certiorari was granted. The Supreme Court, Erickson, J., held that: (1) issue whether employer employee relationship has been severed as a result of permanent replacement of employee was question of fact to be determined under circumstances of each case; (2) Panel was required to follow Administrative Procedure Act standard of review, that hearing officer's determination of "evidentiary facts" would not be disturbed unless against weight of evidence; and (3) Panel improperly substituted its findings of evidentiary fact, that claimants had been permanently replaced, for hearing officer's findings that employer continued to have work available for claimants and they were not formally terminated.

Affirmed and remanded.

Mullarkey, J., concurred in part and dissented in part and filed opinion.

Boyle & Tyburski, Susan J. Tyburski, Denver, for petitioners/cross respondents Manual Federico, Ronald E. Baird, Dean A. Cummings, Richard L. Goodnight, James A. Hall,

Lee Higginbotham, Larry H. Humbler, Gale L. Donnelly, Elery H. Mefford, Donald K. Mefford, John A. Lauro, Floyd J. Mansfield, Theodore Jimenez, Leonard H. Johnson, Orson J. Matteson, Dorlin M. Thompson, Barry J. Todd, Harvey A. Williams, Jose E. Romo, Robert L. Saul, Joseph H. Marcus, Larry E. Owen, Ronald L. Owen, Rudolph L. Palomino, David Scheibley, Louis Siefford, George S. Sims, Ronald W. Stockley and Eugene Romero.

Fogel, Keating and Wagner, P.C., Scott Meiklejohn and David R. Struthers, Denver, for petitioner/cross respondent Richard W. Lanter.

Bradley, Campbell & Carney, P.C., Jim Michael Hansen, Earl K. Madsen and K. Preston Oade, Jr., Golden, for respondent/cross petitioner Brannan Sand & Gravel Co.

Duane Woodard, Atty. Gen., Charles B. Howe, Deputy Atty. Gen., Richard H. Forman, Sol. Gen., and John August Lizza, Asst. Atty. Gen., Denver, for respondents/cross respondents Indus. Claim Appeals Office of the State of Colo. and Div. of Employment and Training for Colorado Dept. of Labor and Employment.

Pedro Leal, respondent/cross respondent pro se.

Justice ERICKSON delivered the Opinion of the Court.

In this consolidated unemployment compensation case involving a number of employees, respondent Brannan Sand and Gravel Company (Brannan) appealed decisions of the Industrial Claim Appeals Panel (Panel) that set aside in part hearing officer orders denying unemployment compensation to the employee petitioners (claimants). The court of appeals consolidated the appeals and, in Brannan Sand & Gravel Co. v. Industrial Claim Appeals Office, 762 P.2d 771 (Colo.App.1988), held that the Panel improperly substituted its own findings of fact for those of the hearing officer and set aside the Panel's orders. We granted certiorari and now affirm the court of appeals and return this case to the court of appeals with directions.

I.

The claimants were members of a local union employed by Brannan pursuant to a collective bargaining agreement entered into by Brannan and the union. The agreement expired on June 30, 1985, and Brannan and the union had failed to negotiate another agreement when the union called a strike against Brannan on July 3, 1985. The claimants participated in the strike and refused to report to their jobs with Brannan. On July 3, 1985, Brannan notified the claimants of their possible replacement in a letter which provided:

For those employees who wish to work and return to work, employment is available. If you choose not to return to work, it will be necessary to seek a permanent replacement for you. Needless to say, if such a replacement is hired before you make an unconditional offer to return to work, you will not have a job with us at that time.

By July 20, 1985, the claimants had not returned to work and Brannan had hired enough replacement workers to resume its normal operations.

The claimants filed claims for unemployment benefits. The deputy awarded the claimants compensation and Brannan appealed the awards to the hearing officer. (FN1) The hearing officer made the following pertinent findings: (1) the labor dispute between the union and Brannan was ongoing at the time of the hearing and none of the claimants had been formally discharged; (2) Brannan hired replacement workers for trucks that had previously been assigned to the claimants, but other trucks were available; and (3) although Brannan could not put all of the claimants to work, it did have positions available for some of the claimants if they chose to return. The hearing officer concluded that the claimants were not eligible for unemployment benefits since their unemployment was due to the labor dispute and that Brannan had not discharged the claimants and had positions available at the time of the hearing.

The claimants appealed to the Industrial Claim Appeals Office. (FN2) The Panel upheld the denial of benefits to the claimants for the period from July 3 to July 20, 1985. However, the Panel found that the claimants had been permanently replaced as of July 20, 1985 and were entitled to unemployment benefits from that date.

Brannan appealed. The court of appeals, relying on Clark v. Colorado State University, 762 P.2d 698 (Colo.App.1988), found that section 24 4 105(15)(b), 10A C.R.S. (1988) (State Administrative Procedure Act), provides the applicable standard of review of hearing officer decisions by the Industrial Claim Appeals Panel. (FN3) Brannan Sand & Gravel Co., 762 P.2d at 773. Since the Panel found that the claimants had been permanently replaced as of July 20, 1988, the court of appeals held that the Panel did not follow the appropriate standard of review. Id. In addition, the court of appeals found that the employer employee relationship could be ended by the permanent replacement of a striking worker and, after permanent replacement, the employee would be eligible for unemployment benefits. Id. at 774. The court of appeals stated that whether an employee has been permanently replaced is a question of fact and that a claimant's offer to return to work is irrelevant to the determination of whether an employee has been permanently replaced. Id. at 774 75.

The claimants petitioned for certiorari review of that part of the court of appeals decision that set aside the Panel's orders. Brannan cross petitioned for certiorari review of the court of appeals conclusion that a striking employee need not offer to return to work and be refused employment in order to be eligible for unemployment benefits. In granting certiorari, we elected to review the issues raised in both the petition and the cross petition.

II.

The Employment Security Act, title 8, articles 70 to 82 of the Colorado Revised Statutes, was enacted to protect workers who become unemployed through no fault of their own from financial hardship. Section 8 70 102, 3B C.R.S. (1986). Section 8 73 109, the strike

disqualification statute, provides that "[a]n individual is ineligible for unemployment compensation benefits for any week with respect to which the division finds that his total or partial unemployment is due to a strike or labor dispute...." The statute expresses a legislative policy of neutrality in labor disputes and, in furtherance of this policy, does not require an employer to fund a strike against itself through unemployment compensation. See F.R. Orr Constr. Co. v. Industrial Comm'n, 188 Colo. 173, 183, 534 P.2d 785, 791 (1975). Throughout the duration of the labor dispute, the employer employee relationship is suspended and the employee's unemployment is held to be "due to" the dispute. Sandoval v. Industrial Comm'n, 110 Colo. 108, 119, 130 P.2d 930, 935 (1942). However, once the employer employee relationship is terminated, the employee's unemployment is no longer considered to be "due to" the dispute and the employee is eligible for unemployment benefits. Ruberoid Co. v. California Unemployment Ins. Appeals Bd., 59 Cal.2d 73, 76 77, 378 P.2d 102, 105 06, 27 Cal. Rptr. 878, 881 21 (1963). The relationship is terminated by the discharge of the employee, by the employee's acceptance of permanent employment with a different employer, or by the permanent replacement of the employee. Pierce v. Industrial Comm'n, 38 Colo. App. 85, 87 88, 553 P.2d 402, 404 (1976).

The question of what causes a permanent replacement to occur has been addressed by a number of courts. One line of authority holds that an employee must abandon the labor dispute, unconditionally offer to return to work and be refused employment by the employer to be terminated as a result of permanent replacement. See, e.g., Four Queens, Inc. v. Board of Review, Nev. , 769 P.2d 49 (1989). Other courts have held that an employee's unemployment is no longer due to the labor dispute if that employee has been permanently replaced, and do not require the employee to offer to return to work and thereafter be refused. See, e.g., Baugh v. United Tel. Co., 54 Ohio St.2d 419, 377 N.E.2d 766 (1978).

The court of appeals held that the determination of whether the employer employee relationship has been severed as the result of permanent replacement of the employee is a question of fact to be determined under the circumstances of each case and that an offer to return to work and a refusal thereof is not a prerequisite to a finding of termination. Brannan Sand & Gravel Co., 762 P.2d at 774 75. We agree. This conclusion comports with both the policies underlying section 8 73 109 and the policies underlying the Employment Security Act as a whole. While a striking employee is involved in a labor dispute, the state's policy of neutrality is furthered by the denial of unemployment compensation to the employee. However, after the employer employee relationship is terminated for any of the reasons set forth in Pierce v. Industrial Commission, the policy of state neutrality in labor disputes is no longer implicated and the policies underlying the Employment Security Act as a whole are furthered by an award of unemployment benefits.

III.

We must determine the standard of review that the Industrial Claim Appeals Panel must employ when reviewing the decision of the hearing officer. In Clark v. Colorado State

University, 762 P.2d 698 (Colo.App.1988), the court of appeals held that section 24 4 105(15)(b), 10A C.R.S. (1988), sets forth the appropriate scope of review to be employed by the Panel when conducting appellate review of hearing officer decisions. Id. at 700. We agree.

Prior to 1986, the Industrial Commission was vested with the ultimate factfinding authority with regard to unemployment compensation matters. Id. at 679. Pursuant to the Employment Security Act, the Industrial Commission was empowered to conduct a de novo review of hearing officer decisions, was authorized to make its own findings of fact, and was allowed to apply its special expertise and knowledge of unemployment compensation matters. Ch. 39, sec. 1, Sec. 8 74 104, 1976 Colo. Sess. Laws 354, 355; Clark, 762 P.2d at 699. The provisions of the State Administrative Procedure Act, sections 24 4 101 to 108, 10A C.R.S. (1988), did not apply to review of unemployment compensation matters by hearing officers, the Industrial Commission, and the courts. Ch. 39, sec. 1, Sec. 8 74 106(1)(f)(II), 1976 Colo. Sess. Laws 354, 356 57.

The Employment Security Act was amended in 1986, substantially changing the administrative review provisions of the Employment Security Act. The Industrial Commission was abolished. Section 24 1 121(2), 10A C.R.S. (1988). Within the Department of Labor and Employment, the Industrial Claim Appeals Office was formed and given the duty to conduct administrative appellate review of orders entered in unemployment and workers' compensation cases. Sections 8 1 102, 8 74 104, 3B C.R.S. (1986). The Panel was not authorized to make its own factual findings; review by the Panel was limited to the record previously submitted in the case. Section 8 74 104(2). Section 8 74 106(1)(f)(II) was amended to provide in part that "[t]he provisions of the 'State Administrative Procedure Act, article 4 of title 24, C.R.S., and particularly sections 24 4 105 and 24 4 106, C.R.S., shall not apply to hearings and court review under this article." (Emphasis added.) The statute does not expressly provide that the State Administrative Procedure Act is inapplicable to appellate review by the Industrial Claim Appeals Office and no other statutory provision specifically sets forth the standard of review to be employed by the Panel.

Section 24 4 107 provides that the State Administrative Procedure Act applies to every agency of the state having statewide territorial jurisdiction, unless the act conflicts with a "specific statutory provision relating to a specific agency," in which case the "specific statutory provision shall control." The General Assembly is presumed to have intended to change the law when a statute is amended. Charnes v. Lobato, 743 P.2d 27, 30 (Colo.1987). It is also presumed that the General Assembly has knowledge of existing statutory law including the State Administrative Procedure Act. See Ingram v. Cooper, 698 P.2d 1314, 1317 (Colo.1985) (the General Assembly was presumed to have knowledge of good time credit statutes when sentencing statutes were enacted). In this case, the legislature did not expressly provide a standard of review to be employed by the Panel when sections 8 74 104 and 8 74 106 were amended, and did not provide that the State Administrative Procedure Act is inapplicable to administrative appellate review by the Panel. We conclude that the legislature intended that section 24 4 105(15)(b) control

the Panel's scope of appellate review of hearing officer decisions in unemployment compensation cases.

IV.

The court of appeals set aside the Panel's orders on the grounds that the Panel applied an improper standard of review and substituted its own findings of fact for those of the hearing officer. Section 24 4 105(15)(b) of the State Administrative Procedure Act provides:

The findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by the administrative law judge or the hearing officer shall not be set aside by the agency on review of the initial decision unless such findings of evidentiary fact are contrary to the weight of the evidence.

The issue, which the court of appeals did not address, is whether the hearing officer's findings constituted evidentiary facts or ultimate conclusions of fact.

Evidentiary facts are the raw historical data underlying the controversy. Lee v. State Bd. of Dental Examiners, 654 P.2d 839, 843 (Colo.1982); Womack v. Industrial Comm'n, 168 Colo. 364, 371, 451 P.2d 761, 764 (1969). Ultimate conclusions of fact, on the other hand, are conclusions of law or mixed questions of law and fact that are based on evidentiary facts and determine the rights and liabilities of the parties. Lee, 654 P.2d at 844. The distinction between evidentiary fact and ultimate conclusion of fact is not always clear, but an ultimate conclusion of fact is as a general rule phrased in the language of the controlling statute or legal standard. See Lee, 654 P.2d at 844.

Here, whether the claimants were permanently replaced was an issue of evidentiary fact. The other issue, which is an ultimate conclusion of fact subject to review by the Panel, is whether the claimants' unemployment is "due to a strike or labor dispute." The Panel, instead of weighing the evidence pursuant to section 24 4 105(15)(b), substituted its own findings that the claimants had been permanently replaced as of July 20, 1985 for the hearing officer's findings that Brannan continued to have work available to the claimants and that the claimants were not formally terminated. (FN4) The court of appeals properly set aside the Panel's orders. However, the hearing officer did not expressly find that the claimants had not been permanently replaced by Brannan. Upon remand, the Panel shall return the claimants' cases to the hearing officer for the determination of whether the claimants had been permanently replaced subsequent to July 20, 1985.

V.

We conclude that an employee involved in a labor dispute is entitled to unemployment compensation benefits when the employer employee relation has been terminated with respect to that employee. The employer employee relationship can be terminated by the permanent replacement of the employee. The question of whether an employee has been permanently replaced is a question of evidentiary fact that cannot be set aside by the

Panel on review of a decision of a hearing officer unless such a finding is contrary to the weight of the evidence in the record. See Krantz v. Kelran Constructors, Inc., 669 P.2d 1049 (Colo.App.1983). The court of appeals correctly set aside the orders of the Panel in part since the Panel utilized an improper standard of review in modifying the decisions of the hearing officer. Accordingly, we affirm the court of appeals and return this case to the court of appeals with directions to remand to the Industrial Claim Appeals Panel. Upon remand, the Panel shall return the cases of the individual claimants to the hearing officer for proceedings consistent with this opinion.

Justice MULLARKEY concurs in part and dissents in part.

Justice MULLARKEY concurring in part and dissenting in part:

I agree with the majority that the Administrative Procedure Act (APA) standard of review applies to the Industrial Claim Appeals Panel (panel) when it reviews a hearing officer's decision in an unemployment compensation matter. I respectfully dissent, however, from the majority's application of that standard in this case.

Section 24 4 105(15)(b), 10A C.R.S. (1988), provides in relevant part:

The findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by the administrative law judge or the hearing officer shall not be set aside by the agency on review of the initial decision unless such findings of evidentiary fact are contrary to the weight of the evidence.

The distinction which the statute draws between findings of evidentiary fact and ultimate conclusions of fact often is difficult to apply. See, e.g., Baca v. Helm, 682 P.2d 474 (Colo. 1984) (depending on circumstances, causation may be either an ultimate fact or an evidentiary fact). The importance of the statutory classification is that it determines whether the hearing officer or the agency has discretion over the matter to be determined. In this case, the majority affirms the court of appeals' conclusion that permanent replacement is a question of evidentiary fact which may not be set aside by the panel unless it finds on review that the decision of the hearing officer is contrary to the weight of the evidence in the record. Maj. op. at 1269. However, I believe that the question of whether the employees were permanently replaced is properly classified as a question of ultimate fact and that therefore the panel acted within its authority in setting aside the determination of the hearing officer. See Raisch v. Industrial Commission, 721 P.2d 693 (Colo. Ct. App.1986) (court finds that hearing officer's determination that worker's compensation claimant was entitled to vocational rehabilitation was one of ultimate fact, reviewable by Industrial Commission).

First, in determining the proper scope of the panel's review in this case, we must consider section 8 73 109, 3B C.R.S. (1986), which provides in relevant part that:

An individual is ineligible for unemployment compensation benefits for any week with respect to which the division finds that his total or partial unemployment is due to a strike or labor dispute....

Under the statute, then, the ultimate legal issue before the hearing officer and the panel was whether the claimants' unemployment was "due to a strike or labor dispute." In Pierce v. Industrial Commission, 38 Colo. App. 85, 553 P.2d 402 (1976), the court held that pursuant to section 8 73 109, unemployment is not "due to a strike or labor dispute" if an employee has been permanently replaced. Under Pierce, once a hearing officer has concluded that an employee has been permanently replaced, it follows that his unemployment is not "due to a strike or labor dispute" and therefore the employee is eligible for benefits.

The majority does not dispute that the question of whether a claimant's unemployment is "due to a strike or labor dispute" is a question of ultimate fact, but distinguishes that question from the issue of whether the claimants had been permanently replaced on the basis that an ultimate fact is a "general rule phrased in the language of the controlling statute or legal standard." Maj. op. at 1272. However, I disagree that merely because the question of whether the claimants have been permanently replaced is not specifically phrased by the statute the issue is not one of "ultimate fact." By deciding the question of whether the claimants have been permanently replaced, the hearing officer resolves the ultimate question of whether the claimant's unemployment was "due to a strike or labor dispute." The court of appeals' decision in Pierce in effect made "permanent replacement" coextensive with the statutory eligibility requirement that a claimant's unemployment not be "due to a strike or labor dispute." The majority does not suggest that the hearing officer was free to find that, although the employees had been "permanently replaced," their unemployment was "due to a strike or labor dispute." Thus, a finding of permanent replacement determines the employee's eligibility for benefits. It is dispositive.

Second, under the relevant legal standards adopted by this and other courts, the question of whether the claimants were permanently replaced is one of ultimate fact. Evidentiary facts are the detailed factual or historical findings upon which a legal determination rests. Lee v. State Bd. of Dental Examiners, 654 P.2d 839 (Colo. 1982). Findings of ultimate fact, as distinguished from raw evidentiary fact, involve a conclusion of law or at least a determination of a mixed question of law and fact and settle the rights of the parties. Id., at 844. Evidentiary facts are based on the evidence presented at the hearing. Ultimate facts are conclusions acquired through reflection and reasoning based upon evidentiary facts and are necessary in order that a determination of the rights of the parties can become a question of law. Baca, 682 P.2d at 479 (Neighbors, J., concurring). See also Woodbury Daily Times Co. v. Los Angeles Times Washington Post News Serv., 616 F. Supp. 502, 505 (D.N.J.1985), aff'd 791 F.2d 924 (3d Cir.1986) (ultimate fact is a mixture of fact and law; fact because it is derived by inference or reasoning from the evidence; law because the derivation is informed by legal principles and policies, producing a fact of independent legal significance).

All parties here agree that (1) a labor dispute existed; (2) that the employer sent a letter to the workers telling them to return to work or be replaced; (3) that the employer has hired replacements; and (4) that although certain positions remain open, there are insufficient positions to hire even a majority of the employees. These are the evidentiary facts. They are the detailed historical findings upon which the legal determination must rest, developed through the evidence presented before the hearing officer. Only a question of ultimate fact remains: whether, under these evidentiary facts, the claimants' unemployment is "due to a strike or labor dispute" or whether they have been permanently replaced. This question of ultimate fact must be resolved through reflection and reasoning based upon the evidence and "informed by legal principles and policies." Woodbury Daily Times, 616 F. Supp. at 505. Further, the resolution of this question determines the rights of the parties. See Lee, 654 P.2d at 844. When considered in this light, it becomes clear that the question of "permanent replacement" must be characterized as one of ultimate fact properly subject to review by the panel. Because I believe that the panel properly found that the claimants were permanently replaced, I would reverse the decision of the court of appeals. For the foregoing reasons I respectfully dissent from the majority's decision upholding the court of appeals' reversal of the panel.

FN1. A deputy is appointed by the director of the division of employment and training and has statutory authority to initially decide the validity of a claim for unemployment benefits. Section 8 74 102, 3B C.R.S. (1986). A dissatisfied party may appeal a deputy's decision to a hearing officer. Section 8 74 103(1), 3B C.R.S. (1986). The hearing officer is authorized to conduct hearings and to enter findings of fact and conclusions of law. Sections 8 74 103(2), (3).

FN2. A party may appeal the decision of a hearing officer to the Industrial Claim Appeals Office. Sections 8 1 102(1), 8 74 104(1). The Industrial Claim Appeals Office conducts administrative review through the Industrial Claim Appeals Panel. See Sec. 8 1 102(1).

FN3. Section 24 4 105(15)(b), 10A C.R.S. (1988), provides in part:

The findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by the administrative law judge or the hearing officer shall not be set aside by the agency on review of the initial decision unless such findings of evidentiary fact are contrary to the weight of the evidence.

FN4. The hearing officer found the following with respect to each of the claimants:

On July 13, 1985, the employer sent a letter to the strikers explaining that work was available should they decide to return, but replacements were being hired and strikers would lose jobs unless they returned to work before such a replacement was hired. With the exception of a few strikers, the workers did not return to work and did not cross the picket line. They were reluctant to return due to the loss and/or reduction of union benefits. Replacements were hired and the employer's operation continued. These replacements were assigned to trucks that the strikers were normally assigned to.

However, the employer did have and does have other trucks available. At no time was the claimant formally terminated. Work continues to be available to the claimant.

Joe H. Fowler, Petitioner,

v.

Carder, Inc., The Industrial Claim Appeals Office of the

State of Colorado and Division of Employment and

Training, Department of Labor,

Respondents.

No. 92CA0758.

849 P.2d 917

Colorado Court of Appeals,

Div. III.

Feb. 11, 1993.

Bill Myers, Denver, for petitioner.

No appearance for respondent Carder, Inc.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., James C. Klein, Asst. Atty. Gen., Denver, for respondents Industrial Claim Appeals Office and Div. of Employment and Training, Dept. of Labor.

CRISWELL, Judge.

The claimant, Joe H. Fowler, seeks review of the order of the Industrial Claim Appeals Office (Panel) which denied unemployment compensation benefits to him after his employment termination by his employer, Carder, Inc. His petition calls upon us to consider what is required of a claimant when he or she seeks to obtain a full award of benefits pursuant to Sec. 8-73-108(4)(b)(IV), C.R.S. (1992 Cum.Supp.), based upon an addiction to alcohol. We conclude that claimant failed to comply with those requirements here and affirm the Panel's order.

Section 8-73-108(4)(b)(IV) provides that, if an employee's separation from employment results from the "off-the-job or on-the-job use of not medically prescribed intoxicating beverages," that employee may, nevertheless, be entitled to a full award of benefits, but only if:

(A) The worker has declared to the division that he is addicted to intoxicating beverages or controlled substances;

(B) The worker has substantiated the addiction by a competent written medical statement issued by a physician ... or has substantiated the successful completion of, or ongoing participation in [an approved treatment program] within four weeks of the claimant's admission;

(C) A worker who is not affiliated with an approved treatment program must present to the division within four weeks after the date of the medical statement ... a program of corrective action which will commence within four weeks ... by an approved private treatment facility or public treatment facility ... or by an alcoholics anonymous program; and

(D) No prior award under [this subparagraph] has been made to the worker within the preceding five years.

Although having the right to do so, see Sec. 8-72-102, C.R.S. (1986 Repl.Vol. 3B), the Director of the Division of Employment and Training has not adopted any special rules or regulations designed to implement the provisions of this statute. The director has, however, promulgated general rules regulating appeals from a deputy's decision and the conduct of a hearing upon such appeal.

Under these regulations, a party appealing a deputy's decision must state "specific reasons" for that appeal. 7 Code Colo.Reg. 1101-2, Sec. 11.2.9 (1987).

Here, in response to claimant's initial claim, the deputy determined that his separation was because of his "off-the-job use of not medically prescribed intoxicating beverages" and that he had not fulfilled any of the requirements of Sec. 8-73-108(4)(b)(IV).

Claimant appealed from the deputy's decision. However, his appeal made no reference to the pertinent statute or to any of its requirements. Specifically, claimant did not admit that he was addicted to alcohol, and he did not supply either a statement from a physician substantiating any such addiction or substantiating that he had either successfully completed an approved treatment program or that he was then participating (or would participate within four weeks) in any such program.

At the evidentiary hearing upon claimant's appeal, he admitted that he was an alcoholic. However, he did not present any medical statement or evidence to substantiate this admission, and he did not present any evidence that he was then participating in any approved treatment program or that he had arranged to do so within four weeks. On the contrary, he testified that he had received no treatment since before 1988, and the Administrative Law Judge (ALJ) found that he had not participated in any such treatment program for nearly four years.

Based on these findings, the ALJ concluded that claimant had not met the requirements of Sec. 8-83-108(4)(b)(IV) and denied the claim for benefits.

After the entry of the ALJ's decision, however, and as a part of his appeal to the Panel, claimant presented additional materials that purported to establish that he had been enrolled in two alcohol treatment programs on the date of the hearing before the ALJ. Relying upon the rule that the Panel may not consider evidentiary materials not submitted to the ALJ, see Voisinet v. Industrial Claims Appeals Office, 757 P.2d 171 (Colo.App.1988), the Panel affirmed the ALJ's order.

Before us, claimant argues that the pertinent statute does not establish a time within which an admission of addiction must be made, but that it allows such a claimant a period of four weeks from the date of such an admission within which to present the supporting materials required by the statute. Hence, he concludes that, because his admission was not made until the date of the evidentiary hearing before the ALJ and because he presented proof of his enrollment in a treatment program within four weeks of that date (albeit after the hearing was closed), his proof was made in a timely fashion and the Panel was required to consider it. We disagree.

First, claimant misinterprets the statute.

Section 8-73-108(4)(b)(IV)(B), C.R.S. (1992 Cum.Supp.) is specific in requiring a claimant, at the time that an admission of addiction is made, to supply either a proper physician's statement supporting that admission or to prove that he or she is presently, or will be within four weeks, enrolled in a proper treatment program. Thus, if a claimant has made no arrangement for such enrollment at the time of the admission of addiction, a physician's statement substantiating the addiction must be supplied.

It is only if a claimant is "not affiliated with an approved treatment program" at the time of the admission but has substantiated the addiction by proper medical proof that Sec. 8-73-108(4)(b)(IV)(C), C.R.S. (1992 Cum.Supp.) grants to the claimant four weeks within which to become properly enrolled in such a program.

Here, when claimant admitted at the hearing that he was an alcoholic, he presented no medical substantiation for such admission, and he denied that he was then enrolled in a treatment program. His admission did not meet the requirements of Sec. 8-73-108(4)(b)(IV)(B); therefore, Sec. 8-73-108(4)(b)(IV)(C) did not allow him four weeks within which to present proof of his enrollment in a treatment plan.

Further, while the statute itself does not establish any time limit within which a claimant must make his admission of addiction and furnish one of the two required substantiations, if, as here, a claimant does not rely upon his addiction when a claim is filed, considerations of a "fair hearing" under 42 U.S.C. Sec. 503(a)(3) (1988) require, at the least, that the employer be given notice that the claimant intends to rely upon such assertion at the hearing before the ALJ. See Monarrez v. Industrial Claim Appeals Office, 835 P.2d 607 (Colo.App.1992); Shaw v. Valdez, 819 F.2d 965 (10th Cir.1987).

Here, the pertinent regulation required claimant's appeal of the deputy's decision to list the specific reasons for the appeal, and the employer was entitled to be informed of his addiction claim prior to that hearing so that it would have an opportunity to contest it. See Monarrez, supra. Having failed to provide such pre-hearing notice, claimant was not entitled to rely upon any claim of addiction in those proceedings.

Order affirmed.

Rothenberg and Smith*, JJ., concur.

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and Sec. 24-51-1105, C.R.S. (1988 Repl.Vol. 10B).

Frontier Airlines, Inc., Petitioner,

v.

The Industrial Commission of the State of Colorado, and

Vickie R. Medley, Amy B. Wiggin, and Patricia J. Hood,

Respondents.

Nos. 85CA0902, 85CA0904 and 85CA0905.

734 P.2d 142

Colorado Court of Appeals,

Div. III.

Oct. 9, 1986.

Rehearing Denied Nov. 6, 1986.

Certiorari Granted (Frontier) March 16, 1987.

Bradley, Campbell & Carney, P.C., Victor F. Boog, Golden, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Dani R. Newsum, Asst. Atty. Gen., Denver, for respondent Indus. Comn.

Winzenburg and Leff, Lawrence B. Leff, Aurora, for respondent Amy B. Wiggin.

No Appearance for respondents Vickie R. Medley and Patricia J. Hood.

BABCOCK, Judge.

In this consolidated proceeding, Frontier Airlines seeks review of the Industrial Commission's orders awarding full unemployment compensation benefits to three flight attendants (claimants) on maternity leave. We affirm.

Frontier's policy mandates maternity leave after a flight attendant reaches her twenty-seventh week of pregnancy. After the attendant has exhausted her accumulated sick leave, maternity leave is unpaid. Each claimant applied for unemployment benefits commencing in her twenty-eighth week of pregnancy. Each testified that she was available for work in related occupations and was actively seeking such work. The Commission found that claimants were entitled to full benefits pursuant to Sec. 8-73-

108(4)(b)(I), C.R.S. (1986 Repl.Vol. 3B), for those weeks when they were unable to work as flight attendants, but were available for other suitable work.

Frontier contends that the Commission erred in applying Sec. 8-73-108(4)(b)(I), C.R.S. (1986 Repl.Vol. 3B), because the claimants were never "separated" from their employment within the meaning of the statute. We disagree.

Section 8-73-108(4), C.R.S. (1986 Repl.Vol. 3B) provides that, "An individual separated from a job shall be given a full award of benefits" if the division determines that conditions specified in the section exist. Relying on Denver Post, Inc. v. Department of Labor & Employment, 199 Colo. 466, 610 P.2d 1075 (1980), Frontier argues that claimants were not "separated" from employment as a matter of law because they continued to receive employee benefits and would resume employment following maternity leave.

In Denver Post, Inc. v. Department of Labor & Employment, supra, claimants, substitute printers and substitute stereotypers, who continued receiving employee benefits while not working were found to be "partially unemployed" under Secs. 8-70-103(18) and 8-70-103(21), C.R.S. (1986 Repl.Vol. 3B). The Commission made the same finding with respect to the claimants here. In Bartholomay v. Industrial Commission, 642 P.2d 50 (Colo.App.1982), we held that an employee who is "partially unemployed" but not "totally separated" is nevertheless eligible for benefits under Sec. 8-73-108(4)(b)(I), C.R.S. (1986 Repl.Vol. 3B), if the claimant is able to perform and is available for other suitable work.

Here, as in Bartholomay v. Industrial Commission, supra, claimants were on mandatory leave from their usual occupation because of a temporary physical condition and were entitled to resume employment when physically able to return to work. They received no wages during leave. The Commission found that they were able to do other suitable work, available for such work, and actively seeking it. This temporary but mandatory medical leave of absence constituted partial unemployment and, thus, was a "separation" sufficient to entitle the claimants to benefits.

Moreover, in contrast to Saint Anthony Hospital Systems v. Industrial Commission, 709 P.2d 967 (Colo.App.1985), here the "employee benefits" claimants continued to receive did not include the right to work when needed by the employer. Therefore, mere continuation of certain employee benefits does not as a matter of law foreclose the Commission's finding that claimants were separated from employment.

Frontier also argues that claimants are not entitled to benefits because they presented no evidence that they became pregnant "through no fault of their own." We hold that such evidence is unnecessary.

Section 8-73-108(4)(b)(I), C.R.S. (1986 Repl.Vol. 3B), specifically provides that benefits are available to a worker "who, either voluntarily or involuntarily, is separated from employment because of pregnancy" if she satisfies the subsection's other requirements.

This provision is a specific exception to the general rule in Sec. 8-73-108(1)(a), C.R.S. (1986 Repl.Vol. 3B) that unemployment compensation is "for the benefit of persons unemployed through no fault of their own." See Sec. 2-4-205, C.R.S. (1980 Repl.Vol. 1B); Denver v. Hansen, 650 P.2d 1319 (Colo.App.1982). Therefore, whether claimants became pregnant of their own volition is totally irrelevant to their eligibility for benefits.

Finally, Frontier asserts that there was insufficient evidence to support the Commission's finding that claimants were available for suitable work. We disagree.

In order to be "available for suitable work," claimants need not be able to perform their normal work, if they are able to perform and are qualified for other jobs within their physical capabilities. Bartholomay v. Industrial Commission, supra. Here, the claimants testified, and the Commission found, that they were able to perform and were actively seeking other work. That job opportunities for claimants in other fields were limited is only one factor for the Commission to consider in its determination of fact. See Couchman v. Industrial Commission, 33 Colo.App. 116, 515 P.2d 636 (1973).

Orders affirmed.

Sternberg and Criswell, JJ., concur.

Perry W. Gandy, Petitioner,

v.

The Industrial Commission of the State of Colorado (Ex-Officio

Unemployment Compensation Commission of Colorado)

and Pitney Bowes, Inc., Respondents.

No. 82CA1398.

680 P.2d 1281

Colorado Court of Appeals,

Div. II.

Aug. 18, 1983.

Rehearing Denied Sept. 29, 1983.

Certiorari Denied May 7, 1984.

Cogswell & Wehrle, Walter M. Kelly, II, Bruce A. Smith, Denver, for petitioner.

Baker & Hostetler, Lynne G. McGowan, Bruce Pringle, Denver, for respondent Pitney Bowes, Inc.

Duane Woodard, Atty. Gen., Charles B. Howe, Deputy Atty. Gen., Joel W. Cantrick, Christa D. Taylor, Asst. Attys. Gen., Denver, for respondent Industrial Com'n.

STERNBERG, Judge.

The claimant, Perry W. Gandy, seeks review of a final order of the Industrial Commission denying his claim for unemployment compensation benefits. We affirm.

Gandy had been employed as a salesman for the employer, Pitney Bowes, Inc., for 19 years when his productivity fell below acceptable standards in 1981. Consequently, the employer set an October 8, 1981, deadline for Gandy to meet his quota.

On October 5 Gandy missed a scheduled sales meeting. He was busy with another call when his supervisor called on the 6th or 7th to arrange another meeting, and he promised to phone later. The evidence was conflicting as to whether he called back.

The employer sent a mailgram to Gandy on the 7th stating that he would be terminated unless he immediately reported to work. The mailgram was returned the next day as undeliverable.

On October 9, the employer decided to terminate Gandy pursuant to a company rule called "bulletin 98." That rule provides that when an employee is absent for unknown reasons, or when the "field office" suspects that the employee does not intend to return to work, a certified letter is to be sent ordering the employee to contact the office within three days. The employee is terminated if he does not contact the office.

On the 9th the employer mailed a letter to Gandy, requesting that he report by October 13. When he did not report, he was terminated for failure to report in accordance with bulletin 98.

Gandy did not receive the mailgram or letters until October 15 when he returned from a hunting trip. He testified that the trip was an authorized vacation, a point disputed by the employer.

The referee who presided at the hearing ordered a full award of benefits based on the employer's failure to file a timely response to the claim. The Commission reversed and ordered the entry of findings on the substantial issues based on the record.

A different referee reviewed the record and denied benefits pursuant to Sec. 8-73-108(9)(a)(XVII), C.R.S.1973 (1982 Cum.Supp.). That statute establishes as grounds for denial of benefits the taking of unauthorized vacations or failing to return to work after an authorized vacation. The referee found that the hunting trip was an unauthorized vacation, that Gandy did not respond to the employer's request for a meeting, and that he did not report to work by October 13.

Gandy contends that the employer's stated reason for his separation was failure to report in accordance with bulletin 98, and therefore, the Commission erred in denying benefits based on Sec. 8-73-108(9)(a)(XVII). He argues that the only applicable section is Sec. 8-73-108(9)(a)(VI), C.R.S.1973 (1982 Cum.Supp.), concerning deliberate disobedience of a reasonable instruction. Gandy asserts that his "disobedience" was not deliberate because he did not receive the letter until October 15 when he returned from hunting. We disagree with his contentions.

The purpose of the unemployment compensation law is to provide assistance to individuals "unemployed through no fault of their own." Section 8-73-108(1)(a), C.R.S.1973 (1982 Cum.Supp.). The law provides that "certain acts of individuals are the direct and proximate cause of their unemployment." Therefore, the Commission is given wide discretion to consider the circumstances of separation and select the applicable provision. Section 8-73-108(1)(a), C.R.S.1973; Dunn v. Industrial Commission, 640 P.2d 1146 (Colo.1982); Colorado State Judicial Department v. Industrial Commission, 630 P.2d 102 (Colo.App.1981).

Here, the record supports the Commission's finding that Gandy took an unauthorized vacation which precluded him from complying with the employer's back to work order. Thus, the Commission's conclusion that Gandy caused his unemployment is binding on review. Colorado State Judicial Department v. Industrial Commission, supra.

Kortz v. Industrial Commission, 38 Colo.App. 411, 557 P.2d 842 (1976) and Stavros v. Industrial Commission, 631 P.2d 1192 (Colo.App.1981) do not compel a different result. In Kortz we held that where an employee is separated for reasons justifying compensation, the employer may not rely on later discovered evidence of misconduct as a basis to contest an award of benefits. Stavros does not address the problem presented here.

Gandy next contends that six alleged mistakes in the findings of fact warrant reversal of the Commission's order. We have reviewed the findings and conclude that, although certain factual errors were made, they were not material. Therefore, we are not at liberty to set aside the Commission's order. Section 8-74-107(6), C.R.S.1973 (1982 Cum.Supp.).

Gandy's final contention is that he was denied due process of law because the referee who made the findings was not the referee who presided at the hearing. Gandy argues that he was deprived of his right to have the referee make credibility determinations based on observation of the witnesses. We conclude there was no due process violation.

Section 8-74-104(1), C.R.S.1973 (1982 Cum.Supp.) grants the Commission authority to "affirm, modify, reverse or set aside" the referee's decision based on the "evidence previously submitted in the case." This authority includes the power to assess independently the credibility of witnesses. McGinn v. Industrial Commission, 31 Colo.App. 6, 496 P.2d 1080 (1972). Consequently, Gandy has no statutory right to expect the benefit of the referee's credibility findings.

Moreover, this statutory scheme is not inconsistent with due process of law in administrative proceedings. If a referee has read and considered a transcript of the evidence adduced out of his presence he may make findings for review by the Commission. Big Top, Inc. v. Hoffman, 156 Colo. 362, 399 P.2d 249 (1965).

Under these circumstances, the Commission did not violate Gandy's due process rights when it remanded the case to the second referee for new findings.

Order affirmed.

Enoch, C.J., and Smith, J., concur.

Edgar M. Gatewood, Petitioner,

v.

Kenneth C. Russell, Individually and as Commissioner of the Industrial Commission of the State of Colorado, Henry C. Kimbrough, Individually and as Commissioner of the Industrial Commission of the State of Colorado, and Industrial Commission of the State of Colorado (ex-officio Unemployment Compensation Commission of Colorado) and Bob Reed Ford, Respondents.

No. 70--186.

29 Colo.App. 11, 478 P.2d 679

Colorado Court of Appeals,

Div. I.

Nov. 10, 1970.

Rehearing Denied Dec. 1, 1970.

Bruce C. Bernstein, Denver, for petitioner.

Duke W. Dunbar, Atty. Gen., John P. Moore, Deputy Atty. Gen., Robert L. Harris, Asst. Atty. Gen., for respondent Industrial Commission of the State of Colorado (ex-officio Unemployment Compensation Commission of Colorado).

COYTE, Judge.

This is an appeal from the decision of the Industrial Commission denying unemployment benefits to claimant.

The factual background of the case reveals that claimant was an employee of defendant, Bob Reed Ford. In July 1969, he left the employ of Bob Reed Ford to accept a job offer from National Auto Brokers, Inc., hereinafter referred to as 'National.' Approximately four weeks later claimant quit his job at National and applied for unemployment compensation. After an initial denial by a deputy, claimant was awarded benefits by the referee. Benefits totaling $497 were then paid to the claimant. The referee's decision was

appealed to the Commission, which reversed the referee and denied benefits to claimant. This decision of the Commission is now here on appeal.

Under the applicable statute, 1965 Perm.Supp., C.R.S.1963, 82--4--8(4)(g), a worker who quits his employment to take a better job must work at the new job at least ninety days in order to be eligible for unemployment compensation. If the worker fails to work this minimum period, it is not considered a 'better job' under 1965 Perm.Supp., C.R.S.1963, 82--4--8(4)(g)(iii), and the Commission is required to deny all unemployment benefits, 1965 Perm.Supp., C.R.S.1963, 82--4--8(6)(b)(vii).

However, under 1965 Perm.Supp., C.R.S.1963, 82--4--8(4)(g)(iii), a worker may cease employment within the ninety-day period and still be eligible for benefits, if the reasons for termination of this employment were conditions over which the worker had no knowledge at the time he accepted employment, and over which he had no control after commencing work. Whether or not the worker lacked this knowledge and control is a question of fact to be determined by the Commission.

Although recognizing that he did not work the required ninety days, claimant maintains that the exception to the rule applied in his case and that the Commission erred in ruling otherwise. We do not agree with this contention.

As noted above, the Commission is responsible for determining whether or not the exception is applicable in a particular case. On appeal, our function is to determine if there exists evidence to support the findings made by the Commission. Findings supported by substantial evidence are binding upon the court. Morrison Road Bar, Inc. v. Industrial Commission of Colorado,138 Colo. 16, 328 P.2d 1076.

Claimant stated that he was subject to constant harassment and criticism while working for National, which forced him to quit before completing the minimum ninety-day period. Defendant, Bob Reed Ford, argued that this was not a condition beyond the knowledge or control of the claimant, but was merely a personality conflict between the claimant and his supervisor, where claimant was unable to adjust to his new situation, and as such was not an exception to the ninety-day rule contemplated by the statute. This latter argument was accepted by the Commission in rejecting this claim.

We concur in this holding. It is undisputed that claimant voluntarily left the employment of National. As C.R.S.1963, 82--1--2, makes clear, the policy of the Colorado Employment Security Act is to provide some protection to those '* * * persons unemployed through no fault of their own.' This so-called condition raised by claimant was personal and subjective, and failed to relate to any objective standards justifying voluntary termination. In order to come within the exception, the reason for voluntary termination of employment must be for objective rather than personal reasons. Geckler v. Review Board of Indiana, 244 Ind. 473, 193 N.E.2d 357; Pennington v. Catherwood, 33 A.D.2d 946, 306 N.Y.S.2d 744.

The next question raised by the claimant concerns the $497 in benefits he received. Claimant argues that the Commission should be equitably estopped from demanding repayment of this amount. Although the Commission indicates that it is uncertain as to whether it will demand repayment of this amount, we feel that it is necessary to answer this question in order fully to dispose of the issues herein.

By virtue of 1967 Perm.Supp., C.R.S.1963, 82--11--1(4)(a), the Commission has authority to demand repayment of benefits mistakenly paid, or may have such overpayments credited to any future benefits the claimant may be entitled to if equity and good conscience so require. The Commission may also waive collection if it deems collection to be administratively impracticable.

Claimant has collected $497 to which he was not entitled. He has failed to advance any justifiable reason as to why the Commission should be prohibited from exercising the authority granted to it by statute. Therefore, the Commission may take such action relative to this $497 as it deems appropriate in accordance with its statutory authority.

Order affirmed.

Silverstein, C.J., and Dufford, J., concur.

Susann A. Getts, Petitioner,

v.

The Industrial Claim Appeals Office of the State of Colorado,

The Colorado Division of Employment and Training and

Ticor Title Insurance Company, Respondents

No. 90CA0330

804 P.2d 282

Colorado Court of Appeals,

Div. IV.

December 6, 1990.

William E. Benjamin, Boulder, Colorado, Attorney for Petitioner.

Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General, Michael J. Steiner, Assistant Attorney General, Jill M.M. Gallet, Assistant Attorney General, Denver, Colorado, Attorneys for Respondents Industrial Claim Appeals Office and the Colorado Division of Employment and Training.

No Appearance for Respondent Ticor Title Insurance Company.

CRISWELL, Judge.

Susann A. Getts (claimant) seeks review of the order of the Industrial Claim Appeals Office (Panel) that denied her claim for unemployment compensation benefits. The sole issue presented is whether § 8-73-108(4)(f), C.R.S. (1990 Cum. Supp.), which is limited in its application to "construction workers," denies to claimant equal protection of the law. We conclude that the record here does not support claimant's assertion of a constitutional deprivation. Thus, we affirm the Panel's order.

Claimant quit her employment as a title examiner for a title insurance company to accept what she considered to be better employment as a customer service representative at a different title company. Claimant was laid off four weeks later when her new employer replaced her with a former employee. Claimant applied for unemployment compensation benefits, but the hearing officer concluded that claimant did not meet the criteria for a full award under § 8-73-108(4)(f). Thus, he concluded that claimant was disqualified under § 8-73-108(S)(e)(V), C.R.S. (1990 Cum. Supp.) from receiving the benefits applied for.

Section 8-73-108(5)(e)(V) provides that an employee is disqualified from receiving benefits if the employee quits the job to seek other work or to accept other employment. However, § 8-73-108(4)(f) creates an exception to this general rule of disqualification. This latter statute says that, "due to the particular nature of the building and construction industry," a "construction worker" will be entitled to full benefits if he quits one "construction job" to accept another "construction job," and if (1) the quitting of the first job occurs within 30 days of the "established termination date" of that job and other specified conditions are met, or (2) the job quit involved unreasonable working conditions with respect to the distance between the job and the employee's residence, or (3) the job quit was outside the state, the employee is a resident of this state, and the new job is within the state, or (4) the quitting of the job was required so as to comply with an employer's assignment under an apprenticeship program that is in accordance with such programs registered with the federal government.

Claimant asserts that the record here demonstrates that this statutory exception to the general rule invidiously discriminates against all other employees and in favor of construction workers and, thus, violates the equal protection requirements of the federal and state constitutions. We disagree.

A statute is presumed to be constitutional, and the party challenging it bears the heavy burden of proving it unconstitutional beyond a reasonable doubt. Weitzel Redi-Mix, Inc. v. Industrial Commission, 728 P.2d 364 (Colo. App. 1986).

The threshold inquiry presented by a claim that a statute denies a party equal protection is whether persons or entities who are in fact similarly situated are subject to disparate treatment under the challenged statute. Board of County Commissioners v. Flickinger, 687 P.2d 975 (Colo. 1984). This inquiry necessarily involves a factual consideration and determination.

Further, because the equal protection challenge here involves neither a "suspect classification" nor an infringement of a "fundamental right," we must apply the "rational relationship" test in determining the statute's constitutionality. See Stevenson v. Industrial Commission, 190 Colo. 234, 545 P.2d 712 (1976).

Under that test, a statutory classification is valid unless it has no rational basis or is not rationally related to a legitimate state interest. Thus, the provision challenged here cannot be invalidated if there is any reasonably conceivable set of facts that would lead to the conclusion that the classification created meets the rational relationship standard. Kinterknecht v. Industrial Commission, 175 Colo. 60, 485 P.2d 721 (1971); In re Claim of Woloson, 796 P.2d 1 (Colo. App. 1989).

Here, claimant presented not an iota of evidence to demonstrate that her job as a title examiner for a title company is so similar to the job of a construction worker as to admit of no rational distinction. See In re Claims of National Claims Associates, Inc. v. Division of Employment, 786 P.2d 495 (Colo. App. 1989) (evidence insufficient to demonstrate that non-exempted insurance agents are similar to real estate agents

exempted from act by § 8-70-103(11)(1), C.R.S. (1986 Repl. Vol. 3B)). Rather, she rests her claim of invalidity solely upon the face of the statute itself.

However, the statute contains a legislative declaration that it was enacted because of the "particular nature" of the construction industry. And, its substantive provisions make the particular nature of the work in this industry evident.

Thus, in its various subsections, § 8-73-108(4)(f) recognizes that a construction worker's employment is not of a continuing nature, but normally has an "established termination date," that such a worker may be required to travel a considerable distance from his or her home to the job site, that such a resident worker may be required to go out of state on a construction job, and that such a worker may be subject to an apprenticeship program that will require him or her to be assigned to various jobs.

Because of the general transitory nature of employment in the building and construction industry, § 8-73-108(4)(f) is merely one of several statutes that treat employees in this industry differently from other employees. At the state level, for example, employees in the construction industry may be exempted from the time-consuming pre-agreement election procedures generally required for an all-union agreement. Section 8-3-109(3), C.R.S. (1986 Repl. Vol. 3B). Similarly, at the federal level, the United States Congress has allowed employees in this industry to enter into so-called "hot cargo" and "pre-hire" agreements, generally forbidden to other employees, and has reduced the time within which such employees may be required to become union members. 29 U.S.C.A. 158 (e) and (f) (1973).

These provisions were enacted to "take into account the occasional nature of employment in the building and construction industry." II C. Morris, The Developing Labor Law 1384 (2d Ed. 1983). And, presumably because of the evident unique nature of the building and construction industry, there have been few claims that these statutes violate either the right to equal protection under the Fourteenth Amendment or the due process clause of the Fifth. When such a claim has been made, it has been rejected. See Truck Drivers Union Local No. 413 v. N.L.R.B., 118 U.S. App. D.C. 149, 334 F.2d 539 (D.C. Cir. 1964). See also Brown v. Local No. 17, Amalgamated Lithographers, 180 F. Supp. 294 (N.D. Calif. 1960) (parties did not dispute existence of special circumstances in construction industry).

These same considerations apply here. Because construction workers are subjected to working conditions not generally encountered by other employees, there is a rational basis for treating them differently for unemployment compensation purposes. And, our review of the substantive provisions of the statute here attacked convinces us that the legislative resolution is reasonably adapted to meet the problems that are unique to this industry. Thus, we reject claimant's assertion that the statute offends, on its face, against any equal protection requirements.

Order affirmed.

Marquez and Davidson, JJ., concur.

Joe A. Gonzales, Petitioner,

v.

Industrial Commission of the State of Colorado, and

Monfort of Colorado, Inc., Respondents.

No. 85SC182.

740 P.2d 999

Supreme Court of Colorado,

En Banc.

July 27, 1987.

Hornbein, MacDonald, Fattor and Buckley, P.C., Philip Hornbein, Jr., Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Christa D. Taylor, Asst. Atty. Gen., Denver, for respondent Industrial Com'n.

Holland & Hart, John M. Husband, James J. Gonzales, Denver, for respondent Monfort of Colo., Inc.

KIRSHBAUM, Justice.

In Gonzales v. Industrial Commission, No. 84CA0804 (Colo.App. Mar. 14, 1985), an unpublished decision, the Court of Appeals affirmed an order of the Industrial Commission (the Commission) disqualifying the petitioner, Joe A. Gonzales (Gonzales), from the receipt of unemployment compensation benefits. The Court of Appeals concluded that, because Gonzales had been discharged pursuant to certain disciplinary guidelines established by his employer, the Commission properly refused to consider other circumstances relevant to Gonzales' discharge. We granted certiorari to review this conclusion, and now reverse and remand with directions.

I

From April 1982 until December 1983, Gonzales was employed by Monfort of Colorado, Inc. (Monfort) as a processing laborer at Monfort's Greeley meatpacking plant. Gonzales was issued a copy of the Monfort Information Handbook, which contained a detailed explanation of the company's five-step disciplinary program governing dismissal of employees without regard to fault. Any employee who reached Step Five as the result of

accumulated disciplinary action was automatically discharged. In this regard, the handbook provided the following pertinent information:

[W]e have developed a NO FAULT absentee program under which all except specific Absence Occurrences listed below will be counted as Absence Occurrences REGARDLESS OF THE REASON FOR ABSENCE....

If you have two (2) or more Absence Occurrences during any thirty (30) calendar day period you may be considered to have been absent excessively....

An employee who has two (2) ABSENCE OCCURRENCES during any thirty (30) calendar day period will be charged with a step in the [five-step disciplinary] program, which will move that employee to the next step of the procedure.

Specifically exempted from disciplinary action were absences involving workers' compensation injury, vacation, jury duty, paid funeral leave, military leave or leave of absence approved in writing and in advance by a supervisor.

Between July 11 and December 23, 1983, Gonzales was disciplined on five separate occasions: twice for absenteeism, once for failure to follow instructions, once for failure to perform the quantity and quality of work expected and once for failure to telephone the job site thirty minutes prior to starting time when unavailable for work due to illness. Upon receiving the fifth disciplinary action, he was discharged from employment.

Gonzales applied for unemployment compensation benefits. Monfort filed a protest, asserting that Gonzales had been discharged because of excessive absenteeism and because he had exhausted all five steps of the company's disciplinary program. The Deputy of the Division of Employment and Training concluded that Gonzales was responsible for the separation and, pursuant to section 8-73-108(9)(a)(XX), 3 C.R.S. (1983 Supp.) (now codified at Sec. 8-73-108(5)(e)(XX), 3B C.R.S. (1986)), denied benefits.

Gonzales appealed, and a hearing was conducted by a Commission referee. The evidence at the hearing revealed several additional circumstances surrounding Gonzales' discharge. The initial discipline was imposed because Gonzales incurred two absences within a thirty-day period, specifically on June 15 and July 8, 1983. Shortly after undertaking a new work assignment processing meat on a moving conveyor belt in early August 1983, Gonzales received a second discipline for failure to follow instructions and a third discipline for failure to perform the quantity and quality of work expected. Gonzales' work performance improved, however, and his work was later complimented by a supervisor. The Step Four discipline was imposed on October 11, 1983, for failure to telephone Monfort at least thirty minutes prior to starting time when too ill to work. The final discipline was imposed when Gonzales was again absent twice within a thirty-day period during December 1983. The evidence also established that Monfort officials counseled Gonzales after both the third and fourth disciplinary sanctions and informed him that his employment would be terminated if he received a Step Five discipline.

Gonzales testified that he was physically unable to perform the quantity and quality of work expected of him when he was transferred to work on the conveyor belt in August 1983; that he was unable to notify his employer of his unavailability for work one-half hour prior to his starting time on October 11, 1983, due to gastrointestinal illness, but did telephone at the first practicable time, approximately fifteen or twenty minutes before starting time; and that he was absent from work in December 1983 due to car trouble beyond his control. The Commission referee concluded that although several of the disciplinary steps imposed on Gonzales under Monfort's process were "questionable," questions about whether any of the steps were unjustified were irrelevant. Accordingly, the referee affirmed the Deputy's decision. The Commission adopted the referee's findings of fact and conclusions of law. In affirming the Commission's order, the Court of Appeals concluded that the evidence established that Monfort properly followed its five-step disciplinary process and also established that Gonzales was discharged for excessive absenteeism.

II

Monfort argues that a final order of the Commission may be reversed only where the evidence is insufficient to support the determination and that the Commission properly relied on Monfort's disciplinary guidelines in concluding that Gonzales should be disqualified from receiving unemployment compensation benefits. We disagree.

A

It is true, of course, that the Commission's findings of fact may not be altered on review where supported by substantial evidence. Sims v. Industrial Comm'n, 627 P.2d 1107 (Colo.1981); Mohawk Data Sciences Corp. v. Industrial Comm'n, 660 P.2d 922 (Colo.App.1983); Sec. 8-74-107(4), 3B C.R.S. (1986). However, section 8-74-107(6), 3B C.R.S. (1986), provides expressly that an Industrial Commission decision must be set aside if the findings of fact do not support the decision or if the decision is erroneous as a matter of law. Thus, a reviewing court may also consider such issues as whether the Commission applied improper principles of law in reaching its decision and whether the Commission's findings support its decision. See, e.g., Andersen v. Industrial Comm'n, 167 Colo. 281, 447 P.2d 221 (1968); Mountain States Tel. & Tel. Co. v. Industrial Comm'n, 637 P.2d 401 (Colo.App.1981). These inquiries are not forestalled simply because substantial evidence in the record supports the Commission's findings. Andersen v. Industrial Comm'n, 167 Colo. 281, 447 P.2d 221; Sec. 8-74-107(6).

B

Monfort asserts that when an employer establishes guidelines for determining when an employee's conduct requires discharge, an employee's discharge pursuant to those guidelines should prohibit any award of unemployment compensation benefits to that employee. However, the determination of eligibility for unemployment compensation benefits and of standards of disqualification are matters within the province of the General Assembly. Pierce v. Industrial Comm'n, 195 Colo. 10, 576 P.2d 1012 (1978);

Miller v. Industrial Comm'n, 173 Colo. 476, 480 P.2d 565 (1971). Private parties may not by agreement or rule render ineffectual the rules and standards provided by statute. E.g., Hagenbuch v. Plainwell Paper Co., 153 Mich.App. 834, 396 N.W.2d 556 (1986); O'Keefe v. Tabitha, Inc., 224 Neb. 574, 399 N.W.2d 798 (1987). The Colorado Employment Security Act establishes the Commission and delegates to that administrative agency the responsibility of applying the standards adopted by the General Assembly to determine whether under all the circumstances of the case a particular separation from employment shall result in an award of benefits. Pierce v. Industrial Comm'n, 195 Colo. 10, 576 P.2d 1012; Sec. 8-73-108(4), 3B C.R.S. (1986). Furthermore, the provisions of the act are to be interpreted liberally in favor of the employee. F.R. Orr Constr. Co. v. Industrial Comm'n, 188 Colo. 173, 534 P.2d 785 (1975); Harding v. Industrial Comm'n, 183 Colo. 52, 515 P.2d 95 (1973); Stern v. Industrial Comm'n, 667 P.2d 244 (Colo.App.1983).

Whether an employee's conduct should disqualify the employee from receiving unemployment compensation benefits is an issue quite distinct from the question of whether the employee was discharged in accordance with particular employer-generated guidelines. Industrial Comm'n v. Moffat County School Dist., 732 P.2d 616 (Colo.1987); accord, e.g., Causin v. Blache, 498 So.2d 101 (La.Ct.App.1986); Deering v. Unitog Rental Services, 381 N.W.2d 486 (Minn.Ct.App.1986). It has been widely recognized that a violation of an employer's disciplinary rule does not per se require denial of unemployment benefits. See, e.g., Industrial Comm'n v. Moffat County School Dist., 732 P.2d 616 (schoolteacher who has been dismissed is not necessarily precluded from receiving benefits); Escamilla v. Industrial Comm'n, 670 P.2d 815 (Colo.App.1983) (where employer discharged claimant for fighting after warning not to engage in fighting, no disqualification from benefits because claimant acted only to protect himself against unprovoked assault by co-employee); Mountain States Tel. & Tel. Co. v. Industrial Comm'n, 637 P.2d 401 (Colo.App.1981) (where employer discharged claimant for accruing absences in excess of employer's attendance guidelines, no disqualification from benefits where absences due to incidental illness); accord, e.g., Henry v. Iowa Dep't of Job Serv., 391 N.W.2d 731 (Iowa App.1986) (dismissal from employment does not necessarily require denial of benefits); Claim of Sunderland, 121 A.D.2d 779, 503 N.Y.S.2d 191 (1986) (dismissal for noncompliance with employer's attendance policy does not invariably warrant denial of unemployment benefits); Williams v. Burlington Industries, Inc., 318 N.C. 441, 349 S.E.2d 842 (1986) (violation of employer's guideline will not per se disqualify claimant from benefits if claimant's actions were objectively reasonable and taken with good cause); Gillespie v. Commonwealth, 523 A.2d 1205 (Pa.Commw.Ct.1987) (unemployment compensation board cannot merely rely on employer's "no fault" attendance policy to dispose of claim for benefits, but must look to whether claimant was justified in absences). Such a violation is but one factor to be considered in the determination of whether a particular employee is entitled to benefits.

The Commission relied on section 8-73-108(9)(a), 3 C.R.S. (1983 Supp.) (now codified at Sec. 8-73-108(5)(e), 3B C.R.S. (1986)), in disqualifying Gonzales from receipt of benefits. The statute provides in pertinent part as follows:

(e) Subject to the maximum reduction consistent with federal law ... if a separation from employment occurs for any of the following reasons, the employer from whom such separation occurred shall not be charged for benefits which are attributable to such employment and, because any payment of benefits which are attributable to such employment out of the fund as defined in section 8-70-103(13) shall be deemed to have an adverse effect on such employer's account in such fund, no payment of such benefits shall be made from such fund:....

(XX) For other reasons including, but not limited to, excessive tardiness or absenteeism, sleeping or loafing on the job, or failure to meet established job performance or other defined standards, unless such failure is attributable to factors listed in paragraph (b) of subsection (4) of this section....

The fundamental guide to statutory interpretation is legislative intent. People v. District Court, 711 P.2d 666 (Colo.1985); People v. Mascarenas, 706 P.2d 404 (Colo.1985). This court must give effect to that intent when construing a statute. People v. District Court, 713 P.2d 918 (Colo.1986); Ingram v. Cooper, 698 P.2d 1314 (Colo.1985); Stephen v. City & County of Denver, 659 P.2d 666 (Colo.1983). Section 8-73-108, 3B C.R.S. (1986), specifically provides in pertinent part:

Benefit awards. (1)(a) In the granting of benefit awards, it is the intent of the general assembly that the division at all times be guided by the principle that unemployment insurance is for the benefit of persons unemployed through no fault of their own; and that each eligible individual who is unemployed through no fault of his own shall be entitled to receive a full award of benefits....

The disqualification provision of section 8-73-108(5)(e) must be read in light of this express legislative intent to provide benefits to those who become unemployed through no fault of their own. Sims v. Industrial Comm'n, 627 P.2d 1107 (Colo.1981); see Sec. 8-70-102, 3B C.R.S. (1986). Our Court of Appeals has frequently recognized that under the terms of particular disqualification provisions disqualification is inappropriate if the totality of the circumstances establishes that a claimant was unemployed through no fault of his own. Frontier Airlines, Inc. v. Industrial Comm'n, 719 P.2d 739 (Colo.App.1986); Zelingers v. Industrial Comm'n, 679 P.2d 608 (Colo.App.1984); Hospital Shared Services of Colo. v. Industrial Comm'n, 677 P.2d 447 (Colo.App.1984). At a minimum, the claimant must have performed some volitional act or have exercised some control over the circumstances resulting in the discharge from employment. Rulon v. Industrial Comm'n, 728 P.2d 739 (Colo.App.1986); Zelingers v. Industrial Comm'n, 679 P.2d 608; Escamilla v. Industrial Comm'n, 670 P.2d 815.

Here, Gonzales was dismissed solely because he had received five disciplines in Monfort's five-step disciplinary program. Two of those disciplinary steps, including the fifth one that precipitated his dismissal, were imposed under a "no-fault" policy that by its very definition prohibits any consideration of whether the absences were justified or unavoidable. While such a policy may form an appropriate basis for discharge from employment, because it insulates the employee's conduct and the circumstances

surrounding such conduct from scrutiny, it cannot serve as a rule of law automatically disqualifying the discharged employee from statutory benefits to which, upon careful consideration, he or she might be entitled. Furthermore, adoption of such an approach would in effect grant employers ultimate authority to determine that some claimants automatically should not receive unemployment compensation benefits--a decision that is committed to the discretion of the Commission and that must be exercised independently in each case under the guidelines established by the General Assembly.

In determining whether the claimant is responsible for the separation from employment, the Commission must consider a variety of factors. Sec. 8-73-108(4), 3B C.R.S. (1986). Included among these factors are failure to meet quantity and quality performance standards, Sec. 8-73-108(4)(j), 3B C.R.S. (1986) (claimant may be entitled to full award where physically or mentally unable to perform the work), and failure to timely notify the employer of an illness, Sec. 8-73-108(4)(b)(II), 3B C.R.S. (1986) (failure to notify employer of illness or emergency prior to absence will not necessarily preclude award of benefits).

In concluding that satisfaction of Monfort's discharge program automatically constituted fault by Gonzales, the Commission failed to apply the correct statutory criteria and, accordingly, did not exercise its discretion appropriately in this case. On remand, such evidentiary matters as the "no-fault" characteristic of Monfort's plan and the circumstances surrounding all of Gonzales' conduct warrant careful consideration in the determination of whether Gonzales was unemployed through no fault of his own.

C

There is a presumption that the General Assembly intends a just and reasonable result in enacting a statute, and a statutory construction that leads to an unreasonable result will not be applied. Ingram v. Cooper, 698 P.2d 1314 (Colo.1985); Allen v. Charnes, 674 P.2d 378 (Colo.1984). Statutory terms should be given their plain, generally accepted meaning. People v. District Court, 713 P.2d 918 (Colo.1986); Trinity Universal Ins. Co. v. Hall, 690 P.2d 227 (Colo.1984); Clark v. Town of Estes Park, 686 P.2d 777 (Colo.1984). Monfort concedes that in determining whether a particular claimant's absences are excessive under section 8-73-108(5)(e)(XX) the Commission must apply the reasonable and ordinary meaning of the term "excessive." Because the Commission automatically accepted the employer's definition of excessive absenteeism, the Commission must also determine on remand whether the four absences incurred by Gonzales in his approximately twenty months of employment constituted excessive absenteeism within the reasonable and ordinary meaning of the term "excessive." See, e.g., Stevenson v. Industrial Comm'n, 705 P.2d 1020 (Colo.App.1985) (unemployment benefits may not be denied on basis of excessive absenteeism where dismissal results from single unauthorized absence from work).

III

The judgment of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals with directions to return the case to the Industrial Claim Appeals Office (formerly the Commission) for further proceedings consistent with the views expressed in this opinion.

GOODWILL INDUSTRIES OF COLORADO SPRINGS, a Not For Profit Colorado Corporation, Petitioner,
v.
The INDUSTRIAL CLAIM APPEALS OFFICE of the State of Colorado, The Division of Employment and Training, and Marcus P. Anderson, Respondents.

No. 93CA0457.
Colorado Court of Appeals,
Div. I.

Oct. 21, 1993.

Employer petitioned for review of final order of the Industrial Claim Appeals Panel which awarded unemployment compensation benefits to claimant. The Court of Appeals, Rothenberg, J., held that: (1) hearing officer did not abuse his discretion in failing to admit into evidence documents concerning prior written warnings claimant had received, and (2) substantial evidence supported hearing officer's findings that claimant was not responsible for his separation and that he did not deliberately or willfully refuse to obey employer's instructions.

Affirmed.

Frank A. Natchez, P.C., Frank A. Natchez, Colorado Springs, for petitioner.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., John D. Baird, Asst. Atty. Gen., Denver, for respondent, Indus. Claim Appeals Office and The Div. of Employment and Training.

No appearance for respondent Marcus P. Anderson.

Opinion by Judge ROTHENBERG.

Petitioner Goodwill Industries (employer) seeks review of a final order of the Industrial Claim Appeals Panel which awarded unemployment compensation benefits to respondent Marcus P. Anderson (claimant). We affirm.

I.

Employer contends that the hearing officer abused his discretion in failing to admit into evidence documentation concerning prior written warnings claimant had received concerning his job performance. We disagree.

Department of Labor and Employment Regulation 11.2.9.4, 7 Code Colo. Reg. 1101 2, provides, in relevant part:

An interested party to a telephone hearing must submit to the referee any documents, or any subpoenaed documents, he intends to introduce at the hearing in time to ensure that the referee receives the documents before the date of the scheduled hearing. Prior to the date of the scheduled hearing, such party must also provide copies of all documents sent to the referee to any other interested party to the hearing or that ... party's representative. All documents submitted to the referee will be identified on the record. Failure to provide both the referee and the opposing party or such party's representative with copies of such documents may result in their exclusion from the record. (emphasis added)

The notice of telephone conference sent to claimant and employer stated in pertinent part:

1. DOCUMENTS

... If either the claimant/employer is participating by telephone, copies of the documents must be mailed IMMEDIATELY to the referee and the claimant/employer....

Failure to provide both the referee and opposing party(ies) or such party's representative with copies of such documents may result in their exclusion from the record.

Department of Labor and Employment Regulation 11.2.9, 7 Code Colo. Reg. 1101 2, provides, in pertinent part, that an interested party may not present evidence of factual issues at the hearing unless the opposing party has been provided notice of the issue as shown by the claims file. New factual issues may be raised only if the interested party proves "good cause" for its failure to provide proper notice of the factual issue. The notice of telephone conference contained an advisement of this portion of Regulation 11.2.9.

Here, employer attached to its notice of appeal from the deputy's decision copies of prior written disciplinary actions against claimant. The hearing was conducted telephonically. At the conclusion of employer's evidence, employer attempted to introduce into evidence copies of the disciplinary actions. However, the hearing officer refused to admit the documents into evidence because the employer had failed to provide copies of the disciplinary actions to the claimant as required by Regulation 11.2.9.4 and the notice of hearing.

Employer argues this was an abuse of the hearing officer's discretion because it showed good cause for admission of the documents. In support of this argument, employer asserts the documents were necessary: (1) to rebut claimant's defense that he had a reading and writing disability; (2) to show that claimant was on notice his job was in jeopardy; and (3) to show that claimant was terminated for insubordination pursuant to employer's progressive disciplinary policy, which employer argues, constituted grounds for claimant's disqualification from benefits.

In support of its claim of good cause, employer cites to the notice of hearing advisement explaining the "good cause" portion of Regulation 11.2.9. However, the employer mistakenly relies on Regulation 11.2.9. The issue here was not whether new factual

issues could be raised by either employer or claimant pursuant to a showing of good cause. Rather, the issue was whether employer had properly provided the documentation to claimant pursuant to Regulation 11.2.9.4 so as to warrant the submission of the documents into evidence. Therefore, the employer's argument lacks merit.

Even if we assume the documents should have been admitted based upon the fact that the documents were attached to the employer's notice of appeal, a copy of which presumably was sent to the claimant, we nevertheless find no reversible error. Here, the record reflects that the hearing officer questioned claimant extensively about the substantive contents of the documents and the employer was not prevented from presenting testimony, either through examination of its own witnesses or of claimant, concerning the documents.

We also reject the employer's argument that the documents were necessary to prove claimant did not suffer from a disability or to show claimant had been terminated pursuant to notice and employer's progressive disciplinary policy. The record reflects that employer presented testimony concerning claimant's reading disability and was not prevented from presenting additional testimony about this issue either through its own witnesses or through claimant.

We do not address employer's next argument that the hearing officer abused his discretion in failing to impose a less severe sanction. This issue was not raised before the hearing officer or the Panel and, thus, was not preserved for our review. Apache Corp. v. Industrial Commission, 717 P.2d 1000 (Colo. App.1986).

II.

Because of an apparent machine malfunction, approximately twelve minutes of the hearing could not be transcribed. Employer argues that the record is so defective because of that missing portion of the transcript that the case must be remanded either for completion of the record or for a de novo hearing. We disagree.

Even if there are some omissions in the transcript, if the relevant portions of the transcript are sufficient to allow review of the dispositive issues on appeal, the record is not insufficient to permit review. See Intermountain Jewish News, Inc. v. Industrial Commission, 39 Colo. App. 258, 564 P.2d 132 (1977).

Here, at the point where the tape was unable to be transcribed, claimant's supervisor was testifying about prior warnings claimant had received about his job performance. However, the supervisor already had testified concerning the final incident which led to claimant's discharge. And, even though employer's witnesses were testifying at the time of the tape malfunction, employer has failed to set forth the nature of the testimony it believes is missing from the record and the reason why the failure to have this testimony included for review is prejudicial to its case. See Intermountain Jewish News, Inc. v. Industrial Commission, supra.

III.

Employer finally contends that the hearing officer erred in awarding claimant unemployment compensation benefits. Employer argues, in essence, that because claimant was terminated for insubordination pursuant to employer's progressive disciplinary policy, he should have been disqualified from the receipt of benefits for insubordination. Employer further argues that its evidence was more credible than claimant's and that the hearing officer erred in not resolving the conflicting evidence in its favor and disqualifying claimant accordingly. We find no reversible error.

Whether an employee's conduct should disqualify the employee from receiving unemployment compensation benefits is an issue quite distinct from the question of whether the employee was discharged in accordance with particular employer generated guidelines. A violation of an employer's disciplinary rule does not per se require denial of unemployment benefits. ***Gonzales v. Industrial Commission, 740 P.2d 999 (Colo. 1987).***

In an unemployment proceeding, hearing officers are required independently to assess the evidence entered at the hearing and reach their own conclusion as to the reason for a claimant's separation from employment. Hearing officers are required to make their own conclusions as to the probative value of the evidence, the credibility of the witnesses, and the resolution of any conflicting testimony. School District No. 1 v. Fredrickson, 812 P.2d 723 (Colo. App.1991).

Even if the evidence arguably might support the application of more than one section of the Employment Security Act, nevertheless, hearing officers have wide discretion in determining which section is applicable. If the decision is supported by substantial evidence and the inferences which may be drawn therefrom, the hearing officer's decision will not be disturbed on review by this court. School District No. 1 v. Fredrickson, supra.

Here, the hearing officer considered and made findings concerning the various factors leading up to claimant's separation from employment, including his prior disciplinary actions and his reading and writing disability. The hearing officer implicitly determined that the proximate cause of claimant's separation was employer's dissatisfaction with his conduct in response to the instruction that he assist a customer in loading some furniture. However, after consideration of the totality of the circumstances, the hearing officer found that claimant was not responsible for his separation.

Since these findings are supported by substantial, although conflicting, evidence, and the permissible inferences which may be drawn therefrom, we thus may not disturb them. Jones v. Industrial Commission, 705 P.2d 530 (Colo. App.1985); see School District No. 1 v. Fredrickson, supra.

The hearing officer’s findings support the conclusions that claimant was not at fault for his separation and therefore was entitled to benefits pursuant to Sec. 8 73 108(4), C.R.S. (1986 Repl. Vol. 3B). See Santa Fe Energy Co. v. Baca, 673 P.2d 374 (Colo.App.1983).

The findings would also support the conclusion that claimant did not deliberately or willfully refuse to obey the employer’s instruction. See Beatty v. Automatic Catering, Inc., 165 Colo. 219, 438 P.2d 234 (1968). Thus, contrary to employer's argument, there was no error in the hearing officer’s failure to disqualify claimant for insubordination pursuant to Sec. 8 73 108(5)(e)(VI), C.R.S. (1986 Repl. Vol. 3B).

We note that employer has attached documentation to his opening brief which was not included in the record before the hearing officer. We may not consider this supplemental evidence, as we are limited on review to the evidence in the record before the hearing officer. Section 8 74 107(1), C.R.S. (1993 Cum. Supp.).

The order is affirmed.

PIERCE and CRISWELL, JJ., concur.

Gray Moving and Storage, Inc., Petitioner,

v.

Industrial Commission of Colorado (Ex-officio Unemployment

Compensation Commission of Colorado), and

Henry M. Brewington, Respondents.

No. 76--454.

38 Colo.App. 419, 560 P.2d 482

Colorado Court of Appeals,

Div. I.

Dec. 2, 1976.

Rehearing Denied Dec. 30, 1976.

Certiorari Denied Feb. 28, 1977.

J. D. MacFarlane, Atty. Gen., Jean E. Dubofsky, Deputy Atty. Gen., Edward G. Donovan, Sol. Gen., Louis L. Kelley, Asst. Atty. Gen., Denver, for respondent Industrial Commission of the State of Colorado.

No appearance for respondent Henry M. Brewington.

ENOCH, Judge.

Gray Moving and Storage, Inc., employer, petitions for review of a final order of the Industrial Commission granting full unemployment compensation benefits to claimant, Henry M. Brewington. We affirm.

Claimant worked as a driver, helper and packer from February 21, 1974, to September 22, 1975, when he quit because of alleged discrimination. The discrimination was evidenced by an alleged change of attitude and treatment by his supervisor and by the assignment of the least desirable jobs. Claimant contends that the discrimination began when the employer learned that claimant, who is black, was dating a female co-employee who is Caucasian.

The Commission concluded that 'claimant quit his job because of a change in his working conditions which became intolerable because of the attitudes and working atmosphere which deteriorated following his association with the other employee.' Employer contends that there is insufficient evidence to support this conclusion, and in any event such change in working conditions would not support an award under s 8--73--108(4)(c) or (d), C.R.S. 1973.

Though there is conflicting evidence with regard to work assignments, and some of the findings are not supported by evidence, there is evidence to support the basic findings and the conclusions, and we are bound thereby. Gatewood v. Russell, 29 Colo.App. 11, 478 P.2d 679. Employer contends that since claimant continued to receive all the necessary communication to fulfill his job responsibility, personal relationships within the company are not to be considered in evaluating working conditions. We disagree. There is evidence that claimant was subjected to cold, curt treatment by his immediate supervisor who spoke openly of claimant in derogatory terms.

Overt acts or conduct by the employer directed at one employee such as is present here is sufficient to support a full award. It is not required that working conditions become impossible, only that there be a substantial change. Section 8--73--108(4)(d), C.R.S. 1973.

Employer further contends that ostracism, as found by the Commission, cannot, as a matter of law, constitute a change in working conditions sufficient to support an award for compensation. We do not perceive ostracism as being a legal principle under the Unemployment Compensation Act that would dictate the granting or denying of compensation; rather, ostracism is a factual matter which may or may not evidence a change in working conditions. Here, the evidence of ostracism, along with other evidence, showed that there was a substantial change to less favorable working conditions for claimant.

Employer also contends that the change of conditions was created by the employee and not employer; therefore no award is proper. We do not agree. The only change created by claimant was the relationship between himself and the other employee, and there is no evidence that this relationship affected working conditions, job performance, or attitudes of claimant or any other employees. The change in working conditions as found by the Commission was brought about by the supervisor, and was directed toward claimant and not to all employees.

The award is affirmed.

Coyte and Sternberg, JJ., concur.

Laura Gutierrez, Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado, Department of Labor and Employment,

Division of Employment and Training, and

Monfort of Colorado, Inc., Respondents.

No. 91CA1125

841 P.2d 407

Colorado Court of Appeals

Div. III.

October 22, 1992.

Ann M. la Plante, Colorado Rural Legal Services, Inc., Greeley, Colorado, for Petitioner.

Gale A. Norton, Attorney General, Raymond T. Slaughter, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Evelyn Bachrach Makovsky, Assistant Attorney General, Denver, Colorado, for Respondents Industrial Claim Appeals Office and Department of Labor and Employment, Division of Employment and Training.

No Appearance for Respondent Monfort of Colorado, Inc.

REED, Judge.

Laura Gutierrez, claimant, seeks review of the final order of the Industrial Claim Appeals Panel denying her claim for full unemployment compensation benefits. She contends that the Panel erred in concluding that the employer, Monfort of Colorado, Inc., was not barred from participating in the proceedings because it had filed an untimely response to a request for information by the Employment and Training Division. We disagree and, thus, affirm.

After the filing of the claim, the Division mailed a Request for Job Separation Information to the employer on December 27, 1990. Under § 8-74-102(1), C.R.S. (1986 Repl. Vol. 3B), the employer had twelve days from the date of mailing of the request to

respond; the statute provides that "such information must be postmarked or received by the division within twelve calendar days from said date of mailing." (emphasis added) Failure to make a timely response bars the employer from protesting the claim. See Division of Employment and Training Regulation No. 7.2.8, 7 Code Colo. Reg. 1101-2.

The employer's twelve days expired on January 8, 1990. The employer's response was dated January 8, 1990, and the envelope in which it was sent bore a private postage meter mark of that date. It did not, however, have a postmark affixed directly by the United States Postal Service, nor was it postmarked with a corrected date stamped by that office. The response was not received by the Division until January 17.

The deputy ruled that the employer's response was timely and denied the claim. On appeal, the referee ruled that the response was timely because the evidence established that it was mailed on January 8, permitted the employer to participate in the hearing, and affirmed the deputy's decision denying the claim. The Panel affirmed.

Claimant contends that the Panel erred in ruling that the employer was properly permitted to participate in the hearing before the referee. We disagree, concluding that the employer's response was timely.

The term "postmark" is not defined in any applicable statute or regulation. Claimant cites the dictionary definition of postmark in Webster's Third New International Dictionary 1772-73 (1981) as an "official postal marking on a piece of mail" in support of her contention that the private postage meter mark was not a postmark.

However, under United States Postal Service regulations, private postage meter marks are official postmarks imprinted under license from the Postal Service. Privately metered mail is entitled to all the privileges applying to the various classes of mail, and such mail is not canceled or postmarked by the Postal Service unless incorrectly dated. See 39 C.F.R. §§ 111.1 - 111.5 (1991); United States Postal Service Domestic Mail Manual §§ 144.111, 144.2, 144.471, 144.532; 144.534 (1991); Bowman v. Administrator, 30 Ohio St. 3d 87, 507 N.E.2d 342 (1987).

To discourage misuse of private postage meters, such as incorrect dating, the Postal Service conducts random checks of privately metered mail. Domestic Mail Manual § 144.6. See Bowman v. Administrator, supra.

Further, if the date stated by the meter mark differs from the date the item is actually deposited in the mail, the item is postmarked with the corrected date of deposit. Bowman v. Administrator, supra; Domestic Mail Manual §§ 144.471, 144.534; postal Operations Manual § 423.35.

In Bowman, the applicable regulation, like § 8-74-102(1), required the document to be "postmarked" before the expiration of the specified period. Based on the Postal Service regulations, the court held that private postage meter marks were postmarks under the

regulation, and the date reflected by the mark is presumptively accurate as to the date the item was mailed. See also Haynes v. Hechler, 392 S.E.2d 697 (W.Va. 1990).

We agree and conclude that private postage meter marks are postmarks within the meaning of § 8-74-102(1). Further, the record here supports the presumption that the protest was in fact mailed upon the meter date. Thus, the employer's response was timely, and it was properly permitted to participate in the hearing.

Because of our resolution of this issue, we need not address the other issues raised by claimant.

The order is affirmed.

Chief Judge Sternberg and Judge Marquez concur.

Joan G. Hellen, Petitioner,

v.

Industrial Commission of the State of Colorado and

Western Stone and Metal Corporation, Respondents.

No. 86CA1225.

738 P.2d 64

Colorado Court of Appeals,

Div. I.

April 16, 1987.

William E. Benjamin, Boulder, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Dani R. Newsum, Asst. Atty. Gen., Denver, for respondent Industrial Comn.

Fairfield and Woods, P.C., Brent T. Johnson, Denver, for respondent Western Stone & Metal Corp.

ENOCH, Chief Judge.

Petitioner, Joan C. Hellen, (claimant) seeks review of an Industrial Commission order disqualifying her from unemployment compensation benefits under Sec. 8-73-108(5)(e)(II), C.R.S. (1986 Repl. Vol. 3B) (quitting because of dissatisfaction with a supervisor). We set aside the order.

The evidence established that claimant quit her employment because she was unhappy with her immediate supervisor. The employer's representative testified that claimant's supervisor had poor management skills and that the employer was contemplating removing him from his managerial position. However, the referee found that the supervisor treated all his staff uniformly.

Claimant contends that the Commission erred by basing its decision on the fact that she was not subjected to disparate treatment by the supervisor. She contends that the evidence is undisputed that the supervision she received was unreasonable, and that she is, therefore, entitled to full benefits. We agree that the applicable statute does not condition the receipt of benefits on disparate treatment by the supervisor.

Section 8-73-108(5)(e)(II), C.R.S. (1986 Repl.Vol. 3B) disallows unemployment compensation benefits if a claimant quits because of dissatisfaction with a supervisor with "no evidence to indicate that the supervision is other than that reasonably to be expected in the proper performance of work." Section 8-73-108(5)(e)(I), C.R.S. (1986 Repl. Vol. 3B), on the other hand, disallows benefits when an employee quits because of dissatisfaction with working conditions which "generally prevail for other workers performing the same or similar work." Since claimant quit for dissatisfaction with a supervisor, the only relevant consideration is whether the nature of such supervision was "reasonably to be expected." Section 8-73-108(5)(e)(II), C.R.S. (1986 Repl.Vol. 3B). If the supervision was unreasonable, it does not matter that it was uniformly applied to all employees.

Relying on In re Claim of Allmendinger v. Industrial Commission, 40 Colo.App. 210, 571 P.2d 741 (1977), the employer argues that since the Commission is not held to a "crystalline standard" when articulating findings of fact, the Commission's application of Sec. 8-73-108(5)(e)(II) implies a finding that the nature of the claimant's supervision was reasonably to be expected.

In re Claim of Allmendinger v. Industrial Commission, supra, stands for the proposition that the Commission's findings will not be overturned on review as long as their basis is apparent in the order. Here, however, the Commission did not make an explicit finding that the nature of claimant's supervision was "reasonably to be expected." That fact, combined with the emphasis the referee attached to the uniformity of the poor supervision, makes it unclear whether the Commission based its decision on the proper standard.

Therefore, the order is set aside and the cause is remanded to the Industrial Claim Appeals Panel with directions to remand the cause to a hearing officer for reconsideration of the evidence and entry of appropriate findings in light of the proper statutory standard.

Smith and Criswell, JJ., concur.

Juanita P. Herrera, Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and

Denver Public Schools, Respondents.

No. 99CA2399

18 P.3d 819

Colorado Court of Appeals,

Div. IV.

August 17, 2000

John W. McKendree Law Offices, John W. McKendree, Elizabeth Kelly, Denver, Colorado, for Petitioner.

Ken Salazar, Attorney General, Y.E. Scott, Assistant Attorney General, Denver, Colorado, for Respondent the Industrial Claim Appeals Office.

No Appearance for Respondent Denver Public Schools.

PIERCE, Judge.

Petitioner, Juanita P. Herrera (claimant), seeks review of a final order of the Industrial Claim Appeals Office (Panel) which affirmed a hearing officer's order determining that she was ineligible to receive unemployment compensation benefits pursuant to § 8-73-107(3), C.R.S. 1999, while she was on summer break from employment with Denver Public Schools (DPS) "between two successive academic years or terms. " We affirm.

Claimant was employed as a food service worker by DPS. At the end of the 1999 spring school session, claimant did not seek, and was not offered, employment during the DPS 1999 summer session. Thereafter, she applied for unemployment benefits.

After an evidentiary hearing, the hearing officer determined that claimant was employed by DPS during its spring academic term which ended June 9, 1999, that the summer session was a scheduled academic break, and that claimant had received reasonable assurance from DPS that she would be reemployed when the fall academic term began September 7, 1999. Consequently, the hearing officer concluded that claimant was ineligible to receive benefits during the summer break between the two successive academic years. The Panel affirmed.

I.

On appeal, claimant contends that the hearing officer erred in determining that she was out of work because of a break between two successive academic years or terms. We disagree.

Section 8-73-107(3)(b), C.R.S. 1999, provides, with respect to services performed for an educational institution in any capacity other than an instructional, research, or principal administrative capacity, that:

Compensation payable on the basis of such services shall be denied to any individual for any week which commences during a period between two successive academic years or terms or periods described in paragraph (c) of this subsection (3) if such individual performs such services in the first of such academic years, terms, or periods and there is a reasonable assurance that such individual will perform such services in the second of such academic years, terms, or periods. . . .

Here, claimant argues that, because the statutory language encompasses academic years, terms, or periods, the General Assembly intended to include within its scope essentially any time frame in which academics were taking place. Asserting that limited academics occurred during the DPS summer session at issue, claimant contends that it was "an academic year or term or period."

She further reasons that, since she was not offered employment during the summer academic term or period, and since the summer academic session was successive to the spring academic term, she was unemployed because of a lack of work during the second of two successive academic terms and the provisions of § 8-73-107(3)(b) are not applicable to her. We are not persuaded.

Statutes are to be construed in a manner that furthers the legislative intent for which they were drawn. Tilley v. Industrial Claim Appeals Office, 924 P.2d 1173 (Colo. App. 1996).

We must read and consider the statute as a whole to determine legislative intent; construe the entire act to give consistent, harmonious, and sensible effect to all parts; and consider the ends the statute was designed to accomplish and the consequences which would follow from alternate constructions. Redin v. Empire Oldsmobile, Inc., 746 P.2d 52 (Colo. App. 1987).

We have previously determined that this provision of the state unemployment act was patterned after and is complementary to analogous provisions of the Federal Unemployment Tax Act. See 26 U.S.C. § 3304 (a)(6) (1994). Thus, like the comparable federal statute, this statute was intended to preclude school teaching and non-teaching personnel from receiving unemployment compensation during summer recess if they have the promise of work in the fall. See Board of County Commissioners v. Martinez, 43 Colo. App. 322, 602 P.2d 911 (1979).

The plain language of the statute is consistent with this policy. The General Assembly specifically provided in this section that, if other criteria are met, a claimant is ineligible to receive benefits for weeks that commence during two time frames. The first is weeks "between two successive academic years or terms." The second is weeks during "periods described in paragraph (c) of subsection (3)."

Contrary to claimant's construction, the "periods" described in § 8-73-107(3)(c), C.R.S. 1999, are "established and customary vacation periods or holiday recesses," not any period during which any academics are taking place.

Further, based on his resolution of the conflicting evidence, the hearing officer rejected claimant's further argument that the summer session was an "academic term or period" as contemplated by the statute. Rather, he found that the summer session was a scheduled academic break. We may not disturb this finding on appeal. See Tilley v. Industrial Claim Appeals Office, supra (findings based on hearing officer's resolution of conflicting evidence, and reasonable inferences to be drawn therefrom, may not be disturbed on review).

The hearing officer necessarily determined that the relevant "successive academic years or terms" under the statute were the 1998-1999 academic year and the 1999-2000 academic year and found, on undisputed evidence, that claimant was employed until the end of the spring term of the 1998-1999 academic year.

He further found, based on his resolution of conflicting evidence, that claimant had signed a document in May 1999 in which she stipulated that she intended to return to work for DPS when the school term began September 7. He also found that, regardless of her concerns that she may not be rehired on that date, she had not been notified that DPS was discharging her. These findings support his conclusion that claimant received reasonable assurance she would be reemployed when the fall term of the 1999-2000 academic school year began in September 1999. See Tilley v. Industrial Claim Appeals Office, supra (findings based on conflicting evidence may not be disturbed); Denver Public Schools v. Industrial Commission, 644 P.2d 83 (Colo. App. 1982) (reasonable assurance found).

We find no error in these determinations. See Board of County Commissioners v. Martinez, supra; see also Friedlander v. Employment Division, 66 Ore. App. 546, 676 P.2d 314 (1984) ("academic year" construed to mean traditional fall through spring sessions of an educational institution); In re claim of Lintz, 89 A.D.2d 1038, 454 N.Y.S.2d 346 (1982) (same).

Consequently, claimant was not eligible for benefits during the break from June 9 through September 7, 1999, and we reject her contention that the hearing officer erred in applying the provisions of § 8-73-107(3)(b).

II.

We also reject claimant's contention that the hearing officer erred in precluding her from presenting evidence concerning whether the summer term was an "academic term or period," as opposed to a break between academic years.

As the Panel noted, some evidence on this issue was presented. Only when claimant sought to introduce evidence that DPS utilized race, age, and sexually discriminatory practices to determine who was offered employment as a food service worker during the summer session did the hearing officer intervene and limit further evidence to the issue of "reasonable assurance."

Although claimant objected, she did not make an offer of proof as to what remaining evidence she would have introduced on the issue of whether the summer session was an "academic term or period." See CRE 103(a)(2). See Hart v. Industrial Claim Appeals Office, 914 P.2d 406 (Colo. App. 1995). Consequently, no reversible error occurred in the hearing officer's ruling, and like the Panel, we perceive no basis for ordering further proceedings.

The Panel's order is affirmed.

Judge Rothenberg and Judge Sternberg* concur.

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const., art. VI, Sec. 5(3), and § 24-51-1105, C.R.S. 1999.

Mary H. Herrera

v.

Industrial Commission for the State of Colorado (ex-officio

Unemployment Compensation Commission of Colorado)

and the Denver Public School Administration

No. 28155

197 Colo. 23; 593 P.2d 329

Supreme Court of Colorado

En Banc.

January 22, 1979

Frederick P. Charleston, for petitioner.

J. D. MacFarlane, Attorney General, David W. Robbins, Deputy, Edward G. Donovan, Solicitor General, Ann Sayvetz, Assistant, for respondents.

KELLEY, Justice.

Petitioner Mary H. Herrera appeals from an order of the Industrial Commission denying her claim for unemployment compensation benefits. We affirm.

Mary Herrera has been employed as a food service worker by the Denver Public Schools (DPS). In 1976, she was laid off during the summer vacation and applied for and received unemployment compensation benefits. She returned to work for DPS in the fall and was again laid off during the summer of 1977. She again applied for unemployment benefits for the time she expected to be out of work. However, an amendment in the federal law under which she applied became effective October 20, 1976. The benefits were denied. Herrera requested a hearing. After listening to her testimony, the referee determined that Herrera was, due to the amendment, excluded from coverage and not entitled to compensation. The Industrial Commission affirmed the referee's decision.

I.

The referee based his decision on the 1976 amendment to the Emergency Jobs and Unemployment Assistance Act of 1974, P.L. 93-567, 88 Stat. 1845 (hereafter "the Act").1 The amendment, P.L. 94-566, 90 Stat. 2691, declares nonprofessional school employees ineligible for Special Unemployment Assistance (SUA) benefits between

school terms when "reasonable assurances" are given that they will be rehired when the next school term begins.2 The referee specifically found that Herrera intended to return to work and that she had not been given any notification by her employer that she would not be rehired in the fall. He concluded she had a "reasonable assurance" that she would be called back to work in the fall.

Herrera asserts she did not receive the necessary assurance. Her employer never appeared at the hearing, and the only evidence in the record of intent to rehire consisted of a signed form from Herrera's employer, stating an intent to rehire her "depending on continued need." Herrera states this is insufficient. We disagree.

The legislative history of the amendment in question reveals that "reasonable assurance" was intended to mean "a written, verbal, or implied agreement that the employee will perform services in the same capacity during the ensuing academic year or term." [1976] U.S. Code Cong. & Ad. News 6036. Inasmuch as Herrera was a non-tenured employee, she could only expect to work for DPS during the fall term if the schools had "continuing need" for her services. The affirmative answer to the query, "Do you intend to reemploy [Herrera]?," combined with Herrera's expressed intent to work for DPS, clearly implied an agreement between employer and employee for the employee's continued performance as a food services worker.

At the hearing, Herrera stated DPS would inform her by letter, late in the summer, if they wished her to return. Should Herrera have become unemployed in fact, she would have then become eligible for benefits from the time her unemployment actually began.3 Until the time unemployment became a certainty, however, Herrera's statement and the employer's expressed intent to rehire her constituted a sufficient factual basis for the referee's decision that she was excluded from SUA coverage.

II.

Herrera also alleges the SUA program is contrary to state unemployment laws. Her allegation carries no weight in this case. The state and federal programs are complementary, designed to cover different situations.4 The claimant filed for benefits under federal law because she was ineligible under the Colorado Employment Security Act. See section 8-70-103(11)(f), C.R.S. 1973, and section 8-70-103(19.5), C.R.S. 1973 (1976 Supp.).

She then asserts the administration of the SUA program unconstitutionally distinguishes nonprofessional school employees from other classes of seasonally employed persons. She fails to demonstrate that the class to which she belongs (nonprofessional school employees) is protected, or that the Act impinges on a fundamental interest. Thus, our inquiry is confined to determining whether the Act as amended and applied has a rational relation to a legitimate governmental interest. See Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 97 S.Ct. 1898, 52 L.Ed.2d 513 (1977); Hyde v. Industrial Commission, 195 Colo. 67, 576 P.2d 541 (1978). We hold that the rational relation exists, and thus find no violation of the petitioner's rights.

The purpose of the SUA program is to provide benefits for workers during aggravated periods of unemployment. The Act, § 201. The declaration of legislative intent was examined and amplified by Judge Flaum in Chicago Teachers U., Local No. 1, AFT/AFL/CIO v. Johnson, 421 F. Supp. 1261 (N.D. Ill. 1976):

"The very nature of the compensation scheme, its extended duration and integral relation to prevailing economic factors, anticipates sustaining an unemployed worker during the search for re-employment in a locale marked by chronic unemployment and a depressed job market."

Since available legislative history supports this interpretation, we accept and adopt Judge Flaum's statement for purposes of this opinion.

The court in Chicago Teachers, supra, interpreted a 1975 amendment to the Act which provides that persons performing services for educational institutions in "instructional, research, or principal administrative capacity" should not receive unemployment benefits during the gap between school terms.5 The court interpreted the legislative history of the amendment to reflect "an underlying assumption that teachers with contracts for the term prior to the summer hiatus and for the term following it are not in fact unemployed." We agree, and find that this reasoning was extended by the 1976 amendment to include nonprofessional school employees.6

Thus, the function of the 1976 amendment in question was not to unreasonably distinguish school employees from other seasonally employed workers, but to combine them with another class of employees to whom they are most similarly situated: professional school employees who can reasonably expect to be rehired at the onset of the next school term. As long as Herrera could reasonably expect to be rehired in the fall, she did not belong to that class of persons whom the Act was designed to assist. See Williamson v. Mississippi Employment Security Commission, Miss., 347 So.2d 978 (1977). Since the distinction drawn by the amendment effectuates the purpose of the Act, it serves a legitimate governmental purpose.

Herrera does not allege that she was seeking reemployment or that she anticipated termination in the fall. Her allegations of unfairness are based on her expectation of receiving unemployment compensation during the summer of 1977, as she had in 1976. She alleges her "justified" expectation of benefits which never materialized created a period of "aggravated" unemployment for her. We find no support for her underlying premise that she was entitled to have the status quo remain unchanged because she benefited from it in the past. Since the 1976 amendment excluded her from unemployment compensation during the summer layoff, she was not entitled to benefits.

We find the referee correctly interpreted the Act and the amendment in question, and find no violation of the petitioner's constitutional rights. We, therefore, affirm the order of the Industrial Commission.

Carrigan, J., not participating.

Footnotes

1. The Act and its amendments are set forth in a series of notes following 26 U.S.C., § 3304. Section numbers referred to will be those of Title II of the 1974 Act.

2. "SEC. 603. DENIAL OF SPECIAL UNEMPLOYMENT ASSISTANCE TO NONPROFESSIONAL EMPLOYEES OF EDUCATIONAL INSTITUTIONS DURING PERIODS BETWEEN ACADEMIC TERMS.

"(a) Section 203 of the Emergency Jobs and Unemployment Assistance Act of 1974 is amended by adding at the end thereof the following new subsection:

'(c) An individual who performs services for an educational institution or agency in a capacity (other than an instructional, research, or principal administrative capacity) shall not be eligible to receive a payment of assistance or a waiting period credit with respect to any week commencing during a period between two successive academic years or terms if --

'(1) such individual performed such services for any educational institution or agency in the first of such academic years or terms; and

'(2) there is a reasonable assurance that such individual will perform services for any educational institution or agency in any capacity (other than an instructional, research, or principal administrative capacity) in the second of such academic years or terms."

3. [1976] U.S. Code Cong. & Ad. News 6036. See Unemployment Insurance Program Letter No. 21-77, page 5 (February 28, 1977).

4. Thus, § 207 of the Act provides that the terms and conditions of state unemployment compensation law apply to claims under the Act except when they are inconsistent with the SUA provisions.

5. Now § 203(b) of the Act, the 1975 amendment is substantially similar to the 1976 amendment with which we are concerned. Only the class of excluded employees is different.

6. See Harvey v. Director of Dept. of Emp. Sec., R.I., 385 A.2d 1057 (1978), for further explication: "[T]he legislative history [of the 1975 amendment] suggests that Congress was attempting to provide for similar treatment for all educational workers who are, in the language of the theater, 'in between engagements.'"

Josefita P. Hesson, Petitioner,

v.

The Industrial Commission of the State of Colorado;

Division of Employment and Training; Colorado

Department of Labor and Employment;

and Great West Life Assurance Co.,

Respondents.

No. 86CA0380.

740 P.2d 526

Colorado Court of Appeals,

Div. III.

June 4, 1987.

Linda J. Olson, Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Dani R. Newsum, Asst. Atty. Gen., Denver, for respondents Industrial Com'n and Div. of Employment and Training.

No appearance for respondent Great West Life Assurance Co.

CRISWELL, Judge.

Claimant, Josefita P. Hesson, seeks review of a final order of the Industrial Commission (Commission) finding that she was not entitled to a waiver of her obligation to repay the unemployment compensation benefits she had been overpaid. We set aside the order and remand for a new hearing.

Claimant was involved in an automobile accident in April 1983, as a result of which she was absent from her employment on several occasions thereafter. This led her employer to terminate her employment in late May of that year.

In June 1983, claimant filed her claim for unemployment compensation benefits with the Division of Employment (Division), and in early July her employer was mailed a notice advising it that it had 12 calendar days within which to protest her claim. See Sec. 8-74-

102, C.R.S. (1986 Repl.Vol. 3B). For reasons not apparent from the record, no protest was filed by the employer at that time. The parties agree that, as a result, commencing in July 1983 and terminating in March 1984, claimant received unemployment benefits amounting to approximately $3,800, that being the maximum amount of benefits to which she would have been entitled.

On July 30, 1984--more than 13 months after claimant's initial claim had been filed and more than 4 months after she had received her last benefit payment--a second notice of the filing of her claim was sent to her employer. While the record before us fails to explain the precise reason for the mailing of this second notice, or upon whose authority such action was taken, it does reflect that this second notice was sent to a different address than was the first notice. The record, however, contains no indication that claimant was given any notice of the mailing of this second notice.

In August 1984, the employer filed a written protest to claimant's claim, but there is no indication in the record that a copy of this protest was provided to claimant. On September 17, 1984, a deputy of the Division rejected this protest and rendered a written decision that claimant was entitled to a full award. That decision was appealed to a referee before whom a hearing was held in October 1984.

The transcript of this hearing was not made a part of the record before us. Hence, there is no indication in this record whether the issue of the timeliness of the employer's belated protest was raised at, or prior to, this initial hearing; the referee's decision makes no reference to any such issue.

On November 1, 1984, the referee rendered his written decision, granting to claimant "a full award of benefits." However, he also found that, because of the injuries resulting to claimant from the automobile accident, claimant was not available for work commencing as of June 26, 1983 (the date she filed her initial claim). Accordingly, the referee ruled she should "be disallowed receipt of unemployment insurance benefits" effective as of that date and continuing until claimant produced a competent medical opinion certifying that she was able and available for work.

Claimant asserts that both she and her attorney were confused by this order and that both considered that she had "won." Consequently, she did not appeal this decision to the Commission.

In January 1985, the Division advised claimant of her liability for the overpayment of benefits, and she filed a request for a waiver of repayment under Sec. 8-81-101(4), C.R.S. (1986 Repl.Vol. 3B). At the hearing upon her request, the foregoing administrative history was reviewed and, in addition, claimant testified that she had insufficient assets or income with which to repay the claimed overpayment. She did not, however, present any direct testimony that she had waived any right or changed her position as a result of her previous receipt of benefits.

The referee denied claimant's waiver request. He did not delineate the bases for his decision, but merely stated that, based upon claimant's testimony, he could not grant such waiver.

On claimant's appeal to it, the Commission concluded that claimant's financial ability to repay was irrelevant; that the referee's decision was based upon equitable considerations; and that the referee did not abuse his discretion in concluding that it would not be "inequitable" to require claimant to repay the benefits previously received by her.

In reaching its conclusions, the Commission relied upon the definition of the phrase, "against equity and good conscience," contained within 20 C.F.R. Sec. 404.509 (1986). However, we conclude that this may have been an inappropriate standard by which to judge claimant's request.

Section 8-81-101(4), C.R.S. (1986 Repl.Vol. 3B), authorizes the Division to waive any repayment of an overpayment of benefits if it determines that such repayment would be "inequitable," or if it finds that such overpayment, or any part thereof, is "uncollectible" or that its collection would be "administratively impracticable." The word, "inequitable," was substituted in the statute for the prior phrase, "against equity and good conscience," in 1979. See Colo.Sess.Laws 1979, ch. 67 at 355. In Mugrauer v. Industrial Commission, 709 P.2d 47 (Colo.App.1985), however, a division of this court held that the change in the wording of the statute caused no substantive change in its meaning.

The supreme court, in Duenas-Rodriquez v. Industrial Commission, 199 Colo. 95, 606 P.2d 437 (1980), has noted the similarity between the prior statutory phrase and similar language used in the federal Social Security Act's provisions for the waiver of repayment of improperly paid social security benefits. See 42 U.S.C. Sec. 404(b) (1982). Under the federal act, the overpayment must have been through no fault on the recipient's part, 42 U.S.C. Sec. 404(b) (1982), and, under the state statute, not a result of a "false representation or willful failure to disclose a material fact," Sec. 8-81-101(4)(a)(II), in order for repayment to be waived.

In Duenas, the supreme court recognized that the statutory reference to equity constituted an elastic expression, and one of unusual generality. Noting that the regulations were not binding upon the Colorado courts, the court in Duenas nevertheless suggested that the administrative definition of the federal statutory term, found at 20 C.F.R. Sec. 404.509 (1986), is "indicative" of the meaning of the statutory phrase. (emphasis supplied) Under that federal definition, in order for a waiver of repayment of improperly received benefits to be granted, the recipient must show either that he relinquished a valuable right or that he changed his position in reliance upon his entitlement to the benefits received.

The federal regulation also provides that "the individual's financial circumstances are irrelevant" to the determination of whether repayment would be inequitable. The Duenas court made no specific comment upon this portion of the regulation, however. Moreover, nothing in Duenas would compel the conclusion that a relinquishment of a valuable right

or a change of position in reliance upon the receipt of benefits is an indispensable element of inequity in every case.

Mugrauer v. Industrial Commission, supra, might be construed as having interpreted Duenas to require that the language of the state statute carry with it the same meaning ascribed to the language of the federal act by the federal regulation. We do not so interpret Mugrauer.

Mugrauer itself recognizes that the change of position necessary under the federal regulation need not be striking. Testimony that, absent receipt of the benefits, the claimant would have expanded his attempts to find employment or further limited his expenses can be considered to be a sufficient change in position to render it inequitable to require repayment under Mugrauer.

Here, had the employer filed its protest within the statutory period authorized therefor, claimant would either have never received any of the benefits paid to her or, if payments had been authorized by the deputy, a referee's decision would have been rendered long prior to claimant's receipt of her maximum benefits. At the very least, then, had the statutory time limits been observed, the amount of any overpayment to claimant would have been substantially less than the amount actually received by her.

Further, claimant had the legal right to rely upon the fact that, if the employer entertained any objection to her receipt of benefits, a proper protest would be filed within the time required by Sec. 8-74-102. There being no protest filed within this period, claimant had the right to rely upon the proposition that there was no legal impediment to her receipt of the benefits and, hence, no realistic reason for her to suppose that she would ever be called upon to repay any portion of them.

Finally, while there was no direct testimony that claimant changed her position in reliance upon her lawful receipt of benefits, and while a claimant's financial condition may, standing alone, be insufficient to establish the inequitability required to be shown, the fact that a claimant's financial condition has required the benefits received to be spent for living expenses may be considered upon this issue, even under the federal regulation. See Frasier v. Harris, 495 F.Supp. 260 (D.Colo.1980); Woods v. Gardner, 286 F.Supp. 648 (W.D.Pa.1968). Certainly, claimant's financial situation cannot be deemed to be irrelevant to a determination of the statutory issues whether the payments are "uncollectible" or whether collection is "administratively impracticable."

Accordingly, under the circumstances at issue, in which the employer failed to protest claimant's receipt of unemployment compensation benefits until the maximum allowable benefits were paid to her, with the result being that claimant received no notice until after receipt of all such benefits that repayment might subsequently be ordered, and in which claimant's limited financial resources have required the benefits received to be used for living expenses, a determination that it would be inequitable to require repayment of those benefits would, in our view, properly be within the discretion of the Commission.

The record demonstrates, however, that the Commission considered itself bound by the federal definition of the pertinent term. Likewise, it appears that the hearing officer, as well as some of the parties, may have considered the factors described in the federal regulation to be the only relevant factors. Accordingly, since we conclude that the federal regulation is not the sole means by which inequity under the state statute may be measured, the matter must be remanded for a new evidentiary hearing.

The order of the Commission is set aside, and this matter is remanded to the Industrial Claim Appeals Office with directions to conduct a new hearing upon claimant's request for waiver and, thereafter, to reconsider the merits of her request for waiver consistent with the views expressed herein.

Van Cise and Sternberg, JJ., concur.

Delbert R. Hodges, Petitioner,

v.

Canon Lodge Medical Investors, Ltd., and The Industrial

Claim Appeals Office of the State of Colorado, Respondents.

No. 93CA1297.

879 P.2d 476

Colorado Court of Appeals,

Div. V.

July 28, 1994.

Pikes Peak Legal Services, Barbara L. Hughes, Colorado Springs, for petitioner.

No appearance for respondent Canon Lodge Medical Investors, Ltd.

Gale A. Norton, Atty. Gen., Stephen K. ErkenBrack, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., James C. Klein, Asst. Atty. Gen., Denver, for respondent Indus. Claim Appeals Office.

NEY, Judge.

Delbert R. Hodges (claimant) seeks review of a final order of the Industrial Claim Appeals Panel that affirmed a hearing officer's order disqualifying him from the receipt of unemployment compensation benefits. We set aside the Panel's order and remand to the Panel for entry of an order awarding claimant benefits.

Claimant worked as a dietary aide at a nursing home run by employer, Canon Lodge Medical Investors, Ltd. The hearing officer found that claimant resigned because he experienced an allergic reaction to a chemical used for one of his job duties.

However, relying upon Slazas v. Industrial Commission, 660 P.2d 513 (Colo.App.1983), the hearing officer concluded that claimant was not entitled to the receipt of benefits pursuant to Sec. 8-73-108(4)(b)(I), C.R.S. (1993 Cum.Supp.) because he failed to notify his employer at the time of his resignation that he was terminating his employment because of the allergic reaction. The hearing officer thus concluded that claimant was disqualified from benefits by Sec. 8-73-108(5)(e)(XXII), C.R.S. (1986 Repl.Vol. 3B) (quitting for personal reasons which do not support an award of benefits). Claimant appealed and the Panel affirmed.

Claimant contends he should have been awarded benefits pursuant to Sec. 8-73-108(4)(b)(I). We agree.

Section 8-73-108(4)(b)(I) mandates that a claimant be awarded benefits if the separation from employment is caused by claimant's health and if the employee has:

Informed his employer of the condition of his health ... prior to his separation from employment; substantiated the cause by a competent written medical statement issued by a licensed practicing physician prior to the date of separation from employment when so requested by the employer prior to the date of his separation from employment or within a reasonable period thereafter; submitted himself ... to an examination by a licensed practicing physician selected and paid by the interested employer when so requested by the employer prior to the date of his separation from employment or within a reasonable period thereafter; or provided the division, when so requested, with a written medical statement issued by a licensed practicing physician....

Here, we agree with claimant that the hearing officer's findings support the award of benefits. The hearing officer found that: claimant resigned his employment because he experienced an allergic reaction to a chemical used for one of his job duties; claimant informed his employer of the condition of his health before his separation; claimant substantiated his condition with a written medical statement issued by employer's physician before his separation from employment when his supervisors requested him to do so. However, claimant did not specifically inform his employer that he was terminating his employment because of his health. These findings are supported by substantial, although sometimes conflicting, evidence and thus may not be disturbed. See Jones v. Industrial Commission, 705 P.2d 530 (Colo.App.1985).

We recognize that, in Slazas v. Industrial Commission, supra, a division of this court held that, to receive benefits under this section, the employee must inform his employer at or prior to leaving that he is quitting because of the condition of his health. However, in our view, Slazas puts a burden on an employee greater than that required by the statutory criteria of Sec. 8-73-108(4)(b)(I).

Thus, to the extent that Slazas v. Industrial Commission, supra might dictate a different result, we view it as unduly restrictive and decline to follow it.

We conclude the Panel erred in determining claimant was not entitled to benefits pursuant to Sec. 8-73-108(4)(b)(I). Given our disposition, we need not address claimant's other contentions.

The Panel's order is set aside, and the cause is remanded with directions to enter an order awarding claimant benefits.

Sternberg, C.J., and Rothenberg, J., concur.

Opinions of the Colorado Supreme Court are available to the public and can be accessed through the Court's homepage at http://www.courts.state.co.us Opinions are also posted on the Colorado Bar Association homepage at www.cobar.org

ADVANCE SHEET HEADNOTE
July 1, 2013

2013 CO 52

No. 12SC49, Industrial Claim Appeals Office v. Colorado Department of Labor and Employment and Kathleen A. Hopkins – [Unemployment Benefits – Retirement Contributions – Offset Provision]

Respondent worked for the Colorado Department of Labor and Employment for a number of years, and then retired. The Department made contributions to Respondent's retirement fund, and once she retired she began receiving retirement payments from that fund. When she was involuntarily separated from her job with the Department during a second period of employment, she applied for and was awarded unemployment benefits. Respondent's benefits were discontinued when a panel of the Industrial Claim Appeals Office reasoned that Respondent was ineligible to receive unemployment benefits under section 8-73-110(3)(a)(I)(B), C.R.S. (2012) (the "offset provision"), which provides that "an individual's weekly benefit amount shall be reduced (but not below zero) by . . . [t]he prorated weekly amount of a pension, retirement or retired pay, or annuity that has been contributed to by a base period employer." (Emphasis added.)

The court of appeals reversed. It held that the offset provision applies only when the employer has contributed to the claimant's retirement fund during the base period employment that made her eligible for unemployment benefits. See Hopkins v. Indus.

Claim Appeals Office & Colo. Dept. of Labor & Emp., No. 11CA0239, slip op. at 6 (Colo. App. Dec. 22, 2011).

The supreme court reverses the judgment of the court of appeals. The offset provision applies when a claimant is receiving payments from a retirement fund "that has been contributed to by a base period employer." In contrast to the definition of employer, which specifically includes a time frame during which the employing unit must pay wages, and in contrast to the definition of base period, which describes the time frame for determining eligibility for benefits, the offset provision contains no temporal limitation. Therefore, it applies any time the employer has contributed to the retirement fund from which the claimant is receiving payments, regardless of when the contributions were made. Accordingly, the supreme court holds that Respondent's unemployment benefits can be offset by the retirement benefits she is receiving from a base period employer.

Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2013 CO 52

Supreme Court Case No. 12SC49
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 11CA239

Petitioner:

Industrial Claim Appeals Office,

v.

Respondents:

Colorado Department of Labor and Employment and Kathleen A. Hopkins.

Judgment Reversed
en banc
July 1, 2013

Attorneys for Petitioner:
John Suthers, Attorney General
Tricia A. Leakey, Assistant Attorney General
Denver, Colorado

Attorneys for Respondent Kathleen A. Hopkins:
University of Denver Student Law Office
Raja Raghunath
Kate Miller, Student Attorney
Kathryn Thomas, Student Attorney
Collin Zundel, Student Attorney
Denver, Colorado

No appearance by or on behalf of Colorado Department of Labor and Employment

JUSTICE EID delivered the Opinion of the Court.

¶1 Kathleen Hopkins ("Hopkins") worked for the Colorado Department of Labor and Employment (the "Department") for a number of years, and then retired. During her period of employment, the Department made contributions to her retirement fund, and once she retired, she began receiving retirement payments from that fund. Later, she went to work for the Department again. When she was involuntarily separated from her job with the Department during this second period of employment, she applied for and was awarded unemployment benefits. Eventually, Hopkins' unemployment benefits were discontinued and she was issued a notice of overpayment. She appealed the notice and a hearing officer restored her benefits.

¶2 The Department appealed, and a panel of the Industrial Claim Appeals Office ("ICAO") reversed the hearing officer's decision. It reasoned that Hopkins was ineligible to receive unemployment benefits under section 8-73-110(3)(a)(I)(B), C.R.S. (2012) (the "offset provision"), which states that "an individual's weekly benefit amount shall be reduced (but not below zero) by . . . [t]he prorated weekly amount of a pension, retirement or retired pay, or annuity <u>that has been contributed to by a base period employer</u>." (Emphasis added). The ICAO concluded that the offset provision applied because the Department had contributed to her retirement fund during the previous period of employment, and the retirement payments she was receiving from that fund exceeded her weekly unemployment benefit amount.

¶3 Hopkins appealed, and the court of appeals reversed. It held that the offset provision applies only when the employer has contributed to the claimant's retirement fund during the base period of employment that made her eligible for unemployment

benefits. See Hopkins v. Indus. Claim Appeals Office & Colo. Dept. of Labor & Emp., No. 11CA0239, slip op. at 6 (Colo. App. Dec. 22, 2011).

¶4 We granted certiorari and now reverse. The offset provision of section 8-73-110(3)(a)(I)(B), which applies when a claimant is receiving payments from a retirement fund "that has been contributed to by a base period employer," contains no temporal limitation. Therefore, it applies any time the employer has contributed to the retirement fund from which the claimant is receiving payments, regardless of when the contributions were made. Accordingly, we reverse the judgment of the court of appeals and remand the case for proceedings consistent with this opinion.

I.

¶5 Hopkins worked for the Department from June 1986 until she retired on July 31, 2001. During this time, the Department made contributions to her retirement fund. In August 2001, Hopkins began receiving a monthly retirement distribution of $3,000.00. She began working for the Department again from April 2009 to August 2009. During this time, neither the Department nor Hopkins contributed to a retirement fund for her. After her employment terminated, Hopkins filed a claim for and was awarded unemployment benefits of $443.00 per week. At the time she was also receiving roughly $580.00 per week from her retirement fund. After some time, Hopkins' unemployment benefits were discontinued and she was issued a notice of overpayment. She appealed the notice and a hearing officer found that because the Department had not made payments to Hopkins' retirement fund during the base period of employment, her unemployment benefits could not be reduced under the offset provision.

¶6 The Department filed an appeal. Upon review, the ICAO reversed the hearing officer's decision. The ICAO held that Hopkins' unemployment benefits had to be reduced because she was receiving payments from a retirement fund to which the Department had contributed prior to her base period of employment. It noted that the purpose of the offset provision was to avoid "double-dipping" by retirees who are receiving both retirement distributions and unemployment benefits.

¶7 Hopkins appealed, and the court of appeals reversed. The court of appeals held that in order for the offset provision to apply, an employer must contribute to an employee's retirement plan during the base period of employment. We granted certiorari[1] and now reverse the judgment of the court of appeals.

II.

¶8 The offset provision of section 8-73-110(3)(a)(I)(B) states that "an individual's weekly benefit amount shall be reduced (but not below zero) by . . . [t]he prorated weekly amount of a pension, retirement or retired pay, or annuity <u>that has been contributed to by a base period employer</u>." (Emphasis added). The court of appeals held that the offset provision is limited to cases where the employer has contributed to the retirement fund during the base period of employment. We disagree. Because the offset provision contains no temporal limitation, it applies any time the employer has

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[1] We granted certiorari on the following issue:

> Whether under section 8-73-110(3)(a)(I), C.R.S. (2012), a claimant's weekly unemployment benefits must be reduced when she is also receiving a pension, retirement or retired pay, or annuity that has been contributed to at any time by a base period employer.

contributed to the retirement fund from which the claimant is receiving payments, regardless of when the contributions were made.

¶9 Statutory interpretation is a question of law that we review de novo. Clyncke v. Waneka, 157 P.3d 1072, 1076 (Colo. 2007). This case involves the intersection of several statutory definitions. An "employer" is defined as "[a]ny employing unit that . . . [p]aid wages of one thousand five hundred dollars or more during any calendar quarter in the calendar year or the preceding calendar year." § 8-70-113(a)(II)(A), C.R.S. (2012). "Base period" is defined as the first four of the last five completed calendar quarters immediately preceding the first day of the individual's benefit year. § 8-70-103(2), C.R.S. (2012). The base period is the period used to determine eligibility for unemployment benefits. § 8-73-102, C.R.S. (2012). A base period employer, then, is an employer that has paid wages to the claimant during the relevant eligibility period. Rivera v. Becerra, 714 F.2d 887, 891 n.3 (9th Cir. 1983).

¶10 In this case, no one disputes that the Department is a base period employer because it paid wages to Hopkins during the relevant period that made her eligible for unemployment benefits. The only question is whether the offset provision is similarly limited only to cases in which the base period employer has made retirement contributions during the relevant period. We conclude that it is not.

¶11 Section 8-73-110(3)(a)(I)(B) states that an offset "shall" be made when the claimant is receiving payments from a retirement fund "that has been contributed to by a base period employer." The phrase "that has been contributed to by a base period employer" specifies who has to have made the contributions—the base period

employer—but not when they had to have been made. Indeed, the phrase does not suggest that the contributions had to have been made during any particular time, just that they had to have been made at some time in the past. Therefore, in contrast to the definition of employer, which specifically includes a time frame during which the employing unit must pay wages, and in contrast to the definition of base period, which describes the time frame for determining eligibility for benefits, the offset provision contains no temporal limitation.

¶12 Hopkins argues that the court of appeals correctly interpreted the phrase "contributed to by a base period employer" to "necessarily refe[r] to the employer's actions during the employee's base period," including pension contributions. Hopkins, No. 11CA0239, slip op. at 6. But this interpretation is contrary to the language of the statute. Under this interpretation, the statute would have been written as applying to "any pension contributed to by the base period employer during the base period." But, as noted above, there is no such temporal limitation contained in the offset provision. The phrase "base period employer" simply identifies which employer contributed to the retirement fund (that is, the one that paid wages to the claimant during the relevant eligibility period); it does not import a temporal limitation into the offset provision.

¶13 Hopkins also argues that the court of appeals was correct to suggest that the federal counterpart to the offset provision supports finding a temporal limitation in the Colorado offset provision, section 8-73-110(3)(a)(I)(B). Hopkins notes that Colorado's offset provision is patterned after the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. § 3304(a)-(d) (2012), and that, because FUTA does not require unemployment

benefits to be offset unless the retirement contributions were made during the base period, the Colorado offset provision should be read in a similar fashion. While it is true that the offset provision is "patterned after and [is] complementary" to FUTA, see Cericalo v. ICAO, 114 P.3d 100, 102 (Colo. App. 2005), FUTA contains additional language in its offset provision that expressly limits the offset to instances in which retirement contributions have been made during the base period. 26 U.S.C. § 3304(a)(15) (limiting offset to instances in which contributions were made "after the beginning of the base period"). Because the Colorado offset provision does not contain similar limiting language, we decline to interpret it as if it did.

¶14 The court of appeals also determined that the interpretation we adopt today leads to the "anomalous result" in which Hopkins, had she worked for another employer, would not have been subject to the offset provision. Hopkins, No. 11CA0239, slip op. at 8. But there is no anomaly here. The offset provision was meant to prevent "double-dipping" by retirees who had withdrawn from the work force and were receiving unemployment benefits and pension benefits from the same employer. Redin v. Empire Oldsmobile, Inc., 746 P.2d 52, 54 (Colo. App. 1987). Had Hopkins worked for another employer during the base period, there would have been no "double-dipping" problem to be addressed, as the base period employer paying unemployment benefits would be different from the entity paying the retirement benefit.

¶15 Finally, Hopkins, echoing the court of appeals, contends that her interpretation should prevail in order to effectuate the General Assembly's stated intent to award unemployment benefits to claimants who are unemployed through no fault of their

own. Hopkins, No. 11CA0239, slip op. at 7. Yet the offset provision plainly expresses the legislature's intent that those benefits be offset when the base period employer has contributed to the claimant's retirement fund. Because the offset provision contains no temporal limitation, we decline Hopkins' invitation to read one into the statute.

III.

¶16 For these reasons, we reverse the judgment of the court of appeals and remand the case for proceedings consistent with this opinion.

In Re Interrogatories by the Industrial Commission of

the State of Colorado (Ex-officio Unemployment

Compensation Commission of Colorado)

No. 72-062

30 Colo. App. 599, 496 P.2d 1064

Colorado Court of Appeals,

Div. I.

May 2, 1972.

Duke W. Dunbar, Attorney General, John P. Moore, Deputy, Robert L. Harris, Assistant, for The Industrial Commission of the State of Colorado (Ex-officio Unemployment Compensation Commission of Colorado).

DWYER, Judge.

Pursuant to 1969 Perm. Supp., C.R.S. 1963, 82-5-11, The Industrial Commission of the State of Colorado (Ex-Officio Unemployment Compensation Commission of Colorado) has certified to this court two questions of law involved in a decision it entered in an unemployment compensation case.

The Commission has also certified to this court the record of the proceedings in which the decision was entered. Claimant was employed as a cook at a private school. The school term was nine months, and on June 11, 1971, the school closed for the summer. Claimant then filed her claim for unemployment compensation, and it was initially allowed by a deputy of the Division of Employment. This award was affirmed by a referee who found that claimant "was laid off for lack of work" and that she was entitled to a full award of benefits under C.R.S. 1963, 82-4-8(4) (b), during the period of her unemployment, which terminated July 5, 1971, when she found another job.

On appeal, the Commission found that claimant "accepted the job with this employer with the agreement and understanding that the job was for a fixed term of approximately nine months. When the nine-month period ended, the claimant had no job with the employer." On the basis of this finding, the Commission ordered that "no award of benefits" be granted claimant. Claimant did not appeal. The Commission, however, has asked this court to rule on two questions of importance which were involved in its decision.

First Interrogatory:

"Is a claimant for unemployment compensation benefits entitled to such benefits when she accepts a job with the agreement and understanding that it was for a fixed term, when, at the end of such term, the claimant becomes unemployed in accordance with such understanding and agreement?

Answer: Yes. Assuming that the claimant meets all other requirements for benefits under the Act, neither the fact that claimant was employed for a fixed term nor the fact that claimant agreed and understood that the employment would end at the expiration of the fixed term is a basis for denying claimant benefits under the Act.

Second Interrogatory:

"In the instant case, claimant was advised there was to be no work during the school summer vacation, but there would be renewed work in the fall. In prior years, she had not applied for benefits, and this year did find new work within twenty day, (sic) after becoming unemployed. Is she entitled to benefits, subject to other eligibility, for the twenty days?"

Answer: Yes.

There are many industries in which it is customary to operate only during a regularly recurring period or periods of less than one year in length. Workers employed in such industries are entitled to benefits under the Unemployment Compensation Act unless their right to such benefits is limited by express provisions in the Act. Thus, it was held in the case of In Re Leshner, 268 App. Div. 582, 52 N.Y.S.2d 587, that the manager of a summer resort hotel was not barred from unemployment insurance benefits by the fact that he was a seasonal worker in an occupation of a seasonal nature. In Studley v. Board of Review of Department of Employment Security, 88 R.I. 298, 147 A.2d 912, it was held that a school lunch worker, whose term of employment commenced with the opening of school in September and ended with the closing of school in June, was entitled to employment security benefits if she was otherwise qualified under the Act.

The Colorado Employment Security Act limits the benefits available to workers employed in a "seasonal industry." 1969 Perm. Supp., C.R.S. 1963, 82-4-6(1) (a), provides:

"As used in this chapter, 'seasonal industry' means an industry or establishment or occupation within an industry in which, because of climatic conditions or the seasonal nature of the employment, it is customary to operate only during a regularly recurring period or periods of less than twenty-five weeks in a calendar year, but any employee of a religious, scientific, educational, or cultural organization, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and whose principal function is performed for an aggregate period of less than thirty-six weeks in any calendar year, is a 'seasonal worker' within the meaning of this chapter. . . ." (Emphasis added.)

Neither the facts in the question certified to us nor the facts in the record place claimant within the statutory definition of "seasonal worker."

Claimant's right to benefits under the Act cannot be denied on the basis of any agreement she entered into in connection with her employment. C.R.S. 1963, 82-10-1, provides that: "Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this chapter shall be void."

Industrial Commission of the State of Colorado (Ex-Officio Unemployment Compensation Commission of Colorado); and Division of Employment and Training, Colorado Department of Labor, Petitioners,

v.

Eudesimo Arteaga, Respondent;

Industrial Commission of Colorado (Ex-Officio Unemployment Compensation Commission of Colorado), and Division of Employment and Training, Colorado Department of Labor and Employment, Petitioners,

v.

Bahman Zanjani, Respondent;

Division of Employment and Training, Petitioner,

v.

Manu Yiadom, and Industrial Commission of Colorado (Ex-Officio Unemployment Compensation Commission of Colorado), Respondents

Nos. 85SC127, 85SC168, 85SC210

735 P.2d 473

Supreme Court of Colorado,

En Banc.

April 6, 1987

Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General, Christa D. Taylor, Assistant Attorney General, Human Resources Section, Attorneys for Petitioners.

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Marcia Egger, Attorney for Amicus Curiae, The National Employment Law Project.

DUBOFSKY, Justice.

We granted certiorari to review the judgments of the court of appeals in three cases involving the eligibility for unemployment insurance benefits of alien claimants who had married United States citizens and whose petitions for legal permanent residence in the United States were pending before the United States Immigration and Naturalization Service (INS). Arteaga v. Industrial Comm'n of State, 703 P.2d 654 (Colo. App. 1985); Zanjani v. Industrial Comm'n of Colorado, 703 P.2d 652 (Colo. App. 1985); and Division of Employment and Training v. Industrial Commission and Manu Yiadom, No. 84-CA-799, unpublished (Colo. App. April 11, 1985).1 In all of the cases, the INS had authorized the claimants to seek employment at the time they earned the wage credits required for unemployment compensation eligibility and when they applied for benefits. The Division of Employment and Training (the division) denied the claimants' request for unemployment benefits. The Industrial Commission (the commission) affirmed the division's denial of benefits in Arteaga and Zanjani and reversed the division's denial in Yiadom. The court of appeals determined that all of the claimants were "permanently residing in the United States under color of law" during the base periods used to determine eligibility for unemployment compensation under section 8-73-107(7)(a), 3 C.R.S. (1984 Supp.) and that they therefore were entitled to benefits.2 We affirm the judgments of the court of appeals.

I.

Eudesimo Arteaga, a citizen of Mexico, entered the United States without a visa in March, 1981. On April 26, 1982, he married a United States citizen. He was arrested two days later at his place of employment on suspicion of being in the country illegally. The INS commenced proceedings to deport Arteaga. On May 5, 1982, Arteaga's wife filed a petition with the INS requesting that the agency classify Arteaga as an immediate relative

eligible for an immigrant visa. The INS released Arteaga from detention, granted him employment authorization and stayed deportation proceedings pending adjudication of the immediate relative petition. Arteaga apparently returned to his place of employment. The immediate relative petition filed by Arteaga's wife was granted on June 23, 1982, and Arteaga became a legal permanent resident on April 16, 1983. On June 13, 1983, Arteaga's Colorado employer terminated his employment. Arteaga filed for unemployment compensation benefits, basing his wage credit on wages earned from January 1, 1982, through December 31, 1982. The division denied benefits for wage credit earned prior to June 23, 1982, the date the petition filed by Arteaga's spouse was granted by the INS. The commission affirmed the division's denial of benefits.

Bahman Zanjani, a citizen of Iran, entered the United States in 1977, with a non-immigrant "F-1" student visa. On September 5, 1981, he married a United States citizen. On August 5, 1982, his wife filed a petition with the INS requesting that the agency classify Zanjani as an immediate relative. On that date the INS granted Zanjani employment authorization, and on October 25, 1982, the INS granted him immediate relative status. Zanjani was discharged from his job on July 13, 1983, and he filed a claim for unemployment compensation. The division denied benefits for wage credit earned by Zanjani before October 25, 1982, and the commission upheld the division's denial of benefits.

Manu Yiadom, a citizen of Ghana, arrived in the United States on March 18, 1977, as a visitor-for-pleasure with a "B-2" visa. He married a United States citizen on or about March 4, 1980, and on March 8, 1980, Yiadom's wife filed a petition with the INS requesting that the agency classify Yiadom as an immediate relative. The INS granted Yiadom employment authorization on that date. In August, 1983, Yiadom's then-estranged wife withdrew her petition, and the INS commenced deportation proceedings. Yiadom eventually was deported. From December, 1978, through October, 1982, Yiadom worked for a Colorado employer. His employment was terminated on October 31, 1982, and he filed for benefits in May, 1983. The division denied his claim, but the commission reversed the division's ruling and granted Yiadom wage credit beginning March 8, 1980, the date his wife filed her petition.3

Eligibility for unemployment benefits requires that a person have received wage credit for services performed during a base period.4 The division initially determined that the claimants had sufficient wage credits to be eligible for benefits. Later the division reversed itself because the credits were earned before the INS granted the petitions filed by the claimants' spouses. The issue in these cases is whether an alien claimant is entitled to credit for quarters of service earned while the claimant was married to a citizen of the United States, working for a Colorado company under authorization from the INS, and waiting for the INS to grant a petition for legal permanent resident status.

The court of appeals held that Arteaga was entitled to unemployment compensation under section 8-73-107(7)(a), 3 C.R.S. (1984 Supp.), because he met the statutory criterion of "permanently residing in the United States under color of law." The factors supporting its decision that Arteaga's residence was permanent were his marriage to a citizen of the

United States, his employment with a domestic company under authorization from INS, and his pending application for legal permanent residence, notwithstanding the INS' continuing power to deport him. The court determined that Arteaga was "permanently residing in the United States under color of law" because the INS was aware of his technically illegal presence and yet consented to it by suspending efforts to deport him and by authorizing him to work. The court of appeals concluded that Arteaga was entitled to wage credit from the date he applied for legal permanent residence and obtained work authorization from the INS. The court of appeals applied the reasoning in Arteaga's case to Zanjani's and Yiadom's claims.

II.

The Colorado Employment Security Act (CESA), §§ 8-70-101 to 8-82-105, 3B C.R.S. (1986), is designed to lighten the burden of unemployment "which . . . . falls with crushing force upon the unemployed worker and his family." § 8-70-102, 3B C.R.S. (1986). See also California Human Resources Department v. Java, 402 U.S. 121, 131-132, 28 L. Ed. 2d 666, 91 S. Ct. 1347 (1971); Salida School District R-32-J v. Morrison, 732 P.2d 1160, slip op. at 7 (Colo. 1987). The CESA establishes a mechanism by which funds are accumulated to provide compensation for a limited time to those who are involuntarily unemployed through no fault of their own. § 8-73-108(1)(a), 3B C.R.S. (1986); Salida School District R-32-J v. Morrison, slip op. at 7; Industrial Commission v. Moffat County School District RE # 1, 732 P.2d 616, slip op. at 9-10 (Colo. 1987); Harding v. Industrial Commission, 183 Colo. 52, 515 P.2d 95 (1973); Andersen v. Industrial Commission, 167 Colo. 281, 447 P.2d 221 (1968). A claimant who receives unemployment compensation is entitled to a statutorily prescribed unemployment benefit that is less than his salary and lasts for a limited time. §§ 8-73-102 and 8-73-104, 3B C.R.S. (1986); Salida School District R-32-J, slip op. at 7.

Unemployment compensation is a cooperative federal-state program. The federal government offers incentives to the states to encourage them to enact unemployment insurance programs that conform to federal statutory requirements. Thus, each state has a comprehensive statute like the CESA governing the program within that state, but federal statutes define the basic outlines of the unemployment insurance system. Included in the congressional incentives are certain tax credits for employers. The Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301 -3311 (1976 & Supp. 1986), imposes on employers in participating states a tax representing a percentage of total wages paid by the employers during the calendar year and representing the number of former employees collecting unemployment insurance, the employer's experience rating. See 26 U.S.C. § 3303 (a)(1) (1976); §§ 8-76-102 to -104, 3B C.R.S. (1986). If the United States Secretary of Labor "certifies" a state to the Secretary of the Treasury, see 26 U.S.C. § 3304 (a)-(c) (1976 & Supp. 1986), employers in that state may obtain a credit of up to ninety percent against their basic FUTA tax liability for unemployment taxes paid to the state unemployment fund.

To be "certified" by the Secretary of Labor, the state unemployment compensation law must conform to certain minimum standards. Relevant to this case, the state law must

contain the provisions found at 26 U.S.C. § 3304 (a)(14) (1976). Section 3304(a)(14)(A) generally prohibits the payment of unemployment compensation to aliens, but permits such payment if certain requirements are met:

Compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act), ...

26 U.S.C. § 3304 (a)(14)(A) (1976).5 The CESA contains the requirements of section 3304(a)(14)(A) in section 8-73-107(7)(a), 3 C.R.S. (1984 Supp.). Section 8-73-107(7)(a) is identical to the federal provision except that it refers to "benefits" payable instead of "compensation" payable.6

Under section 3304(a)(14)(A), unemployment compensation is available to an alien who was "lawfully admitted for permanent residence at the time such services were performed," "was lawfully present for purposes of performing such services," or "was permanently residing in the United States under color of law at the time such services were performed." An individual who "was lawfully admitted for permanent residence" is one who has the privilege of residing in the United States permanently as an immigrant. 8 U.S.C. § 1101 (a)(20) (1976). An individual who was "lawfully present for purposes of performing . . . . services," according to the generally accepted interpretation of this phrase at the time the instant cases arose, was a Canadian or Mexican resident not actually residing in the United States but legally working in the United States. See Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95-19, § 302(a), 91 Stat. 39, 44 (1977); S. Rep. No. 95-67, 95th Cong., 1st Sess. 14 (1977); H.R. Conf. Rep. No. 95-158, 95th Cong., 1st Sess. 103 (1977).7

The phrase "permanently residing in the United States under color of law" is not defined in section 3304(a)(14)(A)8 nor in the version of section 8-73-107(7)(a) in effect when these cases arose.9 "Permanent," however, is defined at 8 U.S.C. § 1101 (a)(31) (1970) as "a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law." The word "temporary" is not defined in the Immigration and Nationality Act; however, its meaning may be inferred from the act by usage of the words "temporary" and "temporarily" in reference to aliens who have no intention of abandoning their foreign residence, including tourists, students, and temporary workers and teachers. 8 U.S.C. § 1101 (a)(15)(B), (F), (H) and (J) (1970 & Supp. 1986).

The Court of Appeals for the Second Circuit supplied a definition for "under color of law" in Holley v. Lavine, 553 F.2d 845, 849-850 (2d Cir. 1977), cert. denied, 435 U.S. 947, 98 S. Ct. 1532, 55 L. Ed. 2d 545 (1978):

"Under color of law" means that which an official does by virtue of power, as well as what he does by virtue of right. The phrase encircles the law, its shadows, and its penumbra. When an administrative agency or a legislative body uses the phrase "under color of law" it deliberately sanctions the inclusion of cases that are, in strict terms, outside the law but are near the border.

There is no more common instance of action "under color of law" than the determination of an official charged with enforcement of the law that he, as a matter of public policy, will exercise his discretion not to enforce the letter of the statute or regulation because such enforcement would involve consequences, or inflict suffering, beyond what the authors of the law contemplated. The discretionary refusal of a prosecutor or like administrator of the law to use his enforcement powers is often not supported by specific language in a statute or other charter of authority. Yet there is a legion of adjudicated cases which recognize that the prosecutor or like enforcing official may exercise a discretionary power, virtually unreviewable by a court, not to enforce a statutory command, and not to seek the imposition of penalties or other sanctions upon a known violator. (Citations omitted.)10 (Emphasis in original.)

The Second Circuit gave additional meaning to the "under color of law" language in Berger v. Heckler, 771 F.2d 1556, (2d Cir. 1985):

The phrase is designed to be adaptable and to be interpreted over time in accordance with experience, developments in the law, and the like . . . .

. . . . "The language . . . . invites dynamic interpretation by both courts and the administrative agency charged with the statute's enforcement to determine the statute's application in particular cases in the light of developments in the country's immigration policy."11

Id. at 1571, quoting appealed orders of the district court (E.D.N.Y.). The courts in both cases concluded that the claimants were entitled to welfare benefits as aliens "permanently residing in the United States under color of law."

The Holley rationale has been followed by other jurisdictions when confronted with similar issues regarding the eligibility of aliens for various benefits, especially unemployment benefits. See Alfred v. Fla. Dept. of Labor and Employ. Sec., 487 So. 2d 355 (Fla. App. 1986) (unemployment benefits); Vazquez v. Rev. Bd. of Indiana Emp. Sec. Div., 487 N.E.2d 171 (Ind. App. 1985) (unemployment benefits); Cruz v. Commissioner of Public Welfare, 395 Mass. 107, 478 N.E.2d 1262 (1985) (Medicaid benefits); Flores v. Department of Jobs and Training, 393 N.W.2d 231, cert. granted (Nov. 1986) (Minn. App. 1986) (unemployment benefits); Papadopoulos v. Shang, 67 A.D.2d 84, 414 N.Y.S.2d 152 (1979) (Medicaid benefits); St. Francis Hospital v. D'Elia, 71 A.D.2d 110, 422 N.Y.S.2d 104 (1979), aff'd 53 N.Y.2d 825, 440 N.Y.S.2d 185, 422 N.E.2d 830 (1981) (Medicaid benefits); Gillar v. Employment Division, 300 Ore. 672, 717 P.2d 131 (Or. 1986) (unemployment benefits); Rubio v. Employment Division, 66 Ore. App. 525, 674 P.2d 1201 (1984); Lapre v. Department of Employment Security, 513

A.2d 10 (R.I. 1986) (unemployment benefits); Antillon v. Department of Employment Security, 688 P.2d 455 (Utah 1984) (unemployment benefits); see also Ibarra v. Texas Employment Commission, 645 F. Supp. 1060 (E.D. Tex. 1986) (unemployment benefits; settled by consent decree); cf. Velasquez v. Sec. of Dept. of Health & Human Ser., 581 F. Supp. 16 (E.D.N.Y. 1984) (given INS inaction to prosecute deportation, alien established eligibility for social security benefits); but see Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985) (asylum applicants denied AFDC benefits); Zurmati v. McMahon, 180 Cal. App. 3d 164, 225 Cal. Rptr. 374 (1986), cert. denied (Dec. 1986) (Sudomir followed; asylum applicant denied unemployment benefits). In several cases courts determined that an alien was "permanently residing under color of law" when the INS had notice of the alien's presence and took no action to deport the alien. E.g., Cruz, 395 Mass. 107, 478 N.E.2d 1262; Lapre, 513 A.2d 10; Antillon, 688 P.2d 455.

Concern about the potential impact of allowing an alien to qualify for unemployment benefits if the INS had notice of the alien's presence and took no action to deport him led the United States Department of Labor to adopt an interpretation of section 3304(a)(14)(A) that would include aliens with authorization to work in the category of "lawfully present for purposes of performing . . . . services." Unemployment Insurance Program Letter No. 1-86 (issued October 28, 1985), 51 Fed. Reg. 29,713 (1986), see note 7, supra. Under the Department of Labor interpretation, beneficiaries of the INS' discretionary authority to permit an alien to work "for humanitarian reasons" pending determination of the alien's status may range from applicants for asylum or suspension of deportation to deportable or excludable aliens. The wage credits used to establish a claim must be earned while an alien is legally authorized to work in the United States. Id. Because the status of aliens in this category may depend upon many factors and also may be subject to change, each case must be reviewed carefully by the state agency to determine the alien's status both at the time of work and the time benefits are claimed. Id. The Program Letter in effect requires an affirmative case-specific or class-specific determination as to whether an alien was authorized to work before an alien may be eligible to receive unemployment compensation.

In a case decided shortly before the Department of Labor issued its Program Letter, Esparza v. Valdez, 612 F. Supp. 241 (D. Colo. 1985), the United States District Court for the District of Colorado reflected a similar concern about allowing an alien to qualify for unemployment benefits if the INS had notice of the alien's presence and took no action to deport that alien. The court in Esparza interpreted the plaintiffs' claim as one that would permit any alien, without regard to the legality of his entry, to obtain a job, make his presence known to the INS by the filing of some application, and, in the absence of deportation, claim that his residence was "under color of law." The court determined that if the plaintiffs' common claim to the broad construction of the statute was accepted, all of the plaintiffs would be entitled to injunctive relief. Instead the court ruled, citing Holley approvingly, that section 3304(a)(14) requires individual consideration of the factual circumstances of each applicant to determine whether the applicant has an immigration status that allows the applicant to remain in the United States for an indefinite period of time.

Claimants Arteaga and Zanjani in the instant case were named plaintiffs in Esparza.12 The court in Esparza noted that none of the plaintiffs in that case had alleged that a state administrative tribunal, after a review of the factual circumstances of each case, had denied unemployment benefits during a period in which a plaintiff held an immigration status that allowed him to remain in the United States indefinitely. The court denied the individual claims for injunctive relief without prejudice to the merits of the claims.

In the case before us, the claimants have alleged that a state administrative tribunal, after review of the factual circumstances of each case, denied unemployment benefits for service during a period in which the claimants held an immigration status that allowed them to remain in the United States indefinitely. Their claims in this posture have merit. The INS Operations Instructions provide that no deportation proceeding should be initiated when a claimant establishes prima facie entitlement to an adjustment of status. INS OI 245.2(a). Arteaga, Zanjani and Yiadom established prima facie entitlement to an adjustment of status, under 8 C.F.R. § 145.1 and .2 (1986), when their citizen spouses presented proof of marriage to the INS and requested that the agency declare the claimants immediate relatives. See 8 U.S.C. § 1154 (1970 & Supp. 1986) (procedure for granting immigrant status), 8 C.F.R. §§ 204.1 (immediate relative petition) and 109.1(b)(3) (1986) (employment authorization). The overwhelming majority of aliens who are legitimately married to United States citizens will be granted permanent residence status once their visa interview occurs. See INS OI 245.3(b). In fiscal year 1984, the INS approved ninety-six percent (96%) of the immediate relative petitions for permanent residence status. Central Office -- Statistical Analysis Branch, Immigration and Naturalization Service, United States Dep't of Justice, Adjudication Summary Report for Fiscal Year 1984 (Form G22.2). Moreover, in recognition of entitlement to an adjustment of status, the INS routinely grants work authorization to claimants whose spouses have filed the petitions.

One amicus in this case, the Federation for American Immigration Reform (Federation), argues that allowing the claimants to qualify for wage credits when they have filed petitions for adjustment of status and received work authorization would broaden the availability of unemployment compensation to aliens, thus enhancing the attractiveness of migrating illegally to the United States. The amicus informs us that the number of aliens for whom the INS adjusted status to legal permanent residence from a non-immigrant or deportable status grew from 26,001 in 1965 to 119,644 in 1983. Immigration and Naturalization Service, United States Dep't of Justice, Statistical Yearbook of the INS, 1965 and 1983. Because the increase in the numbers applying for permanent residence increased the workload of the INS, there was a commensurate increase in the time it took to process a petition for adjustment of status. Consequently, according to the Federation, the number of persons who ultimately may be deportable but who in the meantime are authorized to work in the United States continues to increase.

The Federation's argument might be relevant if this case involved entitlement to welfare benefits. See Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985). However, the funds that provide unemployment compensation benefits are the proceeds of a tax paid by employers based on a percentage of wages paid to all employees and on each employer's

experience rating. 26 U.S.C. § 3303 (a)(1) (1976); sections 8-76-101 to 8-76-104, 3B C.R.S. (1986).13 Contrary to the argument that providing unemployment benefits for aliens will increase the number of illegal aliens coming to this country, denying eligibility may induce employers to hire aliens who can never draw unemployment benefits because the employers of those aliens would receive reduced experience ratings upon which premiums are based and because unemployment insurance funds would receive premiums for insured workers who could never make a claim.14 Moreover, if alien workers are not entitled to unemployment compensation when they leave a job because of poor working conditions, a situation that normally entitles a worker to benefits, substandard working conditions may become more prevalent, ultimately stimulating further illegal immigration. The United States Court of Appeals for the Ninth Circuit, in a case involving the availability of a back pay remedy under the National Labor Relations Act to illegal aliens who are victims of unfair labor practices, responded to an argument similar to the one made by the Federation. Local 512, Warehouse and Office Workers' Union v. National Labor Relations Board, 795 F.2d 705, 718-722 (9th Cir. 1986). The court observed that back pay awards serve a public policy of deterring unfair labor practices and depriving employers who commit them of any competitive advantage, thus discouraging employers from hiring and exploiting undocumented workers to the detriment of both illegal aliens and American workers. Id.

We conclude that claimants are members of the working population intended to be covered by the unemployment compensation system. The claimants, who had filed petitions for adjustment of status based upon their marriage to United States citizens and who had received work authorization from the INS, were persons "permanently residing in the United States under color of law." They should have received wage credits entitling them to unemployment compensation eligibility as of the date they filed their petitions and received work authorization.15

Judgments affirmed.16

Justice Rovira dissenting:

The majority scrutinizes the phrase "permanently residing in the United States under color of law" as used in section 8-73-107(7)(a), 3 C.R.S. (1984 Supp.), and determines that this language, in the words of the Second Circuit, emits "penumbra" and "shadows" that call for a broad judicial interpretation. Because I do not agree with this interpretation, I respectfully dissent.

I.

The issue decided today has ramifications that extend beyond the facts of this particular case. The language in question arises from a provision of Colorado law, modeled after related federal legislation, that is intended to exclude all aliens from unemployment compensation except certain specified categories. See 26 U.S.C. § 3304 (a)(14) (1982). The category at issue in this case covers aliens "permanently residing in the United States under color of law." The language used to describe this category is not unique to the state

and federal unemployment compensation laws, but instead mirrors virtually identical language in similar statutes and regulations governing numerous government entitlement programs. See 42 U.S.C.A. § 602 (a)(33) (1987) (Aid to {735 P.2d 483} Families with Dependent Children); 42 U.S.C. § 1382c (a)(1)(B) (1982) (Supplemental Security Income for the Aged, Blind, and Disabled); Rule 3.140.11, 9 C.C.R. 2503-1 (1980) (Public Assistance); Rule 3.380.15, 9 C.C.R. 2503-1 (1980) (Old Age Pensions); Rule 3.400.16, 9 C.C.R. 2503-1 (1979) (Aid to Needy, Disabled or Blind Persons); Rule 3.600.21, 9 C.C.R. 2503-1 (Aid to Families with Dependent Children); Rule 8.100.53, 10 C.C.R. 2505-10 (1986) (Medical Assistance). This case represents our first opportunity to construe the pertinent language. As a result, our decision will likely influence decisions in future cases involving the eligibility of aliens for a variety of government benefits.

The precedent set by today's decision is especially troubling because the questions surrounding alien eligibility for government benefits are bound to intensify.1 Amicus informs us that immigration to the United States is now at or near the highest level in the history of the country and increasing rapidly. Estimates of illegal aliens now living in this country range well into the millions. According to amicus, in the state of Colorado alone, in 1984 the Immigration and Naturalization Service estimated that 5,328 illegal aliens could be screened off the unemployment compensation rolls for a first-year savings to the state and federal governments of $2.9 million. The majority's opinion in this case, because it has the potential to greatly expand the eligibility of aliens for government benefits and because that result may encourage further illegal immigration, can only exacerbate a growing problem faced by officials charged with administering and financing state entitlement programs.

II.

The key problem that I see in the majority's analysis is the sheer breadth with which the majority defines the phrase "permanently residing in the United States under color of law." Initially, the majority concludes that the term "permanent" in this context essentially refers to aliens who intend to abandon their foreign residence. Maj. Op. slip op. at 11. Then, relying on exceedingly broad language from Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947, 98 S. Ct. 1532, 55 L. Ed. 2d 545 (1978), the majority concludes that an alien permanently resides "under color of law" if the federal Immigration and Naturalization Service knows the alien has no right to reside here but does not seek sanctions against the alien. Maj. Op., slip op. at 11-12.

In my view, this broad construction has the potential for creating serious difficulties. In Esparza v. Valdez, 612 F. Supp. 241, 244 (D. Colo. 1985), a case involving two of the respondents now before this court, Judge Matsch clearly pointed out those difficulties:

Adoption of [such a] position would seriously erode the government's ability to deal with the problem of illegal aliens. It would permit any alien, without regard to the legality of his entry, to obtain a job, make his presence known to the INS by the filing of some application, and, in the absence of deportation, claim that his residence was "under color

of law." Congress has not indicated an intention to place such persons on the unemployment compensation benefits program.

Esparza, 612 F. Supp. at 244. See also Zurmati v. McMahon, 180 Cal. App. 3d 164, 176-77, 225 Cal. Rptr. 374, 381 (1986).

To avoid this problem, Judge Matsch carefully crafted a narrower interpretation of the pertinent statutory language. In my view, he properly concluded that the phrase "permanently residing in the United States under color of law" makes eligible "those aliens who, after review of their particular factual circumstances pursuant to a specific statutory or regulatory procedure, have been granted an immigration status which allows them to remain in the United States for an indefinite period of time." Esparza, 612 F. Supp. at 244. Further, I believe this test, if properly applied, would exclude the respondents from unemployment compensation coverage during the relevant periods at issue in this case.

In its decision, the majority purports to adopt and apply the test formulated in Esparza. However, in applying the test, the majority overlooks certain key language with the result that Judge Matsch's purpose in adopting the test is virtually cast aside. As I read it, the Esparza test clearly requires an alien to have official permission to remain indefinitely, granted under a specific statutory or regulatory procedure.

As other courts have put it, the "fundamental and essential requirement" is "an affirmative 'admission' or 'grant', by a competent official authority, of a specific status, which carries with it the right of the alien to reside in the United States for an indefinite period of time, so long as that status exists." Zurmati v. McMahon, 180 Cal. App. 3d at 176, 225 Cal. Rptr. at 380-81. In other words, there must be an "official sanctioning" of the alien's presence and an "official determination" that the alien can remain indefinitely. Sudomir v. McMahon, 767 F.2d 1456, 1460 (9th Cir. 1985). See also Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947, 98 S. Ct. 1532, 55 L. Ed. 2d 545 (1978) (alien had received "official assurance" that INS did not contemplate enforcing her departure from the United States while her children remained dependent on her).

This interpretation finds support in the Colorado legislature's recent attempt to explicitly define the statutory phrase at issue in this case. See section 8-73-107(7)(a), 3B C.R.S. (1986). That definition is technically inapplicable to this case since it was adopted after this case arose. However, I believe it affords some insight into the legislature's original intent in adopting the ambiguous phrase "permanently residing in the United States under color of law." Importantly, in its definition, the legislature set forth -- in accord with Esparza -- specific categories involving "official sanctioning" of an alien's presence. However, none of the categories listed would, in my view, apply to the respondents.

In light of the "official sanctioning" test adopted by Esparza and related cases, the majority's attempts to categorize the respondents as "permanently residing in the United States under color of law" at the relevant intervals in this case are unpersuasive. While the respondents' applications for permanent residency status were pending, they had not

been granted the permission to remain in the United States indefinitely under any specific regulatory procedure. Their applications for permanent residency status amounted to an attempt to obtain that permission; but until that permission was granted, petitioners remained only temporary residents.

In Sudomir v. McMahon, 767 F.2d at 1461-62, for instance, the Ninth Circuit addressed the comparable status of aliens who had applied for asylum and concluded that, "The status of asylum applicants and its duration can hardly be described as fixed, or permanent. To repeat, they are best described as inchoate." While the court found that "permanent" in the pertinent statutory language did not mean "forever," it also did not embrace "transitory, inchoate, or temporary relationships." It held that an alien's residence is temporary when the continued presence of the alien is solely dependent upon the possibility of having his application acted upon favorably. In this case, since the respondents' continued presence was solely dependent on favorable action on their application for permanent residency, their status must also be construed as "temporary."

Nor can the respondents claim that their marriages to American citizens elevated their status to aliens "permanently residing in the United States under color of law." Such marriages do not entitle an alien to an adjustment of his status to permanent resident. Menezes v. INS, 601 F.2d 1028, 1032 (9th Cir. 1979). Indeed, in cases where an alien engages in a "sham" marriage to evade the immigration laws, the alien is subject to deportation. Garcia-Jaramillo v. INS, 604 F.2d 1236 (9th Cir. 1979), cert. denied, 449 U.S. 828, 66 L. Ed. 2d 32, 101 S. Ct. 94 (1980).

Similarly, the respondents did not receive official permission to remain indefinitely because they received authorization to work. Such work authorization is granted at the discretion of the INS, commonly for humanitarian purposes; it neither indicates nor confers legal status. See 8 C.F.R. § 109 (1987); Zurmati v. McMahon, 180 Cal. App. at 178, 225 Cal. Rptr. at 381-82. In fact, an alien may be granted authorization to work at a time when the government is attempting to deport him. See, e.g., 8 C.F.R. § 109.1(b)(5) (1987).

III.

In its opinion, the majority places great emphasis on a recent interpretation by the federal Department of Labor that aliens who are granted work authorization are eligible for unemployment compensation under a separate statutory category permitting coverage of aliens "lawfully present for purposes of performing . . . . services." Maj. Op., slip op. at 14-15. The majority, however, does not point out that the Department of Justice views that ruling as "legally incorrect."2 Even if it were correct, however, the Department of Labor's view of that statutory category would be irrelevant since construction of the scope of that category is not an issue in this case. Maj. Op. at 477 n.7.

What is highly relevant, however, is the department's interpretation of the language "permanently residing in the United States under color of law," and the very same ruling

cited by the majority also interprets that language -- but in a way contrary to the majority's interpretation:

The issue of whether an alien is permanently residing in the United States under color of law has been the subject of recent State appeals board and court decisions. Usually these cases concern aliens who entered the United States illegally, or who were lawfully admitted to the United States but not authorized to work during their stay. Later the alien may apply to the INS for permanent residence, political asylum, suspension of deportation or some other change in status. While a status determination is pending or deportation proceedings are being considered, the alien may file a claim for unemployment compensation. In some (but not all) of these cases, appeals boards or courts have ruled that if the INS knows of an alien's illegal presence in the United States and has taken no action on the case, the alien is "permanently residing in the United States under color of law."

Rulings of this type do not conform with the intent of Section 3304(a)(14)(A), FUTA, or its legislative history. INS inaction is not sufficient to show that an alien is present under color of law and States may not interpret it as such.

Unemployment Insurance Program Letter No. 1-86 (issued October 28, 1985), 51 F.R. 29713, 29716 (August 20, 1986).

The majority's reliance on Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947, 98 S. Ct. 1532, 55 L. Ed. 2d 545 (1978), is similarly misplaced. Although the Second Circuit in Holley used the broad language now quoted by the majority, the court in that case obviously viewed the case as unique and of little precedential import, and the court implicitly adopted an "official sanctioning" test. In that regard, the court said:

Far from being in a class with millions of aliens unlawfully residing in the United States, plaintiff is in what is almost certainly a minuscule sub-class of aliens who, although unlawfully residing in the United States, are each individually covered by a letter from the Department of Justice stating that the Immigration and Naturalization Service "does not contemplate enforcing . . . . [the alien's] . . . . departure from the United States at this time."

Holley, 553 F.2d at 849.

The respondents in this case and in the related case decided by this court today, Division of Employment and Training v. Turynski, 735 P.2d 469 (Colo. 1987) (involving applicants for asylum), obviously are not part of any similar "minuscule sub-class." Indeed, both classes are probably quite large.3

Further, the facts of Holley are not inconsistent with the "official sanctioning" theory of Esparza and related cases. In Holley, the petitioner had received "official assurance" that

she would not be deported at least until her six children -- all American citizens -- were no longer dependent on her. Holley, 553 F.2d at 849.

At various points in its opinion, the majority attempts to point out narrow factual differences that might limit its wholesale adoption of the broad language of Holley in future cases. However, I am unpersuaded that the majority views any of these potential limitations as critical. For example, at one point, the majority notes that "the overwhelming majority of aliens who are legitimately married to United States citizens will be granted permanent residence status once their visa interview occurs." Maj. Op. at 480. In the majority's eyes, this apparently strengthens the respondents' claim to status as "permanently residing in the United States under color of law." However, in Turynski, the majority fails to note that most applicants for asylum will be denied that status -- and yet the majority finds that these aliens, too, are "permanently residing in the United States under color of law." See, e.g., Sudomir v. McMahon, 767 F.2d at 1468.

Similarly, the majority hints at another point that it might adopt a more restrictive view if the benefits involved were welfare benefits rather than unemployment compensation. Maj. Op., slip op. at 17. However, the language adopted by the majority admits of no distinction between the types of benefits involved. Further, the case that the majority relies on as central to its analysis, Holley, was a case involving welfare benefits.

As a last attempt to justify its decision in this case, the majority analogizes to labor-relations statutes that permit stiff penalties to deter employers who engage in unfair labor practices. Maj. Op., slip op. at 18. In my experience, the notion that our unemployment compensation statutes are designed to penalize employers is a novel one,4 and the majority is certainly stretching far afield to come up with reasons for its conclusion. Admittedly, in the past, we have construed the unemployment compensation statutes liberally in favor of disadvantaged workers of this state beset by the "crushing force" of unemployment. See Industrial Commission v. Sirokman, 134 Colo. 481, 485, 306 P.2d 669, 671 (1957); section 8-70-102, 3B C.R.S. (1986). However, if this case is explained solely as a humanitarian response on behalf of the majority to a vulnerable group, I would suggest the majority's decision is misguided. Although the court may be able to afford relief to these respondents by its decision today, the result may simply be to encourage the government in the future to deny aliens work authorization and other official concessions in order to avoid unintentionally incurring costly liabilities to aliens under the entitlement laws.

Accordingly, I respectfully dissent.

I am authorized to state that Justice Vollack joins in this dissent.

Footnotes

1. The court of appeals considered these cases separately. We consolidated the cases when we granted the separate petitions for certiorari. The court of appeals followed its rulings in Arteaga v. Industrial Comm'n of State, 703 P.2d 654 (Colo. App. 1985) and

Zanjani v. Industrial Comm'n of Colorado, 703 P.2d 652 (Colo. App. 1985) in Yatribi v. Indus. Com'n of State of Colo., 700 P.2d 929 (Colo. App. 1985). The commission did not seek certiorari review in Yatribi.

2. The Industrial Commission ruled in favor of the claimant in Yiadom. Thus, the division and not the commission petitioned for certiorari review in that case. Section 8-74-107(2), 3 C.R.S. (1984 Supp.) allows the division to seek appellate review of a commission ruling.

3. On March 6, 1984, the commission decided that Arteaga was not entitled to wage credit from the date his wife filed her immediate relative petition because Arteaga entered the United States illegally. On May 3, 1984, the commission decided Zanjani was not eligible for wage credit from the date his wife filed her immediate relative petition although his entry into the United States was legal. On May 24, 1984, the commission determined that Yiadom was eligible for wage credit from the date his wife filed her immediate relative petition because he legally entered the United States. The commission's rulings in these cases are not consistent.

4. "Base period" means the first four of the last five completed calendar quarters immediately preceding the first day of the individual's benefit year. § 8-70-103(1), 3B C.R.S. (1986). Any two consecutive quarters of earnings in the base period may be sufficient work history on which to base monetary eligibility for unemployment compensation. §§ 8-73-102 and -107(1)(e), 3B C.R.S. (1986).

5. Sections 203(a)(7) and 212(d)(5) were intended when enacted to apply to Cuban refugees who had been admitted to the United States after 1965 as "conditional entrants." Berger v. Heckler, 771 F.2d 1556, 1572-1574 (2d Cir. 1985). Section 203(a)(7) was codified at 8 U.S.C. § 1153 (a)(7) (1976 & Supp. 1986), and it permitted the United States Attorney General to regulate the conditional entry of refugees. Holley v. Lavine, 553 F.2d 845, 851 (2d Cir. 1977), cert. denied, 435 U.S. 947, 98 S. Ct. 1532, 55 L. Ed. 2d 545 (1978). 8 U.S.C. § 1153 (a)(7) was repealed by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). Sudomir v. McMahon, 767 F.2d 1456, 1460 n. 5 (9th Cir. 1985).

Section 212(d)(5) is codified at 8 U.S.C. § 1182 (d)(5)(A), (1970 & Supp. 1986) and it permits the Attorney General in his discretion to parole into the United States temporarily an otherwise inadmissible alien. Id.

6. Section 8-73-107(7)(a), 3 C.R.S. (1984 Supp.), provides: "Benefits shall not be payable on the basis of services performed by an alien unless such alien is an individual who is lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of § 203(a)(7) or § 212(d)(5) of the "Immigration and Nationality Act")."

7. After the court of appeals' decisions in the cases before us, the United States Department of Labor interpreted the phrase "lawfully present for purposes of performing such services" as including "other aliens who are permitted to work by the INS regardless of their status in the United States." Unemployment Insurance Program Letter No. 1-86 (issued October 28, 1985), 51 Fed.Reg. 29,713 (1986). Although it appears from the letter that the Department of Labor has directed all states to award unemployment compensation benefits to aliens who had work authorization at the time they earned wages credits, that interpretation of the law was not in effect at the time the claims in these cases arose. Therefore, we need to address the question that was before the court of appeals and determine if the claimants were individuals who were "permanently residing in the United States under color of law at the time [their] services were performed."

8. Congress recently again chose not to define "permanently residing in the United States under color of law." See Immigration Reform and Control Act of 1986, P.L. 99-603 (enacted November 5, 1986); 10A U.S.C. Cong. & Ad. News (Dec. 1986).

9. The General Assembly modified section 8-73-107(7)(a) in 1985. See H. 71, sec's 3, 4, § 8-73-107, 1985 Colo. Sess. Laws 366-367; § 8-73-107(7)(a), 3B C.R.S. (1986). The new version of the statute adds the following language:

For purposes of the "Colorado Employment Security Act", "permanent resident under color of law" shall mean: (I) An alien admitted as a refugee under section 207 of the "Immigration and Nationality Act", 8 U.S.C. § 1157, in effect after March 31, 1980; (II) An alien granted asylum by the Attorney General of the United States under section 208 of the "Immigration and Nationality Act", 8 U.S.C. § 1158; (III) An alien granted a parole into the United States for an indefinite period under section 212(d)(5)(B) of the "Immigration and Nationality Act", 8 U.S.C. § 1182 (d)(5)(B); (IV) An alien granted the status as a conditional entrant refugee under section 203(a)(7) of the "Immigration and Nationality Act", 8 U.S.C. § 1153 (a)(7), in effect prior to March 31, 1980; (V) An alien who entered the United States prior to June 30, 1948, and who is eligible for lawful permanent residence pursuant to section 249 of the "Immigration and Nationality Act", 8 U.S.C. § 1259; or (VI) An alien who has been formally granted deferred action or non-priority status by the immigration and naturalization service.

With the exception of sub-sections (III) and (IV), which are the examples set out in 26 U.S.C. § 3304 (a)(14)(A) (1986), the language in section 8-73-107(7)(a) as amended in 1985 does not appear in the FUTA. Because all claims in this case arose under the statute in effect in 1984, we express no opinion on the effect of the amendment.

10. The claimant for Aid to Families with Dependent Children (AFDC) benefits in Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), was a Canadian citizen who overstayed her non-immigrant visa, married and had six children born in the United States. The state agency considering the claimant's request denied benefits because of her immigration status, despite having received a letter from the INS stating that deportation proceedings had not been instituted for humanitarian reasons. The letter specifically stated:

The Service does not contemplate enforcing her departure from the United States at this time. Should the dependency of the children change, her case would be reviewed for possible action consistent with circumstances then existing.

Holley, 553 F.2d at 850. "Permanently residing" language identical or similar to that found in section 8-73-107(7)(a), 3 C.R.S. (1984 Supp.), and 26 U.S.C. § 3304 (a)(14)(A) (1976) is also found in the federal statutes and regulations governing AFDC, see 42 U.S.C. § 602 (a)(33) (1983 & Supp. 1987), and Medicaid, 42 U.S.C. § 1396a (10)(a) (1982); 42 C.F.R. § 436.402(b) (1986).

11. Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985), involved the "permanently residing under color of law" language found in 42 U.S.C. § 1382c (a)(1)(B)(ii) (1982) regarding the eligibility of certain aliens for Supplemental Security Income that is similar or identical to language in section 8-73-107(7)(a) (1984 Supp.) and 26 U.S.C. § 3304 (a)(14)(A) (1986).

12. Kazimierz Kozak, one of the claimants in Division of Employment and Training v. Industrial Commission, 735 P.2d 469 (Colo. 1987), also was a named plaintiff in Esparza v. Valdez, 612 F. Supp. 241 (D. Colo. 1985).

13. One federal court characterized the unemployment compensation system as similar to "a simple insurance system." Brown v. Porcher, 502 F. Supp. 946, 947 (D.S.C. 1980), aff'd, 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150, 74 L. Ed. 2d 1000, 103 S. Ct. 796 (1983). The court in Porcher said, "Employer contributions to the unemployment trust fund can . . . . be fairly characterized as payments made in lieu of wages. It is not a 'welfare' system, but an entitlement system." 502 F. Supp. at 947. See also, Berg v. Shearer, 755 F.2d 1343 (8th Cir. 1985); Wilkinson v. Abrams, 627 F.2d 650 (3d Cir. 1980).

14. Granting lower tax rates to employers with fewer employees who leave under conditions that qualify them for unemployment compensation enhances employment stability. See United States Department of Labor Unemployment Insurance Program Letter No. 29-83, Unemp. Ins. Rep. (CCH) para. 21,728 (1983).

15. Yiadom ceased to "permanently reside in the United States under color of law" when the INS ordered him to present himself for deportation after an immigration judge had entered a deportation order. Yiadom's wage credits were earned, however, at a time when he was lawfully in the United States, and he was lawfully available for employment when the unemployment compensation benefits should have been paid. Therefore, despite his subsequent deportation, Yiadom is entitled to the unemployment benefits at issue in this case.

16. Contrary to the allegations in the dissent, our holding is confined to the facts of this case. We rely on Judge Wyzanski's opinion in Holley for the definition of "permanently residing in the United States under color of law;" Holley, however, was a welfare benefits

case and the only INS action was a letter stating that the INS would not seek to deport Mrs. Holley until her children were grown.

The instant case, involving applicants for unemployment compensation who have been granted authority to work in the United States by the INS, is nowhere near the outer limits (described by the dissent as when "the INS knows of an alien's illegal presence in the United States and has taken no action on the case") of Holley. The dissent finds its support in one case, Zurmati v. McMahon, 180 Cal. App. 3d 164, 225 Cal. Rptr. 374 (1986), ignoring the overwhelming number of cases that have followed the Holley definition of "permanently residing under color of law."

The dissent's central concern appears to be speculative problems with potential alien eligibility for welfare benefits. It must be reiterated that this case concerns unemployment compensation and unemployment compensation funds are not state and federal funds in the same sense as the dollars appropriated to fund welfare benefits. Both the state and the federal governments impose an unemployment tax on employers. The proceeds of the tax are deposited into the Federal Unemployment Trust Fund maintained by the United States Treasury. See 26 U.S.C. § 3302 (a)(3)-(4) (1976); 42 U.S.C. § 1104 (1982). An appropriation in an amount equal to the proceeds of the tax funds administrative costs of state programs administered in conformity with federal statutory requirements. See 42 U.S.C. §§ 502, 1101 (1982 & Supp. 1987). Moreover, should the INS become overly concerned about the numbers of people seeking what the Federation and the dissent describe as "entitlement benefits," it could begin a new policy of immediately deporting all aliens who do not have permanent legal resident status (including persons married to United States citizens and asylum applicants), requiring them to wait abroad for the processing of their applications, and allowing them to come back to the United States only when the INS has issued the documents giving them status as permanent legal residents. Instead, the INS recently proposed granting blanket work authorization for illegal aliens who intend to seek legal status under the new federal immigration law that allows illegal aliens who have resided continuously in the United States since January 1, 1982, to remain here. 52 Fed. Reg. 8762, 8764 (1987).

Footnotes (Dissent)

1. The increasing frequency with which the issue we address today is arising is demonstrated by the majority's listing of 14 cases all involving similar statutory language and all dated 1979 or later. Maj. Op., slip op. at 13-14.

2. In a letter to the deputy solicitor of the Department of Labor dated February 5, 1986, a Justice Department assistant attorney general strongly urged that the Labor ruling be rescinded and pointed out that:

The legislative history surrounding the inclusion of this phrase indicates that Congress intended it to refer to certain classes of Mexican and Canadian citizens present in this country to fill a specific category of jobs. Aliens permitted to work in order to support themselves while their applications for a status change are pending are not present in the

United States for the purpose of performing services; they are permitted, for humanitarian reasons, to maintain themselves while their entitlement to remain in this country is in the process of adjudication. DOL's interpretation of this provision within FUTA is thus refuted by the legislative history and the plain meaning of the phrase itself.

With regard to the phrase "permanently residing in the United States under color of law," the letter stated:

The position of the United States on this issue is that no alien can be granted the status of a permanent resident under color of law, or be deemed eligible for benefits under federal social programs for any other reason, unless INS has made an affirmative, case-specific determination that the alien is entitled to remain in the United States for a period of time which is limited by something other than an official determination that the alien is not legally entitled to be in this country.

3. For example, the majority cites figures that show the INS granted legal permanent residency status to 119,644 aliens in 1983. Maj. Op., slip op. at 17.

4. In contrast, at footnote 13, the majority cites with approval cases characterizing unemployment compensation as a "simple insurance system."

Industrial Commission of the State of Colorado (Ex-officio

Unemployment Compensation Commission of Colorado),

Plaintiff in Error,

v.

Carlee J. Bennett, Defendant in Error.

No. 23062.

166 Colo. 101, 441 P.2d 648

Supreme Court of Colorado,

In Department.

June 10, 1968.

Duke W. Dunbar, Atty. Gen., Frank E. Hickey, Deputy Atty. Gen., Robert L. Harris, Asst. Atty. Gen., Denver, for plaintiff in error.

Leon R. Hetherington, James J. Johnston, Denver, for defendant in error.

HODGES, Justice.

The parties will be referred to herein as the Commission and the claimant.

Unemployment compensation was paid to the claimant during periods she was in attendance at Denver University as fulltime day student. On the claim form and on the periodic interview questionnaires, she had answered 'no' to the question 'Are you attending school or a training course?'

When the claimant's student status was discovered by the Department of Employment, compensation for the periods involved was disallowed because the hours of schooling conflicted with the claimant's availability for employment. She was also requested to reimburse the department in the sum of the overpayment, which amounted to $960.

Claimant appealed this administrative decision to the Commission claiming that her availability for employment was not affected because she would have quit school immediately upon being offered a job. A hearing was held. Claimant, who was represented by counsel, testified and presented evidence in support of her position. As a result of this hearing, a finding was made that the claimant knowingly withheld material facts affecting her eligibility to receive unemployment compensation from June 23, 1965 until January 13, 1966; that her availability for employment, one of the conditions of

eligibility, was restricted by her university attendance; and that, therefore, she was overpaid $960. The Commission adopted these findings and reaffirmed them when it considered the claimant's petition for review.

The claimant thereupon filed a complaint in the trial court for review and reversal of the Commission's findings and order. The trial court reversed the Commission and ordered that the disallowance of compensation during the pertinent period and the consequent order for reimbursement be vacated. The trial court found in substance that the evidence before the Commission was insufficient to support its findings and order. From the trial court's findings and judgment, the Commission prosecutes this writ of error.

The sole issues presented here are the propriety of the Commission's findings and order and whether these findings and order are supported by sufficient evidence.

In explanation of why she answered 'no' to the questions relating to school attendance on the various forms submitted in connection with her claim for unemployment compensation, she testified that attending school, in her view, was not a material circumstance, since she would have quit school promptly in the event a job was offered to her. It was conceded by her, however, that during a previous unemployment period when she was attending night classes, she had answered 'yes' to the same question on the required forms; that she knew school attendance might affect eligibility; and that a 'yes' answer generated further inquiries by the Department of Employment. Claimant also testified that during the pertinent periods, she made numerous job inquiries in an effort to secure employment.

The trial court found that the testimony of the claimant, that she would quit school if she secured employment, was uncontradicted and is therefore sufficient to rebut the findings of the Commission. The trial court in its findings also, in effect, reasoned that since there was no statute or regulation concerning attendance at school as being a proper subject of inquiry by the Department of Employment in determining eligibility, school attendance was therefore not a material fact. The trial court then deduced that the Commission wrongfully found that the claimant knowingly withheld or falsely stated a Material fact affecting her eligibility to receive unemployment compensation. The trial court ultimately concluded that the evidence was insufficient to support the Commission's findings and order. We do not agree with the trial court's reasoning or its ultimate finding. Our examination of this record reveals ample and credible evidence and documents to support the Commission's findings and we further hold that its findings and order are proper as a matter of law.

The claimant's statements and her sworn testimony that her availability for work was not affected by her school attendance because she would have promptly quit school if offered employment, are clearly self-serving declarations of what may have been her intention during the periods involved. The fact that these statements and the testimony were not specifically contradicted does not preclude the fact finder from not accepting them at full face value. The record includes other evidence and documents from which strong inferences could be drawn that the claimant's school attendance would affect and restrict

her availability for employment. If conflicting inferences exist, it is for the Commission to draw the controlling inference. Further, the credibility of the witnesses and the weight of the evidence lie exclusively within the province of the Commission.

Neff v. Industrial Comm., 24 Wis.2d 207, 128 N.W.2d 465 involves a fact situation which in certain respects is similar to the case at bar. In that case, the Commission's findings on the question of availability for work of a full time student is involved, together with his testimony of willingness to quit school on an offer of employment. In upholding the Commission's ruling denying compensation, the court stated with regard to the claimant's testimony:

'His testimony as to his willingness to quit school is a self-serving declaration of future intention. Under the circumstances the testimony was clearly admissible but because it was self-serving and a declaration of future intention the commission was not bound to accept his testimony as a verity but was obligated to test his credibility and weigh his evidence together with other evidence to determine the fact. His testimony was an assertion of his mental state as to future acts. No testimony was available to refute or confirm it. From the testimony quoted the commission could determine that his demeanor and his response to pertinent and compelling questions was evasive and equivocal.'

The above language has particularly strong application to the testimony of claimant here, whose claims of an intention to quit school to work, are retrospective rather than prospective.

It is axiomatic that findings of the commission as to the facts, if supported by substantial evidence shall be conclusive. A reviewing court may not interfere with an administrative judgment merely because there is a ground for difference of opinion. Nor may a reviewing court substitute its judgment for that of the administrative body when the findings of fact are properly supported by the evidence. Morrison Road Bar, Inc. v. Industrial Commission, 138 Colo. 16, 328 P.2d 1076; Burak v. American Smelting and Refining Company, 134 Colo. 255, 302 P.2d 182; Bryant v. Hayden Coal Co., 111 Colo. 93, 137 P.2d 417.

Availability for work' and 'actively seeking work' are two of the eligibility conditions required to entitle a person to unemployment compensation. See C.R.S. 1963, 82--4--7. Both or either of these conditions could be found to be lacking or restricted by full-time attendance at school, and such a finding would be a lawful basis for disallowing compensation. Inquiry therefore regarding any circumstance, including school attendance, which has a bearing upon eligibility conditions is not only proper but is required in the efficient administration of the Colorado Employment Security Act. The answers and representations made by the claimant as to school attendance are representations of material facts. It therefore follows that a false statement in answer to such inquiry is clearly encompassed within C.R.S. 1963, 82--11--1(1)(b) as follows:

'Any person who makes a false representation, knowing it to be false, or who fails to disclose a material fact, with intent to obtain or increase any benefit for himself or any

other person shall be ineligible to receive benefits for a period of fifty-two consecutive weeks beginning with the first week for which a fraudulent payment has been made. The claimant shall repay to the department any overpayments which have resulted due to his act of false representation or his failure to disclose material information and until such amounts are repaid the claimant shall be entitled to no benefits under this chapter. The penalty imposed by this paragraph (b) shall be in addition to and not in lieu of any other penalty, civil or criminal, provided in this chapter.'

The judgment of the trial court is reversed and the cause is remanded for entry of a judgment affirming the findings and order of the Commission.

Moore, C.J., and Kelley, J., concur.

Industrial Commission et al.

v.

Lazar.

Same

v.

Parra.

Nos. 15286, 15287.

111 Colo. 69, 137 P.2d 405

Supreme Court of Colorado,

En Banc.

April 26, 1943.

Gail L. Ireland, Atty. Gen., H. Lawrence Hinkley, Deputy Atty. Gen., and Henry E. Zarlengo, Asst. Atty. Gen., for plaintiffs in error.

Philip Hornbein, of Denver, for defendants in error.

BAKKE, Justice.

These two cases, because of similarity in fact and law, were consolidated for trial below and are for the same reason, submitted to us for disposition in a single opinion. They arise under the Colorado Employment Security Act, S.L.1941, c. 224, particularly section 5 thereof which deals with disqualification for benefits. The claimants in both cases are coal miners who had for years been employed as such in the northern Colorado fields, one at Frederick and the other at Erie. Work was discontinued in these mines in the spring of 1942, and claim was made for compensation under the act. On May 11, 1942, claimants were offered similar work at Hayden, 175 miles away on the other side of the continental divide, but they insisted the work was not suitable and declined to accept, whereupon the claims deputy denied their claim for compensation, holding that the work at Hayden was suitable and that because of their refusal they became disqualified for benefits under the statute. On appeal to the referee, the decision was reversed. The department appealed in turn to the Industrial Commission which refused compensation. Finally the matter reached the district court which set aside the findings and award of the commission and ordered the allowance of compensation. It is for the purpose of reviewing and reversing the decision of the trial courts that the Industrial Commission has brought the cases here on error.

A detailed statement of the facts is unnecessary because they are undisputed. In addition to what has been said it may be noted that both claimants were family men and had their homes at Erie and Frederick, respectively, and both felt that having to leave their homes and families to enter employment at such a distance from their places of residence made the work unsuitable.

Section 5(c)(1) of the statute reads: 'In determining whether or not any work is suitable for an individual, the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence, shall be considered.'

In its findings the commission posed the question at issue to be, 'Whether or not the jobs offered these claimants were suitable?' Its decision was as follows:

'The Commission, in considering the question raised in this case, is of the opinion that the degree of risk involved to the health, safety, and morals of the claimants, in being referred to the jobs offered, was no greater than that to which they are customarily subjected. The Commission has also taken into consideration the claimants' physical fitness and prior training, their experience and prior earnings, the length of their unemployment and their prospects of securing work in their customary occupations, as well as the distance of available work from their residence, and comes to the conclusion that the only question regarding the jobs offered that could possibly render them unsuitable is the distance of the available work from the claimants' residences.

'In deciding whether or not this factor is such as to render the jobs unsuitable, the Commission is of the opinion that the fact that our country is at war must be taken into consideration. Also, the fact that there is a shortage of coal and a shortage of manpower to mine the coal needed in the war effort must be taken into account. It is essential to the welfare of our nation that full use be made of every possible man-hour. To permit jobs essential to the war effort to remain unfilled while fully qualified men remain idle seems contrary to good public policy. To permit men under these circumstances to draw benefits is certainly not within the intent of the provisions of the Employment Security Act of Colorado.

'The commission therefore finds that the claimants did fail without good cause to apply for available suitable work when so directed by the Department of Employment Security and the United States Employment Service.'

It is at once obvious from a reading of this decision that the commission felt that the only matter involved as rendering the job unsuitable, 'is the distance of the available work from the claimants' residences.' It is to be noted that the sole reason assigned by the commission for its holding is the fact that our country is at war, and that because of the shortage of coal and man power as a result thereof, 'To permit jobs essential to the war effort to remain unfilled while fully qualified men remain idle seems contrary to public

policy.' 'Under these circumstances' the decision concludes that the men are not entitled to draw benefits.

While we can understand the patriotic motive that prompted these expressions, the commission was without legal authority to place the decisive factor in the case on this basis. Its only source of authority is in the statute.

Consequently, we agree with the trial court.

Judgments affirmed.

Knous, Justice (specially concurring).

While it may be that the Industrial Commission would be without authority under the Employment-Security Act to adjudge the suitability of the employment offered one unemployed solely upon the basis of what the commission feels should be the patriotic duty of the workman involved, I am satisfied from the records that such was neither the intent nor action of the commission in the cases at bar. Upon this basis I am unable to concur in the ground expressed in the court's opinion for affirming the judgments of the district court.

I believe that section 5(c)(1) of the act, quoted in the opinion of the court, confers upon the commission the broad power to consider prevailing economic conditions, whether they arise from the dislocations of war or from peace time depressions or trends, in deciding whether, in a given case, the offered employment is suitable and so determinative of the right to unemployment benefits. In the situation here involved, due to the burden imposed on the transportation systems of the country by the war, the national and state governments, in an effort to stabilize the flow of traffic thereon, in the spring and summer of 1942, made a wide appeal to users of coal to buy and store such, rather than as ordinarily, to wait until the fall or winter months to fill their bins. As a result of this program and the cooperation of the public therewith, an abnormal demand for summer production of coal in the Hayden field arose, and with it came stable peak employment periods for the miners. To complicate the situation, as a result of the flow of man power to the armed services and war industries, there also was a shortage of labor in the coal mining industry. I am satisfied that these circumstances, legitimate of consideration, rather than any unwarranted effort to impose patriotism on the claimants, prompted the comments on the war situation contained in the commission's decision.

Notwithstanding the right of the commission to notice such factors, I am convinced, however, that any considerations arising therefrom are so overwhelmed by other unchallenged evidence adduced as to make the decision of the commission arbitrary and unjust. The record discloses: (1) That for many years Lazar's place of residence has been at Frederick, Colorado, and Parra's at Erie; both are family men, Lazar with several children; both own their own home and Lazar maintains an extensive family garden in connection with his. (2) For more than a decade the basic employment of both has been in the Frederick-Erie coal fields where both have established seniority rights in particular

mines which they would lose should they not report for work on the opening of such mines. Except for a few shifts worked elsewhere in 1941, Lazar in the past thirteen years has not been employed outside of the Frederick field. (3) Because of the precise war emergencies causing peak employment at Hayden the mines in the home fields of claimants would open early in July, 1942. (4) The offered employment at Hayden, some 200 miles away, was not tendered until the forepart of May, 1942, and the first hearing before the deputy was not held until the latter part of that month. (5) The type of mining carried on in the Hayden field differed materially from that prevailing in the Erie-Frederick fields, to which the claimants were accustomed. (6) There were no accommodations for families available at Hayden, as a result of which claimants, if they accepted employment there, would have to pay their board at Hayden and also maintain separate family establishments at Erie and Frederick. (7) Both had worked at Hayden in 1941 at which time their earnings averaged approximately $2 per day less than the pay received in their home field. Both claimants testified that the wages received by them at Hayden were not sufficient to board themselves and maintain their families at home. Lazar testified that because of his unfamiliarity with the type of mining followed at Hayden he was unable to work efficiently there in any event and admittedly Parra did not have sufficient funds with which to defray transportation charges to Hayden.

It is to be observed that the 'stop-gap' employment offered until the opening of the mines in claimants' own field, to which of necessity they would be obliged to return, would not exceed a few weeks at most.

Considering the inevitable dislocation in the claimants' finances which would result from the payment of two-way traveling expenses and the separate maintenance of their families, in the event the sort employment at Hayden had been accepted by them, and the further circumstances detailed above, I am satisfied that under the intent of the statute involved, the men were within their rights in refusing the offered employment and that the commission acted arbitrarily in ordering the withholding of unemployment benefits from them because of such refusal.

Goudy, Justice (dissenting).

It seems to me that the basic questions here are those of fact. The Industrial Commission considered the evidence and concluded that the employment offered was suitable. The majority opinion and the specially concurring opinion of Mr. Justice KNOUS seem to me to be based upon a review of the facts and a conclusion drawn therefrom by the majority which differs from that of the commission. The result reached by the majority also was the judgment of the district court. In view of our long line of decisions, refusing to invade the field of the fact-finding body, this judgment, in my opinion, should be reversed. We said in Regal Coal Co. v. Jackvich, 105 Colo. 479, 99 P.2d 196, 198: 'If the testimony * * * was such that honest men fairly considering it might arrive at contrary conclusions, then an issue of fact was thereby presented and the finding of the commission on that issue was binding on the district court in its subsequent hearing of the case, and binds us on review.' This doctrine was reiterated in Industrial Commission v. Day, 107 Colo. 332, 111 P.2d 1061, and should not now be repudiated. I therefore dissent.

Burke and Jackson, JJ., concur in this dissenting opinion.

Industrial Commission of the State of Colorado (Ex-officio

Unemployment Compensation Commission of

Colorado), Petitioner,

v.

Stephen J. Redmond, Respondent.

No. C--379.

183 Colo. 14, 514 P.2d 623

Supreme Court of Colorado,

En Banc.

Oct. 1, 1973.

John P. Moore, Atty. Gen., John E. Bush, Deputy Atty. Gen., Robert L. Harris, Asst. Atty. Gen., Denver, for petitioner.

Stephen J. Redmond, pro se.

GROVES, Justice.

From August 1970 through part of February 1973, the respondent-claimant, Stephen J. Redmond (herein referred to as claimant), was a full-time college student working part-time for Casyndekan, Inc. Through no fault of his own, claimant was laid off his part-time job in February 1972. Thereafter, he filed a claim for unemployment compensation which was initially disallowed. Subsequently, following a hearing, a referee also ruled that his claim should be disallowed since, as a full-time student, claimant was unavailable for full-time work. The Industrial Commission (herein referred to as the Commission) affirmed the ruling of the referee. The Court of Appeals reversed. Redmond v. Industrial Commission, Colo.App., 509 P.2d 1277 (1973).

C.R.S.1963, 82--4--5(1) provides as follows:

"(T)he term 'part-time worker' means an individual whose normal work is in an occupation in which his services are not required for the customary scheduled full-time hours prevailing in the establishment in which he is employed or who, owing to personal circumstances, does not customarily work the customary scheduled full-time hours prevailing in the establishment in which he is employed."

As noted by the Court of Appeals, this statute defines two separate types of part-time workers. The Commission agrees that the claimant qualified as a part-time worker under the second definition, I.e., owing to personal circumstances, claimant did not work the "customary scheduled full-time hours prevailing in the establishment in which he is employed."

The Court of Appeals correctly stated as follows:

"Claimant actively sought and was willing to accept part-time work during those hours that his personal circumstances would allow him to work as he had done during the employment from which he had been terminated. The provisions of 1965 Perm.Supp., C.R.S.1963, 82--4--7(4), that a claimant must be 'able to work and (must be) available for all work deemed suitable pursuant to the provisions of section 82--4--8,' should not prevent the intent of the legislature from being carried out. That intent, as evidenced by C.R.S.1963, 82--4--5(2), is to the effect that part-time workers should be afforded benefits notwithstanding inconsistent provisions elsewhere in the Act."

The Commission argues that the intent of the unemployment compensation act was not to subsidize college students seeking advanced degrees. As pointed out by the Court of Appeals, however, C.R.S.1963, 82--4--5 clearly expresses a legislative intent to afford benefits to certain part-time workers, and the claimant was such a worker. Had the legislature intended not to afford part-time worker benefits to full-time college students, it could easily have so stated. See Swanson v. Employment Security Agency, 81 Idaho 385, 342 P.2d 714 (1959). In fact, some statutes do restrict the benefit eligibility of certain students. For example, 1971 Perm.Supp., C.R.S.1963, 82--1--3(8)(h)(i) and (ii) provide that the term "employment," as used in the unemployment compensation act, shall not include service performed in the employ of a school, college or university by a "student who is enrolled and is regularly attending classes at such school, college, or university."

We agree with the Commission that a part-time worker under C.R.S.1963, 82--4--5 must comply with other statutory eligibility requirements, e.g., under 1965 Perm.Supp., C.R.S.1963, 82--4--7(4) he must be "available for all work deemed suitable" and he must be "actively seeking work" under 1965 Perm.Supp., C.R.S.1963, 82--4--7(8). These requirements, however, must be applied with the thoughts in mind that the claimant is a part-time worker and that the legislature intended to afford benefits to such workers. We certainly disagree with the referee's conclusion that a part-time worker who is a full-time college student must be available for Full-time work in order to qualify for unemployment benefits. His conclusion subverts the intent of the legislature to afford benefits to part-time workers, and particularly to those workers who are employed part-time "owing to personal circumstances."

As pointed out by the Court of Appeals, Industrial Commission v. Bennett, 166 Colo. 101, 441 P.2d 648 (1968) does not stand for the proposition that a full-time college student can never be entitled to unemployment benefits. Rather, that case properly held that school attendance, and the resulting restrictions on the worker's availability for work

and ability to seek work, is one of the circumstances bearing on a claimant's eligibility for benefits. As applied to part-time workers, school attendance--and the resulting restrictions on availability for work and ability to seek work--may be considered in determining a part-time worker's eligibility for benefits. The Commission must again keep in mind, however, that most part-time workers, and especially those who work part-time "owing to personal circumstances," will have some restrictions on their availability for work and their ability to seek work. The essential question in each case would seem to be whether the particular part-time worker claimant so restricted his availability for suitable work or so restricted his ability to actively seek work, that--in relation to the condition of the surrounding labor market--he cannot be deemed to have met the eligibility requirements.

The following is from the Court of Appeals opinion:

"The commission has not promulgated rules applicable to part-time workers, as required by C.R.S.1963, 82--4--5(2):

'The commission shall prescribe fair and reasonable general rules applicable to part-time workers for determining their full-time weekly wage and the total wages for employment by employers required to qualify such workers for benefits. Such rules, with respect to such part-time workers, shall supersede any inconsistent provisions of this chapter, but, so far as practicable, shall secure results reasonably similar to those provided in the analogous provisions of this chapter.'

The present claimant is entitled to receive benefits for the loss of his part-time employment through no fault of his own. Therefore, the commission is directed forthwith to comply with the mandate of C.R.S.1963, 82--4--5(2), and prescribe fair and reasonable rules which will afford part-time workers benefits due them. Thereafter, the commission is directed to rehear this matter and determine, under its rules, the proper amount due claimant."

We reverse the Court of Appeals in its conclusion that the claimant is entitled to receive benefits. The Commission must make a finding in this respect under the law as set forth in this opinion. The statute requires the adoption of rules and the Court of Appeals is affirmed in this respect. The matter should be remanded to the Commission for a new hearing.

The decision of the Court of Appeals is affirmed in part and reversed in part, and the cause is returned to it for appropriate remand to the Commission.

Industrial Commission of the State of Colorado (Ex-officio

Unemployment Compensation Commission of Colorado) and

Reed-Johnson Co., a Colorado Corporation, Plaintiff in Error,

v.

Rocco Zavatta, Defendant in Error.

No. 23313.

166 Colo. 365, 443 P.2d 982

Supreme Court of Colorado,

En Banc.

July 22, 1968.

Duke W. Dunbar, Atty. Gen., Frank E. Hickey, Deputy Atty. Gen., Robert L. Harris, Asst. Atty. Gen., Denver, for plaintiff in error.

Philip Hornbein, Jr., Roy O. Goldin, Denver, for defendant in error.

GROVES, Justice.

This is an unemployment compensation case brought here to review the judgment of the district court, which reversed a decision of the Industrial Commission of Colorado (Ex-officio Unemployment Compensation Commission of Colorado), referred to as the "commission." Defendant in error will be called the "claimant."

The claimant has been a journeyman plumber for a number of years. During the period involved here he resided and worked in Colorado Springs. He was employed by Reed-Johnson Co. from July 1964, to June 3, 1966, at a wage of $4.75 per hour. In addition, this employer paid the equivalent of about 9 cents per hour on claimant's Blue Cross and Blue Shield premiums. He was to receive two weeks vacation if he remained in the employ of Reed-Johnson Co. throughout 1966. Reed-Johnson Co. operated a nonunion shop.

Claimant concluded that he wished to work for a union shop. Accordingly, he left the employ of Reed-Johnson Co. on Friday, June 6, 1966, joined the union that night and on the following Monday went to work for Douglas-Jardine, a union establishment. For the period commencing January 1, 1967, the union contract in effect provided for an hourly wage of $4.66 plus fringe benefits of 37 cents per hour, or a total of $5.03 per hour.

Douglas-Jardine laid off claimant for lack of work on January 20, 1967, and on February 20, 1967, he applied for unemployment benefits at the Department of Employment under the Colorado Employment Security Act. C.R.S.1963, Ch. 82, as amended. Reed-Johnson Co. made a request of the Department of Employment for a journeyman plumber at the pay rate of $4.50 per hour. This was communicated to the claimant on about March 15, 1967, but claimant understood that the request specified $4.60 per hour. Claimant refused the job offer for the reason that Reed-Johnson was nonunion; moreover, he thought that if he were to go to work there the union would fine him $500.

On receipt of the job offer claimant contacted Mr. Oscar Johnson of Reed-Johnson Co. and conversed with him briefly. The amount of wages to be paid claimant was not discussed. Claimant left with the statement that he would think over the matter of the employment and let Mr. Johnson know. Mr. Johnson testified that when the request was made of the Department of Employment it was not known that claimant would be appearing in response thereto; that had claimant accepted the employment he would have received his former wage of $4.75 plus the same contribution to Blue Cross and Blue Shield; and that, in addition, he would have been entitled to two weeks vacation. A union representative testified that had the claimant accepted the Reed-Johnson employment the union would not have fined him but might have given him a reprimand.

The claimant went to work for a third plumbing firm on March 27 or 28, 1967, and was so employed at the time of the referees' hearings herein.

A deputy of the Department of Employment denied the claim and claimant appealed from the deputy's decision. A Department of Employment referee held a hearing on April 27, 1967, and affirmed the deputy's decision. Claimant's attorney requested that another referee's hearing be held, which request was granted. Another Department of Employment referee conducted a hearing on May 10, 1967, and the deputy's denial of the claim again was affirmed. While the testimony in both hearings is in the record, the referee referred to in the remainder of this opinion is the one who conducted the second hearing.

The pertinent portions of C.R.S.1963, 82--4--7, and 8, as amended, are as follows:

"82--4--7. * * * (1) Any unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

"(4) He is able to work and is available for all work deemed suitable pursuant to the provisions of section 82--4--8. * * *"

"82--4--8. * * *

"(6)(a) No Award. As a guide to the department in the administration of this chapter, the general assembly determines that no award of benefits shall be granted to a claimant who is unemployed as a result of any of the following conditions, as determined by the department, * * *

"(c)(i) The refusal of suitable work or refusal of referral to suitable work at any time from the beginning of the base period to the time of the filing of a claim. In determining whether or not any work is suitable for an individual, the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing work in his customary occupation, and the distance of the available local work from his residence, shall be considered. Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

"(iii) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality."

There was no testimony as to the prevailing wage scale in Colorado Springs. The referee apparently assumed that the union scale was the prevailing scale. None of the parties had any objection to this assumption and for the purposes of this case we accept it. The parties further agree: (1) That a claimant may not justify his refusal of a job offer on sole grounds that it is nonunion (See Annot., 56 A.L.R.2d 1015); and (2) that, if in fact the job offered is not "suitable," then the reason for the claimant's refusal is immaterial. The principal question in the case, therefore, was whether there was substantial evidence to support the finding by the referee to the effect that the wages and fringe benefits of the work offer were not substantially less favorable than those prevailing in the locality. The district court thought not. The commission thought there was sufficient evidence, and we agree.

The finding of the district court was as follows:

"* * * That the evidence established that the plaintiff was offered a job at the rate of $4.50 per hour, that the prevailing wage was $5.03 per hour with time-and-a-half for overtime. That in view of these facts the wages and other conditions of the work offer were substantially less favorable to the plaintiff than those prevailing for similar work in the locality, and that therefore such work was not suitable under the provisions of Section 82--4--8(6)(c)(iii) of C.R.S.1963, as amended."

In Industrial Commission v. Brady, 128 Colo. 490, 263 P.2d 578, the offered work paid $2.00 an hour and the prevailing wage was $2.39. This court affirmed the district court's finding that this was a substantial difference. Between $2.39 and $2.00 there is a reduction of about 17%. Between $5.03 and $4.50 there is a reduction of about 10 1/2%. It is not necessary for us to make a determination as to whether the 10 1/2% Would be considered as "substantial." There was conflicting evidence before the referee--even portions of claimant's testimony were inconsistent with other portions. When there is evidence to support findings and they are made on conflicting evidence, such findings are conclusive on review. Vanadium Corp. of America v. Sargent, 134 Colo. 555, 307 P.2d 454.

There was sufficient evidence before the referee to support a finding that claimant rejected a job that would have paid him $5.03 an hour, computed as follows: Base wage that would have paid to him $4.75 Health insurance .09 Vacation pay .19 ----- $5.03

The claimant testified that he thought the job offer amounted to the following: Base wage $4.60 Health insurance .09 Vacation pay .18 ----- $4.87

This would have amounted to a variance of 3% From $5.03. If a base wage figure of $4.50 instead of $4.60 were used, the variance would be 5%. We hold that under the circumstances of this case a variance of 5% would not be "substantially less favorable."

The Attorney General has pointed out that when working on a union job the claimant's wages would be reduced by payments on his union initiation fee and union dues. We doubt that this factor should be taken into consideration in determining the matter of "substantially less favorable" wages, just as we believe that claimant's fear of a $500 fine by the union should be disregarded.

Reed-Johnson Co. did not pay premium pay for overtime work, but permitted a claimant to work what ever overtime hours he wished. Douglas-Jardine was under contract to pay premium wages for overtime, but its overtime work was minimal. The respective overtime situations do not affect the finding of the referee concerning "substantially less favorable wages."

The claimant contends that the commission failed to give consideration to claimant's short period of unemployment and has set forth in his brief the following quotation from Bayly Manufacturing Co. v. Department of Employment, 155 Colo. 433, 395 P.2d 216:

"It is clear that the beneficent purposes of the Act do not include a guaranty that a job offer must be for wages equal to that of the old job in order to be deemed as 'suitable' work, but work at a substantially lower wage should not be deemed 'suitable' unless a claimant has been given a reasonable period to compete in the labor market for available jobs for which he has the skill at a rate of any commensurate with his prior earnings. * * *"

In other words, the shorter the period of unemployment the less variance there can be between the prevailing wage and the offered one. In ruling that there was sufficient evidence to support the referee's finding, we have in mind the short period of unemployment. The referee must have been mindful of it, and it was directed to the commission's attention.

The judgment is reversed and the cause remanded to the district court for the entry of an order affirming the denial of the claim by the commission.

Pringle, J., concurs in the result.

Moore, C.J., and Day, J., not participating.

Intermountain Jewish News, Inc., a Colorado Corporation, Petitioner,

v.

Industrial Commission of the State of Colorado (Ex-Officio

Unemployment Compensation Commission of Colorado),

and Joel P. Goldberger, Claimant, Respondents.

No. 76--766.

39 Colo.App. 258, 564 P.2d 132

Colorado Court of Appeals,

Div. III.

April 28, 1977.

Gelt & Webster, P.C., Richard H. Goldberg, Denver, for petitioner.

J. D. MacFarlane, Atty. Gen., Jean E. Dubofsky, Deputy Atty. Gen., Edward G. Donovan, Sol. Gen., James M. Downey, Sp. Asst. Atty. Gen., Joel W. Cantrick, Asst. Atty. Gen., Denver, for respondent, Industrial Commission of the State of Colorado (Ex-Officio Unemployment Compensation Commission of Colorado).

No appearance for respondent Joel P. Goldberger.

BERMAN, Judge.

Intermountain Jewish News, Inc., (employer) petitioner for review of an order of the Industrial Commission granting claimant, Joel P. Goldberger, a full award of unemployment compensation benefits pursuant to § 8--73--108(4)(a), C.R.S.1973. We affirm the order.

The facts are not disputed. Claimant was hired by the employer on June 11, 1975, in the capacity of an advertising salesperson. In mid-July 1975 the parties mutually agreed that claimant's employment would terminate following publication of what was termed the 'Sports Issue' on August 8, 1975. Claimant was separated from employment on that date and he thereafter applied for and was awarded full unemployment compensation benefits.

The employer asserts there was insufficient evidence to sustain the finding that claimant was laid off for 'lack of work.' On the contrary, we find that the evidence is sufficient to sustain this finding.

The employer also asserts that the mutual decision to end claimant's employment on August 8, 1975, necessarily operates to preclude claimant from receiving unemployment compensation benefits. However, the employer does not contend that a particular provision of Article 73, Title 8, C.R.S.1973, disqualifies the claimant, as a matter of law, from receiving unemployment compensation benefits.

The fact that claimant agreed and understood that his employment would end at the expiration of a fixed term is not a basis for denying him benefits under the Colorado Employment Security Act. See In re Interrogatories by the Industrial Commission, 30 Colo.App. 599, 496 P.2d 1064 (1972). 'Claimant's right to benefits under the Act cannot be denied on the basis of any agreement (he) entered into in connection with (his) employment.' In re Interrogatories, supra. Also, § 8--80--101, C.R.S.1973, provides that: 'Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under (the Colorado Employment Security Act) shall be void.' Accordingly, the agreement between the parties could not operate to deprive claimant of unemployment compensation benefits.

The employer also asserts that the transcript of the testimony from the Industrial Commission hearing is so defective that this court cannot properly review the matter. However, the only issue on this appeal is whether the mutual agreement between the claimant and the employer to terminate the employment on a specified date operated to bar claimant from receiving unemployment compensation benefits. Even though there are some omissions in the transcript, its relevant portions are entirely adequate to present that issue. See Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970).

The order of the Industrial Commission is affirmed.

Pierce and Sternberg, JJ., concur.

Jefferson County, Petitioner,

v.

Richard C. Kiser and The Industrial Claim Appeals Office of

the State of Colorado, Respondents.

No. 93CA0636.

876 P.2d 122

Colorado Court of Appeals,

Div. IV.

May 19, 1994.

Ellen G. Wakeman, Acting Jefferson County Atty., William A. Tuthill III, Asst. County Atty., Justin Dituri, Asst. County Atty., Golden, for petitioner.

Lee D. Warkentine, P.C., Lee D. Warkentine, T.R. Prater Sandefer, Broomfield, for respondent Richard C. Kiser.

Gale A. Norton, Atty. Gen., Stephen K. Erkenbrack, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., John D. Baird, Asst. Atty. Gen., Denver, for respondent Industrial Claim Appeals Office.

PLANK, Judge.

Jefferson County (employer) seeks review of a final order of the Industrial Claim Appeals Panel which awarded unemployment compensation benefits to Richard C. Kiser (claimant). We set aside the Panel's order and remand for entry of an order disqualifying claimant from the receipt of benefits.

At the hearing, the following evidence was undisputed. Claimant was a detention deputy for the Jefferson county sheriff's department. His duties included caring for and guarding prisoners in employer's jail. One of employer's rules required claimant to refrain from engaging in any illegal activity which affected his ability to perform his job.

While off-duty, claimant took some items from a store and admitted that he had no intention of paying for them. He thereafter was arrested and charged in municipal court with a misdemeanor violation of shoplifting. Employer discharged claimant after it learned of claimant's arrest and misdemeanor charge.

The hearing officer found that claimant was discharged because of the shoplifting arrest and found that claimant had engaged in criminal conduct in violation of employer's rule. However, the hearing officer further determined that employer did not produce evidence which would support a finding that claimant's conduct resulted or could have resulted in serious damage to employer's interests, as would be required for a disqualification pursuant to Sec. 8-73-108(5)(e)(VII), C.R.S. (1986 Repl.Vol. 3B). Consequently, he awarded claimant benefits pursuant to Sec. 8-73-108(4), C.R.S. (1986 Repl.Vol. 3B). The hearing officer did not address the application of Sec. 8-73-108(5)(e)(XI), C.R.S. (1986 Repl.Vol. 3B) (theft).

The Panel agreed that the evidence would not support the application of Sec. 8-73-108(5)(e)(VII) (violation of a statute or company rule which resulted or could have resulted in serious damage to employer's property or interests). The Panel further declined to apply Sec. 8-73-108(5)(e)(XI) (theft) and affirmed the award of benefits pursuant to Sec. 8-73-108(4). See Santa Fe Energy Co. v. Baca, 673 P.2d 374 (Colo.App.1983).

Employer contends that claimant should have been disqualified from the receipt of benefits pursuant to Sec. 8-73-108(5)(e)(XI) which allows disqualification for "theft." We agree.

Here, the Panel reasoned that Sec. 8-73-108(5)(e)(XI) contemplates theft from an employer, or at least theft which is committed in the course of employment, and therefore, it declined to apply this subsection here. We disagree with the Panel's conclusion.

In interpreting this subsection, as in any statutory construction, our primary task is to discern the intent of the General Assembly. In ascertaining that intent, words and phrases must be given effect according to their plain and ordinary meaning, and a statute should be interpreted in such a way as to give sensible effect to all of its parts. See Harding v. Industrial Commission, 183 Colo. 52, 515 P.2d 95 (1973); People v. Harvey, 819 P.2d 1087 (Colo.App.1991); Sec. 2-4-101 and Sec. 2-4-201, C.R.S. (1980 Repl.Vol. 1B).

Section 8-73-108(5)(e)(XI) provides for a disqualification from benefits simply for "theft." The plain and ordinary meaning of "theft" is "the act of stealing; the wrongful taking and carrying away of the personal goods or property of another; larceny." Webster's Encyclopedic Unabridged Dictionary of the English Language 1470 (1989 Ed.).

In drafting Sec. 8-73-108(5)(e)(XI), the General Assembly did not place any qualifying criteria on the nature of the theft involved. Specifically, in contrast to its treatment of substance abuse, it did not delineate between theft in the course of employment and theft outside the scope of employment. See Sec. 8-73-108(5)(e)(VIII), C.R.S. (1986 Repl.Vol. 3B) (disqualification for off-the-job use of not medically prescribed intoxicating beverages or controlled substances).

Furthermore, in looking at the disqualifying provisions of the statutory scheme as a whole, we note that the General Assembly has provided, in essence, for a disqualification for employee theft from an employer. See Sec. 8-73-108(5)(e)(VII) (disqualification for violation of a statute or company rule which resulted or could have resulted in serious damage to employer's property or interests, which includes removal or attempted removal of employer's property from the premises of the employer without proper authority).

Thus, in looking at the plain and ordinary meaning of the term "theft," and the application of Sec. 8-73-108(5)(e)(XI) in the context of the entire statutory scheme, we disagree with the Panel's conclusion that "theft" in this subsection means only theft either from employer or in the course of employment.

Since such additional limitations on the meaning of the term "theft" are not set out in the statutory wording, we are unwilling to engraft such a requirement onto the subsection. Accordingly, we interpret Sec. 8-73-108(5)(e)(XI) to allow disqualification of a claimant for theft, whether or not it occurs in the course of employment or is from employer.

The evidence at the hearing established that claimant took the items from the store without any intention of paying for them and the hearing officer so found. Thus, the hearing officer's findings support the application of Sec. 8-73-108(5)(e)(XI), and the Panel erred in failing to apply that subsection.

Given this disposition, we need not address employer's other contentions.

Accordingly, the Panel's order is set aside, and the cause is remanded to the Panel for entry of an order disqualifying claimant from the receipt of benefits pursuant to Sec. 8-73-108(5)(e)(XI).

Marquez and Rothenberg, JJ., concur.

Linnie Jennings, Petitioner,

v.

Industrial Commission of the State of Colorado (Ex-Officio

Unemployment Compensation Commission of Colorado), Colorado

Division of Employment and Training and the Salvation Army,

Respondents.

No. 83CA0274.

682 P.2d 518

Colorado Court of Appeals,

Div. IV.

May 17, 1984.

William E. Benjamin, Boulder, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Robert Lehnert, Asst. Atty. Gen., Denver, for respondents Indus. Com'n and Colorado Div. of Employment and Training.

Sherman & Howard, Mary Volk Gregory, Denver, for respondent The Salvation Army.

COYTE, Judge.*

Linnie Jennings (claimant) seeks review of a final order of the Industrial Commission denying her unemployment benefits pursuant to Sec. 8-73-108(9)(a)(I), C.R.S.1973 (1983 Cum.Supp.) (quitting because of dissatisfaction with working conditions). We affirm the order.

Claimant was employed by the Salvation Army (employer) as a social worker in November 1980. She counseled indigents experiencing social problems. The Salvation Army has waived its claim of statutory exemption. Thus, her claim will be decided on the substantive issue presented.

The evidence reveals that in November 1981 claimant noticed a sharp increase in the number of clients requiring services, and she was required to deal with more clients suffering from serious mental disturbances. This increased case load resulted in more altercations between clients present to be interviewed. Claimant testified that she quit her

job in June 1982 because of the "change in working conditions" caused by the increased caseload.

The employer's witness admitted that claimant's caseload had increased. However, he stated that conditions were the same for the employer's other social worker. He also stated that claimant was given a 10 percent raise in January 1982.

The Commission found that claimant did not quit until seven months after she noticed the increased caseload and that conditions were the same for the other social worker; therefore, it applied Sec. 8-73-108(9)(a)(I).

Citing Industrial Commission v. McIntyre, 162 Colo. 227, 425 P.2d 279 (1967), claimant contends that the Commission erred in applying Sec. 8-73-108(9)(a)(I) because her termination followed a substantial change in working conditions. Claimant argues that she is entitled to a full award of benefits under Sec. 8-73-108(4)(d), C.R.S. 1973 (1983 Cum.Supp.). We reject these contentions.

McIntyre does preclude application of Sec. 8-73-108(9)(a)(I) when termination follows a substantial change in duties or work environment. Martinez v. Industrial Commission, 657 P.2d 457 (Colo.App.1982). However, McIntyre does not preclude an employee from acquiescing in changes, thereby establishing new "standard working conditions," and it does bar benefits if a claimant quits because of dissatisfaction with standard working conditions or regularly assigned duties.

Here, the Commission implicitly found that claimant had acquiesced in the increased caseload. Thus, by June 1982, the increased caseload was a standard working condition. This conclusion was supported by evidence that claimant worked for seven months after she noticed the increase and accepted an intervening pay raise.

The Commission's application of Sec. 8-73-108(9)(a)(I) is supported by substantial evidence in the record, and thus, it may not be disturbed on review. Sims v. Industrial Commission, 627 P.2d 1107 (Colo.1981).

Order affirmed.

Enoch, C.J., and Lee*, J., concur.

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const., Art. VI, Sec. 5(3), and Sec. 24-51-607(5), C.R.S. (1982 Repl.Vol. 10).

Donna L. Kalkbrenner, Petitioner,

v.

The Industrial Claim Appeals Office of

the State of Colorado, Respondent.

No. 90CA0018.

801 P.2d 545

Colorado Court of Appeals,

Div. II.

Oct. 25, 1990.

Pikes Peak Legal Services, Leo L. Finkelstein, Colorado Springs, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Michael J. Steiner, First Asst. Atty. Gen., Tony Arguello, Asst. Atty. Gen., Denver, for respondent.

ROTHENBERG, Judge.

Donna L. Kalkbrenner, an unemployment compensation claimant, seeks review of a final order of the Industrial Claim Appeals Office (Panel) requiring her to repay previously awarded benefits. We set aside the order and remand with directions.

In March 1988, Kalkbrenner was receiving unemployment benefits when she began working part-time. She continued to file unemployment compensation claims and receive benefits on a reduced basis; however, the nature of her work schedule required her to estimate her earnings. Her estimates, though made in good faith, were inaccurate and resulted in a $618 overpayment of benefits.

After she was notified of the overpayment, Kalkbrenner requested a waiver of repayment, pursuant to Sec. 8-81-101(4), C.R.S. (1986 Repl.Vol. 3B). The pertinent part of that statute states:

"(a) Any person who has received any sum as benefits ... to which [she] was not entitled shall be required to repay such amount ... except that the division may waive the repayment of an overpayment if the division determines such repayment to be inequitable."

After a hearing, the referee found that Kalkbrenner is a disabled, single parent with two children who is totally welfare dependent; her doctor has prohibited her from working because of her diabetic condition and has given her no prognosis as to when she will be able to return to work.

Nevertheless, the referee concluded that Kalkbrenner's request for waiver was premature. Since the overpayment was used to support her family and pay normal living expenses, he found that she had not relied on benefits to her financial detriment or relinquished valuable rights in reliance on benefits. Finally, he concluded that the problem would be "cured with [her] return to the work force." The Panel affirmed the referee.

Kalkbrenner first argues that the referee and Panel failed to properly consider her financial condition as required by Hesson v. Industrial Commission, 740 P.2d 526, 529 (Colo.App.1987). We agree.

In Hesson a claimant sought a waiver from an overpayment. The referee denied the waiver, apparently because the claimant failed to prove that she had waived any right or changed her position in reliance upon the receipt of benefits. We set aside the referee's order and ruled that the referee's reliance on those two factors, along with his refusal to consider claimant's financial condition, constituted error.

We further stated:

"[W]hile there was no direct testimony that claimant changed her position in reliance upon her lawful receipt of benefits, and while a claimant's financial condition may, standing alone, be insufficient to establish the inequitability required to be shown, the fact that a claimant's financial condition has required the benefits received to be spent for living expenses may be considered upon this issue...." (emphasis added)

Similarly, the referee here improperly focused upon Kalkbrenner's failure to give up any rights or to change her position as a result of her receipt of benefits. He also failed to consider other relevant facts including Kalkbrenner's health problems and dire financial condition. See Duenas-Rodriquez v. Industrial Commission, 199 Colo. 95, 606 P.2d 437 (1980). See generally Annot., Repayment of Unemployment Compensation Benefits Erroneously Paid, 90 A.L.R.3d 987 (1979).

She next argues that there was not substantial evidence to support the decision denying the waiver. Section 8-74-107(4), C.R.S. (1986 Repl.Vol. 3B). We agree. Substantial evidence is that which is probative, credible, and competent, of a character which would warrant a reasonable belief in the existence of facts supporting a particular finding. Rathburn v. Industrial Commission, 39 Colo.App. 433, 566 P.2d 372 (1977). See also Colorado Municipal League v. Mountain States Telephone and Telegraph Co., 759 P.2d 40, 44 (Colo.1988) (for purposes of judicial review of administrative decisions, competent evidence is the same as substantial evidence.)

Unlike the situation in Rathburn, which involved factual determinations made from conflicting evidence, the sole evidence regarding Kalkbrenner's medical condition and ability to work was her own testimony that the doctor had instructed her not to work.

"Question: (by referee) Again, I may have asked you this--what does a doctor--does a doctor indicate any time in the future when you can return to work?

"Answer: (by Kalkbrenner) She has not indicated any time, she just said whenever they can get all this under control....

"Question: (by counsel) So you're not really considering yourself out of--completely out of the work force? Temporarily out?

"Answer: (by Kalkbrenner) For probably the next two years I will be." (emphasis added)

Accordingly, we find no credible or competent evidence in the record to support the conclusion that Kalkbrenner was able to resume work within ninety days or even within two years of the hearing. To the contrary, and through no fault of her own, Kalkbrenner is indefinitely unemployed.

The order of the Panel affirming the referee is set aside and the cause is remanded for entry of an order granting claimant Kalkbrenner's request for waiver of overpayment.

Sternberg, C.J., and Dubofsky, J., concur.

Edwin W. Keil, Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado, Colorado Division of Employment and

Training, and Metwest, Inc., Respondents.

No. 92CA0639.

847 P.2d 235

Colorado Court of Appeals,

Div. I.

Jan. 7, 1993.

William E. Benjamin, Boulder, for petitioner.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., John R. Parsons, Asst. Atty. Gen., Denver, for respondents Indus. Claim Appeals Office and Colorado Div. of Employment and Training.

No appearance for respondent Metwest, Inc.

DAVIDSON, Judge.

Edwin W. Keil, claimant, was discharged from his employment with respondent, Metwest, Inc., for refusing to comply with a reasonable instruction. He seeks review of a final order of the Industrial Claim Appeals Panel which disqualified him from the receipt of unemployment compensation benefits, contending primarily that respondent's failure to comply with its three-step discipline policy requires that he be awarded benefits. We disagree and affirm.

I.

We first conclude that the hearing officer did not err in finding that claimant should be disqualified pursuant to Sec. 8-73-108(5)(e)(VI) (deliberate disobedience of a reasonable instruction of an employer).

The hearing officer found that claimant had been given adequate notice that he was at risk of losing his job for failing to complete assigned tasks and preventive maintenance inspection duties, that claimant had refused to comply with a reasonable instruction by

working on a lawn trimmer for a co-worker after being instructed not to do so by his immediate supervisor, and that claimant was discharged after his supervisor observed claimant working on the lawn trimmer prior to completing his regular work.

These findings, supported by substantial, although sometimes conflicting evidence, may not be disturbed on review. Jones v. Industrial Commission, 705 P.2d 530 (Colo.App.1985). The findings support the conclusion that claimant deliberately disobeyed a reasonable instruction of employer, and thus, a disqualification pursuant to Sec. 8-73-108(5)(e)(VI) was warranted. See Rose Medical Center Hospital Ass'n v. Industrial Claim Appeals Office, 757 P.2d 1173 (Colo.App.1988).

II.

An employee is entitled to a full award of benefits if he is unemployed through no fault of his own. Zelingers v. Industrial Commission, 679 P.2d 608 (Colo.App.1984). Fault is not necessarily related to culpability, but has been defined as a volitional act or the exercise of some control in light of the totality of the circumstances. Collins v. Industrial Claim Appeals Office, 813 P.2d 804 (Colo.App.1991); Zelingers v. Industrial Commission, supra.

Even if the findings of the hearing officer support the application of one of the disqualifying sections of the statute, a claimant may still be entitled to benefits if the totality of the circumstances establishes that the claimant was discharged through "no fault" of his own. Zelingers v. Industrial Commission, supra.

Accordingly, in reliance on Hospital Shared Services v. Industrial Commission, 677 P.2d 447 (Colo.App.1984) and Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo.1987), claimant argues that he was not "at fault" for his separation because he had not been given the benefit of employer's stated disciplinary procedures prior to his termination. We disagree.

A.

The Colorado Employment Security Act, Sec. 8-73-101, et seq., C.R.S. (1986 Repl.Vol. 3B) delegates to the hearing officer and the Panel the responsibility of applying the standards adopted by the General Assembly to determine whether, under all the circumstances of the case, a particular separation from employment should result in an award of benefits. School District No. 1 v. Fredrickson, 812 P.2d 723 (Colo.App.1991).

In an unemployment proceeding, the hearing officer is required independently to assess the evidence entered at the hearing and reach his own conclusion as to the reason for claimant's separation from employment. The hearing officer is required to make his own conclusions concerning the probative value of the evidence, the credibility of the witnesses, and the resolution of conflicting testimony. School District No. 1 v. Fredrickson, supra.

Thus, "[whether] an employee's conduct should disqualify the employee from receiving unemployment compensation benefits is an issue quite distinct from the question of whether the employee was discharged in accordance with particular employer-generated guidelines." Gonzales v. Industrial Commission, 740 P.2d 999, 1002 (Colo.1987). Accordingly, a violation of an employer-generated guideline, policy, procedure, or rule by an employee is not per se determinative of the issues of whether an employee generally is entitled to benefits and of whether claimant specifically was "at fault" for his separation, but is only one factor to be considered in the totality of the circumstances surrounding the separation.

The employer in Gonzales had argued that when an employer establishes guidelines for determining when an employee's conduct requires discharge, a discharge pursuant to those guidelines prohibits any award of unemployment compensation benefits. In rejecting that argument, the supreme court concluded that the employer's automatic no-fault discharge policy was inconsistent with the statutory mandate that compensability be based on the "exercise of discretion" and "independently in each case under the guidelines established by the General Assembly." Thus, it concluded that the fact that claimant's discharge was in compliance with employer's discharge policy was not dispositive of the question of whether claimant was unemployed through no fault of his own. Gonzales v. Industrial Commission, supra. See Sec. 8-73-108(5)(e).

In its adoption of this totality of the circumstances test to determine fault, the supreme court relied, in part, on the decision of this court in Hospital Shared Services v. Industrial Commission, supra. There employer had a three-step disciplinary policy--a verbal warning, a written warning, and discharge. The employee had been discharged only after the second violation. In its affirmance of an award of benefits, this court noted that the employer had deviated, without justification, from its stated policy. Thus, it concluded that the employer had been terminated through no fault of her own.

Here, it was undisputed that respondent did not follow the third step of its discipline procedure. Thus, in reliance on Hospital Shared Services, claimant argues that respondent's failure to follow its discipline policies without justification for its deviation, ipso facto, requires an award of benefits. We do not agree.

Contrary to claimant's assertion, Hospital Shared Services does not set forth any such bright line rule. To the contrary, as we read Hospital Shared Services, the discharge of the employee there after her second violation despite the three-step policy indicated that she had no warning or notice that commission of the second infraction would result in her discharge. Thus, the employer's violation of its own disciplinary policy was a factual circumstance relevant to a determination of whether the employee was at fault, that is, did she perform a volitional act or exercise some control over the circumstances resulting in the discharge. See Zelingers v. Industrial Commission, supra (employer's failure to inform employee that next absence from work would result in discharge deprived her of the opportunity to act volitionally in her separation from employment); cf. Pabst v. Industrial Claim Appeals Office, 833 P.2d 64 (Colo.App.1992) (no requirement that a claimant be explicitly warned that his job is in jeopardy if his performance does not

improve in order to support a disqualification for failure to meet established job performance standards).

Here, any violation of respondent's discipline policy did not result in misinformation to claimant nor affect his ability to act volitionally with respect to his discharge. Based on the totality of the circumstances, the hearing officer found that, even though employer did not follow all the progressive disciplinary procedures prior to discharging claimant from employment, claimant was given adequate notice that his conduct had placed him at risk of losing his job and that employee, in essence, did not act reasonably by working on a personal project instead of the employer's work when he was aware of his deficient performance.

Therefore, he found that claimant acted volitionally in the circumstances that led to his separation from employment. These findings are supported by substantial, although sometimes conflicting, evidence and may not be disturbed. Jones v. Industrial Commission, supra. Further, the findings support the conclusion that claimant was responsible or "at fault" for his separation. We therefore find no error in the hearing officer's conclusion that claimant was responsible for his separation.

B.

Citing Continental Air Lines, Inc. v. Keenan, supra, claimant suggests in his brief that under his contract of employment, he was entitled to rely on the three-step discipline procedure set forth in respondent's discipline manual and that, thus, he was not "at fault" for his discharge. Continental Air Lines, Inc. v. Keenan, supra, however, is not applicable here.

In the Keenan case, the supreme court set forth the doctrine that, in the area of wrongful discharge law, in certain circumstances, employees originally hired under contracts terminable at will may be able to enforce termination, disciplinary, or other procedures in an employees' manual or employer's administrative manual under either ordinary contract principles or the theory of promissory estoppel.

In contrast, the unemployment statutory scheme was developed to allow a hearing officer discretion to determine the reason for claimant's separation and whether claimant was at fault. See Gonzales v. Industrial Commission, supra. For the most part, it has been considered to be an organic statute, basically standing alone. Accordingly, this court and the supreme court consistently have refused to engraft federal unemployment case law or statutory requirements onto the state act. See Industrial Commission v. Northwestern Mutual Life Insurance Co., 103 Colo. 550, 88 P.2d 560 (1939); Brannan Sand & Gravel Co. v. Industrial Claim Appeals Office, 762 P.2d 771 (Colo.App.1988); Insul-lite Window & Door Manufacturing, Inc. v. Industrial Commission, 723 P.2d 151 (Colo.App.1986); see also School District No. 1 v. Fredrickson, supra (hearing officer not bound by determination of any other agency, administrative body, or forum which is not required to make its decisions under the Employment Security Act).

Moreover, the purpose of the unemployment statute and case law has been to keep the law and procedures as streamlined as possible. See Division of Employment & Training v. Hewlett, 777 P.2d 704 (Colo.1989). On the other hand, the scope of the civil wrongful discharge area of law as first established under the Keenan ruling is expanding. See Martin Marietta Corp. v. Lorenz, 823 P.2d 100 (Colo.1992); Allabashi v. Lincoln National Sales Corp., 824 P.2d 1 (Colo.App.1991); Tuttle v. ANR Freight System, Inc., 797 P.2d 825 (Colo.App.1990); Cronk v. Intermountain Rural Electric Ass'n, 765 P.2d 619 (Colo.App.1988). To engraft its requirements onto the unemployment statute would unnecessarily encumber the unemployment statutory scheme.

Therefore, we conclude that principles concerning wrongful discharge set forth Continental Air Lines, Inc. v. Keenan, supra, and its progeny are not determinative of the entitlement and "fault" issues in an unemployment compensation benefits case. Cf. Gonzales v. Industrial Commission, supra.

Accordingly, the order is affirmed.

Ney, J., and Hodges*, Justice, concur.

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, sec. 5(3), and Sec. 24-51-1105, C.R.S. (1988 Repl.Vol. 10B).

Christine A. Larsen-Oldaker, Petitioner,

v.

The Industrial Commission of the State of Colorado and

Butler Computer Graphics, Respondents.

No. 86CA0378.

735 P.2d 209

Colorado Court of Appeals,

Div. III.

Feb. 12, 1987.

James D. King & Associates, P.C., Joan Garden Cooper, Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Gregory K. Chambers, Asst. Atty. Gen., Denver, for respondent Industrial Com'n.

Mark W. Gerganov, Denver, for respondent Butler Computer Graphics.

METZGER, Judge.

Christine A. Larsen-Oldaker, claimant, seeks review of a final order of the Industrial Commission which disqualified her from receiving unemployment benefits. We set aside the order and remand for further findings.

Claimant was employed as senior layout technician for Butler Computer Graphics (employer). Claimant's supervisor testified that, shortly after she was placed in claimant's department, she became concerned about claimant's frequent tardiness, her attitude about certain work standards and functions, her ability to follow instructions given by senior staff members, and her general job performance. Within a three month period, the supervisor gave claimant two written reviews, noting various deficiencies in claimant's work performance and one corrective action concerning claimant's tardiness. She also discussed the issues with claimant. Not finding the necessary improvement in the noted problem areas, the supervisor then gave claimant a final written warning and initiated proceedings to demote her to a technician II position, which entailed a decrease in pay and in job responsibilities. Claimant then quit her employment.

Claimant testified that her supervisor was constantly hypercritical of her performance, that she wrote up issues without first discussing them with claimant, that she did not

attempt to listen to claimant's explanation of events, and that claimant felt her supervisor was, in essence, trying to set her up for some kind of disciplinary action. She further testified that she tried to improve her performance and failed to complain or appeal her supervisor's oral or written actions because she felt that the questioned events were based on misunderstandings and could be resolved. Claimant finally testified that she quit rather than accept the demotion, particularly after learning there was little chance for a transfer to a different department, and that she would continue to be working under the same supervisor. She did not pursue employer's internal grievance or appeal procedures on either the corrective action or the demotion.

The Commission found that claimant quit after being informed that her position was to be downgraded. However, it further found that, because she did not pursue the internal appeal rights available to her prior to quitting, she could not be granted a full award of benefits. Consequently, the Commission disqualified claimant from receiving benefits pursuant to Sec. 8-73-108(5)(e)(I), C.R.S. (1986 Repl. Vol. 3B), which provides that an employee is disqualified from receiving benefits if the employee quits because of dissatisfaction with "standard working conditions."

I.

Claimant first contends that her right to have counsel represent her was effectively denied when the hearing officer advised her prior to the hearing that she did not need an attorney. We disagree.

Although the unemployment act allows a party to be represented by an attorney at the hearing, it does not require counsel for parties to be present, nor does it automatically mandate a continuance if a party appears without an attorney and fails to request a continuance in order to have one present. Snelling & Snelling v. Industrial Commission, 495 P.2d 1150 (Colo.App.1972) (not selected for official publication); see Sec. 8-74-106(1)(e), C.R.S. (1986 Repl.Vol. 3B).

There is no evidence in the record that claimant expressed a desire to have an attorney represent her or that she requested a continuance to obtain one. Thus, based on this record, we find claimant's contention to be without merit.

II.

Claimant next contends that her failure to pursue employer's grievance procedures should not be dispositive of her eligibility for benefits. We agree. The pursuit of such a course of action is not required by statute as a prerequisite to an award of benefits. Musgrave v. Eben Ezer Lutheran Institute, 731 P.2d 142 (Colo.App.1986).

III.

Finally, claimant contends that, since she quit subsequent to a substantial unfavorable change in her working conditions, the Commission erred in disqualifying her from the

receipt of benefits pursuant to Sec. 8-73-108(5)(e)(I), C.R.S. (1986 Repl.Vol. 3B) (dissatisfaction with standard working conditions).

In general, if an employee's separation follows a substantial change in working conditions, the statutory provision concerning dissatisfaction with standard working conditions is inapplicable. Martinez v. Industrial Commission, 657 P.2d 457 (Colo.App.1982); Industrial Commission v. McIntyre, 162 Colo. 227, 425 P.2d 279 (1967). Here, there is evidence that a substantial change in claimant's working conditions occurred as a result of her demotion. Further, the evidence is undisputed that claimant quit her employment because of the change in working conditions, the demotion. Consequently, we agree with claimant that the Commission erred in applying Sec. 8-73-108(5)(e)(I) to disqualify her from receiving benefits.

However, there is further evidence that the cause of claimant's change in working conditions, i.e., her demotion, was conduct by claimant herself which could have disqualified her from being entitled to benefits pursuant to Sec. 8-73-108(5)(e)(VI) or (XX), C.R.S. (1986 Repl.Vol. 3B), namely: excessive tardiness, failure to meet established job performance or other defined standards, or insubordination. Hence, if the evidence supports a conclusion that claimant's change in working conditions, and therefore her separation, resulted from conduct by claimant that would fall within the disqualifying provisions of the statute, then claimant is subject to the maximum disqualification from the receipt of benefits.

An order may be set aside if it is not supported by sufficient findings of fact. Stern v. Industrial Commission, 667 P.2d 244 (Colo.App.1983). The Commission made no findings concerning the reasons for claimant's separation from employment.

Accordingly, the order is set aside and the cause is remanded to the Industrial Claim Appeals Office for remand to a hearing officer to reconsider the evidence and enter new findings and conclusions consistent with the views expressed in this opinion.

Van Cise and Babcock, JJ., concur.

Longmont Turkey Processors, Inc., Petitioner,

v.

The Industrial Claim Appeals Office of the State of Colorado

and Ricardo Manriquez, Respondents.

No. 88CA0458.

765 P.2d 1073

Colorado Court of Appeals,

Div. II.

Nov. 17, 1988.

Daniel J. Collyar, Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Curt Kriksciun, Asst. Atty. Gen., Denver, for respondent The Indus. Claim Appeals Office.

No appearance for respondent Manriquez.

METZGER, Judge.

The focal issue in this case is whether an employee's consumption of alcohol during a brief, paid, rest break on the employer's premises constitutes misconduct occurring "on the job" warranting denial of unemployment compensation benefits pursuant to Sec. 8-73-108(5)(e)(IX), C.R.S. (1986 Repl.Vol. 3B). The Industrial Claim Appeals Office (Panel) awarded Ricardo Manriquez (claimant) full benefits holding that, since claimant "was not performing services for the employer at the time [he consumed the alcohol], he was not 'on the job.' " Asserting that the Panel's definition of "on the job" constituted error as a matter of law, Longmont Turkey Processors, Inc. (employer) seeks review. We set aside the order and remand the cause for entry of an order denying benefits.

The Panel determined that: "claimant was discharged by the employer after a security officer and his supervisor observed him drinking beer during his afternoon break. The incident took place in the car of claimant's girlfriend, which was parked on property belonging to the employer.... [Asserting that he was eating strawberries,] claimant denied that he was drinking beer."

Section 8-73-108(5)(e)(IX) provides that unemployment benefits shall be denied if a separation from employment results from "[o]n-the-job use of not medically prescribed intoxicating beverages or controlled substances, as defined in Sec. 12-22-303(7), C.R.S....." No statutory definition exists for "on-the-job," nor have any Colorado appellate decisions addressed the issue for unemployment compensation purposes. As well, the unemployment compensation regulations contain no definition of "on the job."

However, in other employment contexts, rest breaks are included in the definition of "on the job." The Colorado Division of Labor regulations define the phrase "time worked" to include rest breaks: "time worked means the time during which an employee is subject to the control of an employer...." Department of Labor Regulations No. 3, 7 Code Colo.Reg. 1103-3. Injuries incurred during rest breaks are generally considered to be within the course of employment for workmen's compensation purposes. See Deterts v. Times Publishing Co., 38 Colo.App. 48, 552 P.2d 1033 (1976); see generally 1 A. Larson, Workmen's Compensation Law Secs. 15.50 & 21.71 (1985).

In Roache v. Industrial Commission, 729 P.2d 991 (Colo.App.1986), we held that, for workmen's compensation purposes, one of the primary issues for determination was whether the employee was in the course of employment during the rest break period. The underlying inquiry there concerned the existence and extent of the employer's control. We noted that resolution of this question required examination of several factors, including whether the break period was of a duration so short as to support the inference that employment activities were virtually uninterrupted, whether the break was provided for by the employment contract, and whether it was a paid interval. This analysis is helpful to a resolution of the issue presented here.

The record shows that the claimant's drinking occurred on company property during mid-afternoon on a regularly scheduled workday. Claimant's rest break was limited to 15 minutes, and he was required to perform his normal work tasks before and after the break. Claimant was paid for the time he was on the break. It is undisputed that claimant's alcohol consumption violated a company rule and that claimant was aware of this rule.

Even though claimant was not performing services at the time of the drinking incident, the timing of the rest break, its brevity and location, and the fact of uninterrupted compensation evidence the employer's control as contemplated both by the Department of Labor Regulations and the analogous situation in Roache v. Industrial Commission, supra. Thus, under these facts, we conclude that claimant was "on the job" for purposes of the application of Sec. 8-73-108(5)(e)(IX). Thus, the Panel's award of benefits based on its interpretation of the statute was an error of law, and we are not bound by it. Colorado Division of Employment v. Parkview Hospital, 725 P.2d 787 (Colo.1986).

The Panel also awarded benefits based on Sec. 8-73-108(5)(e)(VIII), C.R.S. (1986 Repl.Vol. 3B), which concerns use of intoxicating beverages or controlled substances off the job. Since we have determined that claimant's consumption of alcohol occurred on the job, that statutory subsection is inapplicable here, and the Panel's award pursuant to this subsection was error.

The order is set aside and the cause is remanded with instructions to deny claimant's request for benefits.

Smith and Marquez, JJ., concur.

Ronald Madrid, Petitioner,

v.

Mountain States Telephone and Telegraph Company and the

Industrial Commission of the State of Colorado,

Respondents.

No. 85CA1295.

728 P.2d 1299

Colorado Court of Appeals,

Div. III.

Oct. 30, 1986.

Podoll & Podoll, P.C., Richard B. Podoll, Rhonda J. Watson, Denver, for petitioner.

Eiberger, Stacy & Smith, Raymond W. Martin, Denver, for respondent Mountain States Tel. and Tel. Co.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Robert C. Lehnert, Asst. Atty. Gen., Denver, for respondent Industrial Com'n.

BABCOCK, Judge.

Claimant, Ronald Madrid, seeks review of a final order of the Industrial Commission (Commission) denying him full unemployment compensation benefits following his discharge from Mountain States Telephone & Telegraph Company (employer). We affirm.

Claimant initially contends that the Commission's findings are unsupported by the evidence. We disagree.

The evidence shows that while employed as a second-level manager, claimant and two other employees were officers, directors, and shareholders of Treelore, Inc., a computer consulting firm. Claimant admitted preparing Treelore documents, including invoices, contract proposals, and business cards, on his employer's computer and related equipment. Claimant's company also sought and performed contract work for employer's Public Relations Department.

The Commission found these practices violative of employer's policies forbidding use of company property for non-work related purposes, and its policy regarding potential employee conflicts of interest. Claimant testified he received a copy of these policies when he was first employed, that he understood them, and that he reviewed them annually.

Claimant complied with company policy by filing a conflict of interest disclosure statement with employer in March 1982, in which he disclosed his business relationship with and interest in Treelore, Inc., but claimant stated that Treelore did not supply services to employer. In response, employer determined that no conflict existed, but directed claimant to file an updated disclosure statement should circumstances change. Thereafter, Treelore supplied employer with computer services, but claimant admitted not updating his disclosure statement.

While conflicting evidence was received on the extent of employer's toleration of employees' personal use of its equipment, it is for the Commission to resolve disputed questions of fact. In re Claim of Allmendinger v. Industrial Commission, 40 Colo.App. 210, 571 P.2d 741 (1977). We will not substitute our judgment where, as here, the Commission's findings are supported by the record.

Claimant argues that the Commission's findings nonetheless do not support its decision. Again, we disagree.

In resolving this claim, the Commission relied upon Sec. 8-73-108(5)(e)(VII), C.R.S. (1986 Repl.Vol.3B). This section permits a reduced award of benefits upon a showing that claimant violated a company rule which resulted or could have resulted in serious damage to the employer's property or interest. Claimant argues that no evidence of serious damage to the employer's interest was received.

The Commission found that while employer could not estimate the exact value of claimant's use of its equipment, such unauthorized use had a cost impact on employer. Moreover, the employer's policies that the Commission found violated are of such nature that their violation is prejudicial to its legitimate interests as a public utility. The record amply supports the conclusion that because these policies were violated, serious damage could have resulted to the employer's interests. See In re Claim of Allmendinger v. Industrial Commission, supra.

Order affirmed.

Van Cise and Metzger, JJ., concur.

The Marlin Oil Company, d/b/a Sterling Well Service, Petitioner,

v.

Industrial Commission of Colorado, (Ex-Officio Unemployment

Compensation Commission of Colorado), and

Leonard L. Llamas, Respondents.

No. 81CA0942.

641 P.2d 312

Colorado Court of Appeals,

Div. II.

Feb. 4, 1982.

Hannon, Stutz, Dyer & Miller, Jeremiah B. Barry, Denver, for petitioner.

J. D. MacFarlane, Atty. Gen., Richard F. Hennessey, Deputy Atty. Gen., Mary J. Mullarkey, Sol. Gen., Robert S. Hyatt, Asst. Atty. Gen., Denver, for respondents.

VAN CISE, Judge.

Petitioner, The Marlin Oil Company (employer), seeks review of the final order of the Industrial Commission awarding respondent, Leonard Llamas (claimant), unemployment compensation benefits pursuant to §§ 8-73-108(4)(o) and 8-73-108(4)(j), C.R.S.1973 (1980 Cum.Supp.). We affirm.

Claimant was employed by employer as a derrick-hand and roustabout from January 1980 to July 10, 1980, and from August 4 until December 19, 1980. His testimony at the hearing before the referee in support of his claims was that in July 1980 he experienced harassment by his foreman and voluntarily quit his employment for several weeks. According to claimant, the foreman forced him to walk some distance back to the motel where they were staying, when he could have driven him there. The foreman then laughed at claimant's discomfort.

As to claimant's December separation, he testified that he was requested to remove drill casings by hand rather than with power tongs as was customary. Claimant testified that he had informed the foreman of a previous wrist injury which would affect his ability to break the casings by hand. After deciding that any further attempts to break casings by hand could result in severe injury to his wrist, claimant voluntarily terminated his

employment. Claimant testified that his brother-in-law later informed him that the next day a new and simpler procedure for removing casings was instituted.

The referee found, as to the July separation, that claimant had quit his employment because of personal harassment unrelated to his job performance. He further found that claimant had quit his position in December because of a physical limitation which prevented him from performing the requested work. The referee then granted claimant a full award of benefits pursuant to §§ 8-73-108(4)(o) and 8-73-108(4)(j), C.R.S.1973 (1980 Cum.Supp.). The Commission affirmed and adopted the decision of the referee.

Employer contends that there was insufficient evidence to support the Commission's findings either that claimant was harassed or that he was physically unable to perform the work, and that, therefore, the Commission erred in granting claimant a full award of benefits. We disagree.

Section 8-73-108(4)(o), C.R.S.1973 (1980 Cum.Supp.) provides for a full award if it is determined that the employee quit his employment "because of personal harassment by the employer not related to the performance of the job." There is nothing in this section stating that, as argued by the employer, the harassment must be continuous and substantial, and we will not read those words into the statute. The evidence supports the finding that claimant was harassed and that the harassment was not related to the performance of the job. That is all that is required.

The Commission, at the time of the hearing involved herein had the power to determine the credibility of the witnesses and the weight to be given their testimony. See Armijo v. Industrial Commission, Colo.App., 610 P.2d 107 (1980). Here, although the testimony was conflicting, the record contains substantial evidence to support the Commissions's findings as to the reasons for both of claimant's terminations. Therefore, under s 8-74-107(4), C.R.S.1973 (1980 Cum.Supp.), these findings are conclusive on review. Pierce v. Industrial Commission, 195 Colo. 10, 576 P.2d 1012 (1978).

Separate hearings were scheduled for taking of testimony. The first session was held in Denver to obtain the testimony of the employer. The second session was held in Greeley to obtain the testimony of the employee. Separate notices were sent as to each hearing, advising of the designated time and place and the purpose of the hearing. The parties were told they were welcome to attend. Each notice specified that the section of law cited by the deputy in his decision had been § 8-73-108(4)(c), C.R.S.1973. Employer contends that it was denied a fair hearing in that the notice cited § 8-73-108(4)(c), C.R.S.1973 (1980 Cum.Supp.), but the referee based his decision on §§ 8-73-108(4)(o) and 8-73-108(4)(j), C.R.S.1973 (1980 Cum.Supp.). We find no merit to this contention.

An administrative appeal in an unemployment compensation case is a review of the case in its entirety, and the hearing is, in effect, a trial de novo. The administrative appellate tribunal may consider all matters at issue regardless of the ground or basis for the appeal. Anderson v. Industrial Commission, 29 Colo.App. 263, 482 P.2d 403 (1971).

Furthermore, there was nothing in the notices that in any way limited the scope of the hearing to only § 8-73-108(4)(c). At the hearing, the referee made it clear that he was going to explore both separations and claimant's entire work history. The employer's representatives testified in detail concerning both separations, and must have known that claimant would be questioned at the later hearing on his version of the separations. Since the employer did not avail itself of the opportunity to attend the second hearing and cross-examine claimant, it is in no position to complain that the Commission based its findings on claimant's testimony rather than the employer's.

Order affirmed.

Enoch, C. J., and Kelly, J., concur.

Jesus Marquez, Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado; The Colorado Division of Employment and

Training; and Qiviut, Inc., Respondents.

No. 93CA0433.

868 P.2d 1175

Colorado Court of Appeals,

Div. I.

Jan. 27, 1994.

William E. Benjamin, Boulder, for petitioner.

No appearance for respondent Industrial Claim Appeals Office.

No appearance for respondent Qiviut, Inc.

PIERCE, Judge.*

In this unemployment compensation benefits case, Jesus Marquez (claimant) seeks review of a final order of the Industrial Claim Appeals Panel which determined that he failed to show good cause for his untimely filing of an appeal from an hearing officer's order adverse to him. The Panel dismissed the appeal. We set aside the Panel's order and remand with directions.

After claimant applied for unemployment compensation benefits, a deputy disqualified him from the receipt of benefits pursuant to Sec. 8-73-108(5)(e)(VII), C.R.S. (1986 Repl.Vol. 3B). Claimant appealed that decision. After a hearing, the hearing officer disqualified him from the receipt of benefits pursuant to Sec. 8-73-108(5)(e)(VI), C.R.S. (1986 Repl.Vol. 3B). Claimant did not appeal this determination.

Claimant asserts that he later applied for federal extended unemployment benefits and was denied the benefits on the ground that he had been disqualified from benefits under the state unemployment compensation benefits scheme. In an attempt to have his disqualification set aside, claimant filed a late appeal of the hearing officer's determination and requested that the Panel find good cause for his untimely appeal.

As grounds for the good cause determination, claimant argued that the advisements on the deputy's and hearing officer's decisions were ambiguous and unclear and he therefore misunderstood the effects of the disqualification on his ability to obtain benefits.

The deputy's decision contained the following language:

The Division finds you were responsible for the separation and a disqualification is being imposed.

Payment of benefits is deferred from August 30, 1992 to November 7, 1992. Benefits based on this employment will be reduced by the maximum amount permitted by federal law on this claim as well as any future claim filed.

The decision paragraph of the hearing officer's order contained the following language:

It is determined that Section 8-73-108(5)(e)(VI), C.R.S. applies, and that claimant's maximum benefits payable are reduced by the benefits attributable to this employment. Additionally, benefits shall be delayed for a period of ten weeks.

The decision of the deputy is affirmed as modified.

Claimant argued that he understood the language concerning the "reduction" of, "delay," and "deferral" of benefits to mean that he would at some time in the future receive a reduced amount of benefits and that he therefore did not need to appeal the hearing officer's order. The Panel determined that claimant had been sufficiently advised of the effects of the hearing officer's determination and that he thus had failed to show good cause for his late appeal.

Relying on Richardson v. Freund & Co., 755 P.2d 1 (Colo.App.1988), claimant contends that the Panel erred in failing to find that the ambiguous advisements on the deputy's and hearing officer's orders constituted "administrative error by the Division" pursuant to Department of Labor & Employment Regulation 12.1.8, 7 Code Colo.Reg. 1101-2. We agree.

Regulation 12.1.8. sets forth the substantive guidelines for the Panel to use in determining whether a party has shown good cause for its failure to file a timely appeal from a hearing officer's decision. It states that the Panel is to consider any relevant factors including, but not limited to, certain factors set forth in the regulation. Among the listed factors is "administrative error by the Division."

We agree with claimant that the language of the deputy's and hearing officer's orders concerning the effect of a disqualification on his receipt of benefits is confusing to a reasonable person in his position.

The advisements were couched in language indicating there would be a "reduction" of, "deferral," and "delay" in claimant's receipt of benefits. These are procedural terms of art

used in the application of the unemployment compensation statute, and, when so used, they do not necessarily have their dictionary meaning.

Even assuming claimant is presumed to know the contents of the statute, see Paul v. Industrial Commission, 632 P.2d 638 (Colo.App.1981), we note that neither the statute nor pertinent regulations explain the effect of the application of these terms on a claimant's receipt of benefits. See Sec. 8-73-108(5)(e), C.R.S. (1986 Repl.Vol. 3B). Therefore, it was reasonable for claimant to conclude that a "reduction," "deferral," or "delay" in the receipt of his benefits meant that he still would receive, at some point in the future, a lowered amount of benefits.

Furthermore, the hearing officer's order, unlike the deputy's, did not contain any reference to a reduction of benefits on future claims. Thus, it was also reasonable for him to assume that he later might qualify for federal extended emergency benefits under Sec. 8-75-103.5(8), C.R.S. (1986 Repl.Vol. 3B).

We also agree with claimant that the Division can easily revise its advisements so they are worded in plain English understandable to a reasonable person in claimant's position, rather than in legal jargon.

Thus, given the ambiguous and confusing nature of these advisements, the Panel erred in failing to determine that the cumulative effect of these ambiguous advisements constituted "administrative error by the Division" pursuant to Regulation 12.1.8.

The Panel has discretion to weigh the various factors found in Regulation 12.1.8 to determine whether a claimant has shown good cause for an untimely appeal of a hearing officer's decision. The Panel here, however, failed to find, and then failed to consider this factor when it considered the other factors set forth in the regulation. We therefore conclude that the Panel's order must be set aside and the matter remanded for reconsideration of whether, in light of the "administrative error," claimant showed good cause for his untimely appeal.

In so ruling, we reject claimant's argument that the hearing officer's order did not sufficiently advise him that the order would become final if he did not appeal it within 15 days. The first paragraph under the section entitled "APPEAL RIGHTS" stated: "WITHIN FIFTEEN DAYS FROM THE DATE MAILED the claimant or employer may appeal this to the Industrial Claim Appeals Office (ICAO)." The following paragraphs explained the appeal process.

It would have been preferable for the advisement to state specifically that the decision would become "final" if not timely appealed. However, the advisement was sufficient to put a reasonable person on notice that the hearing officer's decision had to be appealed within 15 days.

We decline to reach claimant's due process argument, as it was not raised before the Panel and therefore was not properly preserved for our review. See Apache Corp. v. Industrial Commission, 717 P.2d 1000 (Colo.App.1986).

The order of the Panel is set aside, and the cause is remanded to the Panel for it to reconsider, in light of our disposition, whether claimant showed good cause for his untimely appeal.

Criswell and Rothenberg, JJ., concur.

* Sitting by assignment of the Chief Justice under provisions of the Colo.Const. art. VI, Sec. 5(3), and Sec. 24-51-1105, C.R.S. (1988 Repl.Vol. 10B).

Glen D. Martinez, Petitioner,

v.

Industrial Commission of the State of Colorado, (Ex-Officio

Unemployment Compensation Commission of

Colorado), and Boys Club of Denver,

(Employer), Respondents.

No. 82CA0850.

657 P.2d 457

Colorado Court of Appeals,

Div. I.

Dec. 2, 1982.

Glen D. Martinez, pro se.

J.D. MacFarlane, Atty. Gen., Charles B. Howe, Deputy Atty. Gen., Joel W. Cantrick, Sp. Asst. Atty. Gen., William Levis, Asst. Atty. Gen., Denver, for respondent Industrial Comn.

Holme, Roberts & Owen, Charles J. Kall, Denver, for respondent Boys Club of Denver.

COYTE, Judge.

Petitioner seeks review of a final order of the Industrial Commission denying him unemployment benefits. We set aside the order.

The Commission found that petitioner had voluntarily quit his job and was ineligible for benefits pursuant to Sec. 8-73-108(9)(a)(I), C.R.S.1973 (1982 Cum.Supp.). Petitioner contends that the Commission erred in applying the facts of this case to the above section. We agree. Furthermore, we conclude that applying the proper standard found in Sec. 8-73-108(4)(d), C.R.S.1973 (1982 Cum.Supp.), claimant is entitled to an award of benefits.

The petitioner was employed as a "branch director" for Boys Club of Denver (employer). As a branch director, petitioner managed a building and supervised four staff members. His salary was $12,500 per year and he worked full time.

Petitioner testified that he quit his job when he was asked to accept a "demotion" to gym teacher or shop director. Petitioner considered the change in duties a demotion because he thought he would lose the respect of the boys at the club and would lose his responsibilities as a supervisor.

The referee found that petitioner voluntarily quit his job because of a change in duties which he thought would be a demotion. He also found that the petitioner would have received the same salary and would not have been demoted "except for a change in titles and some duties." Based on the foregoing, the referee found that Sec. 8-73-108(9)(a)(I), C.R.S.1973 (1982 Cum.Supp.) precludes petitioner from recovering benefits. The Commission affirmed and adopted the referee's order.

Section 8-73-108(9)(a)(I), C.R.S.1973 (1982 Cum.Supp.) provides that an employer shall not be charged for benefits if the employee quits:

"because of dissatisfaction with prevailing rates of pay in that industry, standard hours of work, standard working conditions, or working conditions which generally prevail for other workers performing the same or similar work, regularly assigned duties, or opportunities for advancement."

Petitioner contends that the Commission erred in its application of the law to the facts. We agree.

We view Industrial Commission v. McIntyre, 162 Colo. 227, 425 P.2d 279 (1967) as standing for the proposition that where an employee's termination follows a change in his work environment or in his duties the statutory provision concerning dissatisfaction with standard working conditions is inapplicable.

Here, although the Commission made no specific findings as to which portions of Sec. 8-73-108(9)(a)(I), C.R.S.1973 (1982 Cum.Supp.) govern this case, it did find that the petitioner quit his job because of an impending change in duties which he interpreted as a demotion.

Under these circumstances, it was improper to find that the petitioner quit his job because he was dissatisfied with standard working conditions or regularly assigned duties. Such a finding is proper only when there has been no change in working conditions or duties. Industrial Commission v. McIntyre, supra.

However, the referee concluded that the claimant voluntarily quit his job with this employer because of the change in duties which the claimant thought would be a demotion. As branch director, claimant was responsible for the overall supervision and management of Boys Club branch. In the new position of gym instructor or shop instructor, he would not have had supervisory or managerial responsibilities. Under these circumstances, the proposed job transfer involved a substantial change in working conditions as a matter of law. Accordingly, claimant is entitled to a full award of unemployment benefits. Section 8-73-108(4)(d), C.R.S.1973 (1982 Cum.Supp.).

In view of our holding that claimant is entitled to full benefits, we need not address his contention that he was given "false information" concerning his right to call witnesses at the hearing before the referee.

The order is set aside and the cause is remanded with directions to award claimant full unemployment benefits.

Berman and Sternberg, JJ., concur.

Susan B. McClaflin, Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Division of Employment, Customer Service/Benefits,
Respondents.

No. 05CA0057

126 P.3d 288

Colorado Court of Appeals

Div. III

October 6, 2005

Steven U. Mullens, P.C., Steven U. Mullens, Colorado Springs, Colorado, for Petitioner

John W. Suthers, Attorney General, Laurie Rottersman, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

No Appearance for Respondent Division of Employment

HAWTHORNE, Judge.

Petitioner, Susan B. McClaflin (claimant), seeks review of a final order of the Industrial Claim Appeals Office (Panel) affirming a hearing officer's decision determining that claimant was ineligible to receive unemployment benefits. We affirm.

A deputy determined that claimant was ineligible to receive benefits during the applicable period because she was not actively seeking work as required under the statutory scheme. See § 8-73-107(1)(g)(I), C.R.S. 2005. Claimant appealed, and the matter proceeded to a hearing. The hearing officer found that claimant, a longtime employee of King Soopers (employer), was diagnosed with carpal tunnel syndrome and was placed on leave, during which she had surgery to correct her condition. He found that when claimant was eventually released to work, employer did not provide claimant with any work hours.

The hearing officer further found that claimant then filed a claim for unemployment benefits but did not attempt to seek other work, in part because her union agreement prohibited her from seeking or accepting other employment. He found that seeking other work could have jeopardized claimant's "disability" (that is, workers' compensation) claim. Nevertheless, the hearing officer found that, after filing her claim for unemployment benefits, claimant, by her own admission, did not contact any other employers and did not make an active search for work. After concluding that the work

search eligibility requirement was clear and unambiguous, the hearing officer determined that claimant was ineligible to receive benefits.

Claimant appealed the hearing officer's decision, and the Panel affirmed. The Panel concluded that the evidence clearly established claimant did not seek work as required under the statutory scheme. The Panel also concluded that claimant had failed to demonstrate she should be exempt from the work search eligibility requirement because of her circumstances.

On appeal, claimant contends that the Panel erred in affirming the hearing officer's decision that she was ineligible to receive benefits. We disagree.

I.

Claimant first argues that she actually satisfied the work seeking requirement because she sought work from employer. However, claimant failed to raise this argument to the Panel. Instead, claimant argued that she should be excused from the workseeking requirement because of the potential consequences to her employment status and her workers' compensation claim. Indeed, in her brief to the Panel, claimant essentially admitted that she did not comply with the workseeking requirement and that she "effectively elected the lesser of two evils" when she did not actively seek work with another employer.

Under these circumstances, we decline to consider this argument. See Hart v. Indus. Claim Appeals Office, 914 P.2d 406 (Colo. App. 1995) (appellate court declined to consider issue because claimant failed to raise it before the Panel and, therefore, failed to preserve it for review).

II.

Claimant also contends that the hearing officer and the Panel should have excused her failure to satisfy the workseeking requirement because application of that requirement is inequitable under the circumstances. We perceive no error.

An unemployed individual is eligible to receive benefits with respect to any week only if the Division finds that the individual "is actively seeking work." See § 8-73-107(1)(g)(I). Department of Labor & Employment Regulation 2.8.4 provides that a claimant must make reasonable and diligent efforts actively to seek suitable work unless otherwise relieved of this requirement by virtue of (1) participation in approved job training, (2) job attachment, or (3) limited job opportunities pursuant to statute or regulation. Fulfillment of this obligation is a prerequisite to receiving unemployment compensation benefits. See Arteaga v. Indus. Claim Appeals Office, 781 P.2d 98 (Colo. App. 1989).

Here, claimant has failed to demonstrate that any of the three possible bases for relief from the workseeking requirement was satisfied. Claimant clearly is not participating in a job training program. Nor has she demonstrated, or even claimed, that she is "job attached" as defined by Department of Labor & Employment Regulation 2.8.2. Indeed, in

an earlier decision in this case, a hearing officer specifically determined that claimant was not job attached. Finally, claimant is not faced with “limited job opportunities,” which the regulations specifically limit to circumstances in which a search for work would be fruitless “due to economic conditions within the labormarket area.” See Dep’t of Labor & Employment Reg. 2.8.4.5.

Claimant’s reliance on § 8-3-103, C.R.S. 2005, is unavailing. The portion of that statute cited by claimant merely provides that nothing in the Colorado Labor Peace Act shall be construed to deprive an employee of unemployment benefits he or she “might otherwise be entitled to receive under any other laws of the state of Colorado.” Claimant fails to explain how that language would render her eligible to receive unemployment benefits when she is otherwise ineligible under the state statutory scheme.

Claimant further cites to § 8-73-108(1)(a), C.R.S. 2005, which sets forth the overarching principle that unemployment insurance is for the benefit of persons who become unemployed through no fault of their own. However, this statute addresses entitlement rather than eligibility. See Arteaga v. Indus. Claim Appeals Office, supra. Indeed, it specifies that “each eligible individual who is unemployed through no fault of his own shall be entitled to receive a full award of benefits” (emphasis added). Once again, here claimant failed to establish that she was eligible to receive benefits.

Claimant¿s reliance on § 8-40-102(1), C.R.S. 2005, is equally unpersuasive. That subsection merely expresses the General Assembly¿s intent regarding the interpretation of Colorado¿s workers¿ compensation statutes. It does not discuss unemployment benefits much less authorize the modification or relaxation of eligibility requirements for receiving such benefits.

In sum, claimant has failed to demonstrate that the hearing officer or the Panel erred in declining to excuse her from the statutory eligibility requirement of actively seeking work. While claimant was certainly free, based upon her circumstances, to refuse to seek work from other potential employers, we are not persuaded that the unemployment fund should bear the expense of that refusal. See Bayly Mfg. Co. v. Dep’t of Employment, 155 Colo. 433, 395 P.2d 216 (1964) (citing Hallahan v. Riley, 94 N.H. 48, 45 A.2d 886 (1946); unemployment statute was not designed to finance apparently hopeless quest for claimant's old job or job paying equal wages, and although claimant may continue to refuse lower paying jobs, she must do so at her own expense rather than that of the unemployment fund).

The order is affirmed.

Judge Graham concurs.

Judge Marquez dissents.

JUDGE MARQUEZ dissenting.

Because I believe that the Industrial Claim Appeals Office (Panel) interprets the statute too narrowly, I respectfully dissent.

Section 8-73-107(1)(g)(I), C.R.S. 2005, provides in pertinent part that any unemployed individual shall be able to receive benefits with respect to any week only if the Division finds that:

He or she is actively seeking work. In determining whether the claimant is actively seeking work, the division, taking notice of the customary methods of obtaining work and the claimant's usual occupation, or any occupation for which he or she is reasonably qualified, and the current condition of the labor market, shall consider, but shall not be limited to a consideration of, whether, during said week, the claimant followed a course of action that was reasonably designed to result in his or her prompt reemployment in suitable work.

(Emphasis added.)

Here, in disallowing benefits, the hearing officer found that claimant established a valid claim for unemployment insurance benefits on April 14, 2003, having an effective date of March 23, 2003. In addition to finding that claimant did not contact any employers in her attempt to comply with the Division's requirement, the hearing officer found that claimant repeatedly attempted to obtain work through her employer, but was unsuccessful in her attempts, and that the employer was unwilling to provide any hours of work for claimant. The hearing officer also found that claimant did not seek other employment, "as her union agreement prohibited the claimant from seeking or accepting employment": "Had the claimant sought other work, the claimant would have been terminated from her employment with this employer. In addition, by seeking or accepting other employment, the claimant could have jeopardized her disability claim."

The hearing officer characterized claimant's argument as seeking to be exempted from making an active work search and ultimately determined that the Colorado Employment Security Act, as well as the regulations, is clear and unambiguous in its requirements. According to the hearing officer, to be eligible to receive unemployment benefits, a person must make an active search for work; claimant had not done so and thus had not satisfied the requirements of the Act.

The Panel determined that the hearing officer's factual findings were not contrary to the weight of evidence in the record and did not alter them. In affirming the hearing officer's decision, the Panel determined that claimant essentially conceded she was not actively seeking work as required by § 8-73-107(1)(g)(I), and the hearing officer therefore could properly conclude she was not eligible to receive unemployment benefits.

The proper construction of a statute is a question of law that we review de novo. Anderson v. Longmont Toyota, Inc., 102 P.3d 323 (Colo. 2004). In construing statutes,

the primary duty of an appellate court is to give full effect to the intent of the General Assembly. Thus, we apply the plain and ordinary meaning of the statute. We read the statute as a whole and, if possible, construe its terms harmoniously. We presume that the General Assembly intended a just and reasonable result. Anderson v. Longmont Toyota, Inc., supra.

Here, the Panel, like the hearing officer, denied benefits because claimant was not seeking employment with other employers. Nothing in § 8-73-107(1)(g)(I) requires such a search in every case. Rather, the statute states that in determining whether the claimant is actively seeking work, the Division shall consider, “but shall not be limited to” a consideration of, whether the claimant followed a course of action which was reasonably designed to result in her prompt reemployment in suitable work.

While the majority states claimant argued she should be excused from the requirement of seeking work, the record reflects claimant argued that she was prohibited from seeking work with any other employer because of the union contract. In her brief before the Panel, she argued that she was prohibited by the labor management agreement between King Soopers and her union from looking for work outside of King Soopers.

The concept of “actively seeking work” is incapable of precise definition, and it is for the appropriate agency to make such a determination after considering all the facts and circumstances in each particular case. Bayly Mfg. Co. v. Dep't of Employment, 155 Colo. 433, 395 P.2d 216 (1964); see Denver Post, Inc. v. Dep’t of Labor & Employment, 199 Colo. 466, 610 P.2d 1075 (1980). The record here reflects uncontested testimony by claimant that she was subject to a negotiated labor agreement; that she was restricted from looking for work elsewhere; that she had worked for King Soopers for thirty years; and that if she looked for work elsewhere, according to the agreement King Soopers would terminate her.

In my view, the language of the statute, “but shall not be limited to,” indicates that the phrase “actively seeking work” does not require in every case that a claimant apply to other possible employers.

James R. McGee, Petitioner,

v.

Digital Equipment Corporation; Division of Employment and

Training; and The Industrial Claim Appeals Office of

the State of Colorado, Respondents.

No. 92CA1458.

856 P.2d 87

Colorado Court of Appeals,

Div. I.

June 17, 1993.*

Hellman & Knight, P.C., Jonathan J. Hellman, Robert J. Weisbard, Englewood, for petitioner.

No appearance for respondent Digital Equipment Corp.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., James C. Klein, Asst. Atty. Gen., Denver, for respondents Div. of Employment and Training and Indus. Claim Appeals Office.

PIERCE, Judge.

James R. McGee, claimant, seeks review of a final order of the Industrial Claim Appeals Panel which determined that he failed to show good cause for the late filing of an appeal from an adverse order of a hearing officer. We set aside the order of the Panel and remand for further proceedings.

A hearing officer's decision adverse to claimant was mailed to the parties. The record shows that a copy of the decision was mailed to claimant's attorney. Claimant's appeal was filed three calendar days later. The appeal submitted by claimant's attorney contained a handwritten explanation of why it was filed late. The Panel, after receipt of employer's response to claimant's statement, determined that claimant had failed to show good cause for his failure to file a timely appeal and the appeal was dismissed.

I.

Claimant first contends that the provisions of the Department of Labor & Employment Regulation 12.1, 7 Code Colo.Reg. 1101-2, were not followed because the determination of good cause was made by the Panel rather than the Division. We disagree with claimant.

Claimant's position would be correct under the previous regulations, but the regulation in question was amended effective August 3, 1992. The Panel issued its order in this action on August 18, 1992. Department of Labor & Employment Regulation 12.1.3, 7 Code Colo.Reg. 1101-2, now provides that the Panel shall determine whether good cause has been shown for permitting an untimely appeal. Therefore, the Panel acted within its authority in making a determination of good cause on this issue.

II.

Claimant further contends that the Panel, even if it had the authority to make the determination, too narrowly interpreted Albertsons, Inc. v. Industrial Commission, 735 P.2d 220 (Colo.App.1987) in ruling that neglect of a party's representative is dispositive of the issue of good cause. We agree.

Department of Labor & Employment Regulation 12.1.8, 7 Code Colo.Reg. 1101-2, reads as follows:

In determining whether good cause has been shown for permitting an untimely action or excusing the failure to act as required, the Division and the Panel may consider any relevant factors including but not limited to whether the party acted in the manner that a reasonably prudent individual would have acted under the same or similar circumstances, whether the party received timely notice of the need to act, whether there was administrative error by the Division, whether there were factors outside the control of the party which prevented a timely action, the efforts made by the party to seek an extension of time by promptly notifying the Division, the party's physical inability to take timely action, the length of time the action was untimely, and whether any other interested party has been prejudiced by the untimely action. Provided, however, that good cause cannot be established to accept or permit an untimely action which was caused by the party's failure to keep the Division directly and promptly informed in writing of his current and correct mailing address. A written decision concerning the existence of good cause need not contain findings of fact on every relevant factor, but the basis for the decision must be apparent from the order.

In reliance upon Albertsons, Inc., supra, and Trujillo v. Industrial Commission, 648 P.2d 1094 (Colo.App.1982), the Panel determined that "neglect" by a party's representative who fails timely to file a response is a "factor outside the party's control" for purposes of determining good cause under Regulation 12.1.8. The Panel further decided, pursuant to Albertsons, that such neglect is dispositive of the issue of good cause. It also ruled that the "nature" of the representative's "neglect" is a pertinent factor and concluded that the

nature of claimant's counsel's neglect here could not establish good cause, again basing its determination on Albertsons.

We do not read Albertsons so restrictively. We agree with the Panel that Trujillo and Albertsons stand for the proposition that "neglect" by a party's representative is a "factor outside the party's control which prevented timely action" for purposes of determining good cause under Regulation 12.1.8. However, we do not agree that Albertsons should be interpreted to hold that such neglect, in and of itself, is dispositive of the issue of good cause. Rather, we read Albertsons to state that such "neglect" is only one of the factors to be considered pursuant to the regulation in determining good cause.

Here, the Panel's ruling indicates a reliance on only one factor among the numerous criteria set forth in the regulation. This was error.

The order of the Panel is set aside. The cause is remanded to the Panel for a new determination of good cause premised on consideration of all the factors set forth in Regulation 12.1.8 and the views expressed herein.

Metzger and Davidson, JJ., concur.

* Prior Opinion announced April 1, 1993 was withdrawn. Petition for Rehearing Granted.

Carolyn L. Medina, Petitioner,

v.

Industrial Commission of the State of Colorado (Ex-Officio

Unemployment Compensation Commission of

Colorado), Respondent.

No. 76--206.

38 Colo.App. 256, 554 P.2d 1360

Colorado Court of Appeals,

Div. I.

Sept. 16, 1976.

Karp & Goldstein, Jeffrey A. Goldstein, Denver, for petitioner.

J. D. MacFarlane, Atty. Gen., Jean E. Dubofsky, Deputy Atty. Gen., Edward G. Donovan, Sol. Gen., Louis L. Kelley, Asst. Atty. Gen., Denver, for respondent.

SILVERSTEIN, Chief Judge.

Petitioner, Medina, seeks reversal of an Industrial Commission order which denied her unemployment compensation benefits on the ground that she "was able and available only for part-time work." We affirm.

Section 8--73--107(1)(c), C.R.S.1973 provides that an unemployed individual (who is otherwise qualified) is eligible to receive benefits if "(h)e is able to work and is available for all work deemed suitable . . . ."

Medina worked for Walgreen's at a job which required her to be on her feet eight hours a day. On May 28, 1974, she obtained a leave of absence for surgery needed because of an injury which was unrelated to her employment. In September 1974, she was terminated because her job could no longer be held open. On June 27, 1975, her doctor released her for work as of July 1, 1975, stating she was physically able to work, "but she cannot work on her feet." Then on July 29, 1975, the same doctor certified that she was able to work part-time at her usual occupation. Upon applying for work at Walgreen's she was advised that they had no part-time work, nor any jobs that would meet her physical limitations. There is no evidence in the record that she sought other types of employment elsewhere.

"A determination of the availability for employment is one for which an all-inclusive rule cannot be stated, but rather must be made within the context of the factual situation presented by each case." Couchman v. Industrial Commission, 33 Colo.App. 116, 515 P.2d 636. The initial burden is on the claimant to establish a prima facie case of eligibility for benefits. Von Poppenheim v. Morgan, 9 Or.App. 495, 497 P.2d 866; Loew's Inc. v. California Employment Stabilization Comm., 76 Cal.App.2d 231, 172 P.2d 938.

The essential question in each case is whether the claimant's availability for suitable work is so restricted--in relation to the condition of the surrounding labor market--that he cannot be deemed to have met the eligibility requirements of ability to, and availability for, work. Industrial Commission v. Redmond, 183 Colo. 14, 514 P.2d 623. See Bayly Manufacturing Co. v. Department of Employment, 155 Colo. 433, 395 P.2d 216. Here the type and hours of work sought by the claimant were so limited that she was not "able and available" for all suitable work within the meaning of the statute. See Ellis v. Employment Security Agency, 83 Idaho 95, 358 P.2d 396.

Order affirmed.

Coyte and Ruland, JJ., concur.

Mountain States Telephone and Telegraph Company,

a Colorado corporation

v.

Department of Labor and Employment, Industrial Commission of

the State of Colorado (Ex-Officio Employment

Compensation Commission of Colorado), and

Alice J. Wetherow

No. C-1543

197 Colo. 335; 592 P.2d 808
Supreme Court of Colorado

En Banc

April 2, 1979

DeMuth, Eiberger, Kemp & Backus, David H. Stacy, for petitioner.

J. D. MacFarlane, Attorney General, David W. Robbins, Deputy, Edward G. Donovan, Solicitor General, Louis L. Kelley, Assistant, for respondents.

HODGES, Chief Justice.

The claimant-respondent is a 38-year-old woman, married, and the mother of three. On July 7, 1976, she resigned from her job with Mountain Bell in order to accompany her husband to California where he had obtained new employment. The claimant applied for unemployment compensation under the Colorado Employment Security Act, section 8-70-101, et seq., C.R.S. 1973 (1978 Supp.). The Industrial Commission granted a full award of benefits, and the court of appeals affirmed in Mountain States Telephone and Telegraph Co. v. Department of Labor and Employment, 40 Colo. App. 381, 579 P.2d 651 (1978). We granted certiorari and now reverse.

In granting a full award of benefits to respondent, the Industrial Commission concluded that under section 8-73-108(6)(b)(VI), C.R.S. 1973 (1976 Supp.) (now repealed), the claimant's separation from employment was "unavoidable" and, therefore, she was entitled to a full award of benefits. We do not find it necessary to reach the issue of whether a married woman who terminates her employment in order to relocate with her husband is deemed to be unavoidably unemployed within the meaning of section 8-73-

108(6)(b)(VI), C.R.S. 1973 (1976 Supp.). Assuming, however, that the respondent fell within the purview of this provision, the commission nevertheless lacked statutory authority to make an award under it. Section 8-73-108(6) stated explicitly that the subsection was only applicable where "the division determine[d] that a claim for benefits was not specifically covered under other provisions of this section."

In the present case, respondent's claim was explicitly covered by section 8-73-108(5)(d) which mandates a reduction of benefits where the claimant's reason for separation is "[m]oving to another area except for health reasons or to accept a better job." Respondent concedes that her move to California was not prompted by health reasons or by job prospects. Accordingly, the court of appeals and the Industrial Commission erred in finding that respondent was entitled to a full award of benefits under subsection (6), rather than a reduced award under subsection (5).

The cases cited by the court of appeals in support of its opinion (Briggs v. Industrial Commission, 36 Colo. App. 292, 539 P.2d 1303 (1975), and Mountain States Telephone and Telegraph Company v. Department of Labor, 38 Colo. App. 298, 559 P.2d 252 (1976)), are inapposite, because they involved claimants who qualified for a "special award" of benefits under the marital obligation section of the statute. Section 8-73-108(7)(a)(I), C.R.S. 1973 (1976 Supp.) (now repealed). Unlike subsection (6), subsection (7) did not contain the requirement that it could not be invoked if the commission determined that the claim was covered under other provisions of section 108.

The marital obligation provision was declared unconstitutional by this court in Kistler v. Industrial Commission, 192 Colo. 172, 556 P.2d 895 (1976), and was subsequently deleted from the statute by the general assembly. Accordingly, a claim for compensation, such as the one requested here, can no longer be supported on a marital obligation grounds.

The judgment is reversed and the case is returned to the court of appeals for remand to the respondent consonant with this opinion.

The Mountain States Telephone and Telegraph Company,

a Colorado corporation, Petitioner,

v.

Industrial Commission of the State of Colorado (Ex-Officio

Unemployment Compensation Commission of Colorado),

and Karletta K. Clark, Respondents.

No. 80CA1243.

637 P.2d 401

Colorado Court of Appeals,

Div. III.

Aug. 20, 1981.

Eiberger, Stacy & Smith, Raymond W. Martin, David H. Stacy, Denver, for petitioner.

J. D. MacFarlane, Atty. Gen., Richard F. Hennessey, Deputy Atty. Gen., Mary J. Mullarkey, Sol. Gen., Abby L. Pozefsky, Asst. Atty. Gen., Denver, for respondents.

VAN CISE, Judge.

Mountain States Telephone and Telegraph Co. (the employer) seeks review of an order of the Industrial Commission which awarded Karletta K. Clark (the employee) full unemployment compensation benefits following her discharge. We affirm.

The employer had attendance guidelines which, although administered with flexibility, provided for certain action to be taken when an employee was absent a certain number of days during a 12 month period. Under the guidelines, an employee could be discharged for excessive absenteeism for nine absences or four occurrences (a continuous absence of multiple days constituting one occurrence). Here, according to the employee's attendance record, she was absent approximately 17 days in 12 occurrences during the 12 month period before she was discharged. The reasons for her absences, some of which were pregnancy related, included: upset stomach (4), vomiting (2), back trouble, flu (2), diarrhea, child ill (2), feet swollen-cannot walk, bedrest (3), and unable to get to work because of snow storm. As a result of her attendance record, the employee was discharged for excessive absenteeism.

The Commission found that the employee had been discharged for excessive absenteeism. However, the Commission also found that the absences were primarily due to health problems. Therefore, under § 8-73-108(4)(j), C.R.S. 1973 (1980 Cum.Supp.), it concluded that the employee was entitled to full benefits because her separation from employment was due to her inability to perform work because of physical problems.

The issue on appeal concerns the interplay between § 8-73-108(4)(j), on which the Commission's ruling was based, and § 8-73-108(5)(x), C.R.S. 1973 (1980 Cum.Supp.), which provides for a reduced award where separation from employment is due to excessive absenteeism. Specifically, the issue is whether incidental illnesses resulting in excessive absences constitute a physical inability to perform the work.

Section 8-73-108(4)(j) provides for a full award where the reason for an employee's separation is "(b)eing physically ... unable to perform the work ...." We have held that a full award of benefits was justified under this section where an employee, discharged for excessive absenteeism, suffered a disabling injury which rendered him unable to get out of bed or unable to remain in a standing or sitting position for sustained periods. See Colorado State Judicial Department v. Industrial Commission, Colo.App., 630 P.2d 102 (1981).

The purpose of unemployment compensation legislation is to assure "that each eligible individual who is unemployed through no fault of his own shall be entitled to receive a full award of benefits." Section 8-73-108(1)(a), C.R.S. 1973 (1980 Cum.Supp.). In light of this purpose, we cannot say that the General Assembly intended to deny compensation to an employee who, although excessively absent, is so because of incidental illness. Accordingly, the language of § 8-73-108(4)(j) is sufficiently broad that illness which is not necessarily disabling can constitute a physical inability to perform the work.

An illness may be so minor that absence resulting therefrom is more for employee's comfort than due to physical inability to perform the work. In such event, an employee discharged for excessive absenteeism due to illness would be entitled only to a reduced award under § 8-73-108(5)(x). However, this is a factual question for the Commission.

Here, the Commission found that the employee's illnesses constituted physical inability to perform her work. These findings are supported by substantial evidence and are conclusive on review. Section 8-74-107(4), C.R.S. 1973 (1980 Cum.Supp.). Accordingly, the Commission was justified in granting a full award under § 8-73-108(4)(j), rather than a reduced award under § 8-73-108(5)(x). See Michals v. Industrial Commission, 40 Colo.App. 5, 568 P.2d 108 (1977).

Order affirmed.

Berman and Kelly, JJ., concur.

Clifford R. Mugrauer, Petitioner,

v.

Industrial Commission of the State of Colorado; Director, Department of

Labor and Employment; Division of Employment and Training; Rio Grande

Western Land Company, Inc., Respondents

No. 84CA0792

709 P.2d 47

Court of Appeals of Colorado,

Div. II.

June 6, 1985

Colorado Rural Legal Services, Inc., Lisa Robinow, Alamosa, Colorado, Attorneys for Petitioner.

Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General, Dani R. Newsum, Assistant Attorney General, Denver, Colorado, Attorneys for Respondents Industrial Commission and Director, Department of Labor and Employment.

No appearance for Respondent Rio Grande Western Land Company.

SMITH, Judge.

Claimant, Clifford Mugrauer, seeks review of a final order of the Industrial Commission in which it determined that he had been overpaid $1,596 in unemployment compensation benefits. We set aside the order and remand for further proceedings.

Claimant applied for unemployment benefits on January 19, 1983, alleging that he had been laid off. On January 26, 1983, the employer, Rio Grande Western Land Company, protested payment alleging that the claimant had voluntarily quit his job. The Division of Employment wrote to claimant on May 11, 1983, informing him of his employer's protest of payment. A hearing was held on August 9, 1983, and the hearing officer determined that the claimant was responsible for his separation from work and accordingly reduced claimant's benefits. On September 2, 1983, the Division of Employment sent claimant a Notice of Overpayment of Benefits in the amount of $1596.

Claimant appealed the overpayment decision alleging that it would be inequitable to collect the overpayment in that he had relied to his detriment on his unemployment checks. The Commission found that:

"recovery of the overpayment is not inequitable and waiver of same is not in order. While the claimant was overpaid not as a result of misrepresentation, the criteria for waiver of overpaid benefits as contained in Regulation 15 to the Colorado Employment Security Act is not met here. The claimant is still living and is not totally and permanently disabled. The claimant has not removed himself from the labor market, and while his financial resources are limited at best, he has not been adjudicated as bankrupt. There is no showing that the cost of collection exceeds the amount of overpayment; or that the overpayment is uncollectible or administratively impracticable."

The Commission concluded that the cases cited by claimant in support of his claim that recovery of the overpayment would be against equity and good conscience had been overruled in that the relevant statute had been amended to delete the provision permitting recovery of overpayment to be waived for reasons of "equity and good conscience." The Industrial Commission affirmed the referee in form orders.

The claimant contends that the findings of the Commission were inconsistent with Colorado case law and statutory authority. We agree.

The cases relied upon by claimant in support of his position were Duenas-Rodriguez v. Industrial Commission, 199 Colo. 95, 606 P.2d 437 (1980) and Schmidt v. Industrial Commission, 42 Colo. App. 253, 600 P.2d 76 (1979). These two cases interpreted § 8-81-101(4)(a), C.R.S. , which provided in pertinent part:

"Any person who has received any sum as benefits . . . . for which he was not entitled other than by reason of his false representation or willful failure to disclose a material fact, if so found by the division, shall be liable to repay such amount to the division . . . . if such recovery would not, in the opinion of the division, be against equity and good conscience. The division may waive the recovery or adjustment of all or part of the amount of any such overpayment which it finds to be noncollectible, or the recovery or adjustment of which it finds to be administratively impracticable." (emphasis added)

At the time of claimant's hearing the above quoted statute, along with other sections, had been amended. See Colo. Sess. Laws 1979, ch. 67, § 8-81-101 (4)(a) at 355. As part of these amendments the words against equity and good conscience were deleted and were replaced by "if such repayment in the opinion of the division would not be inequitable."

Although Duenas-Rodriguez, supra, and Schmidt, supra, were decided under the prior law, they remain pertinent in that there is no substantial difference between the meaning of the phrases "against equity and good conscience" and "not inequitable."

In Duenas-Rodriguez, supra, the pertinent phrase in the previous statute was recognized as having the following meaning:

"'Against equity and good conscience means that adjustment or recovery of an incorrect payment . . . . will be considered inequitable if an individual, because of a notice such payment would be made or by reason of the incorrect payment, relinquished a valuable right . . . . or changed his position for the worse . . . .'"

That definition remains applicable under the present statute.

Here, in reliance on the unemployment benefits, claimant had relinquished certain rights, i.e., the right to obtain public assistance in the form of food stamps and the right to participate in the Low Income Energy Assistance Program. He also argued that if he had not been receiving unemployment benefits he would have looked for work in other areas and limited his expenses. However, the hearing officer looked only at claimant's financial circumstances and did not consider claimant's arguments. Under such circumstances, the ruling cannot stand.

The order is set aside and the cause is remanded for a new determination on the equitability of collection consistent with the rule in Duenas-Rodriguez, supra.

Judge Kelly and Judge Metzger concur.

Rex E. Muhlenkamp, Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado, and Nor Colo Distributing Company,

Respondents.

No. 89CA1491.

802 P.2d 1127

Colorado Court of Appeals,

Division III.

June 7, 1990.

Rehearing Denied July 5, 1990.

Certiorari Denied Dec. 17, 1990.

Colorado Rural Legal Services, Inc., Ann M. la Plante, Greeley, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Paul H. Chan, Asst. Atty. Gen., Denver, for respondents.

JONES, Judge.

Rex E. Muhlenkamp, claimant, seeks review of a final order of the Industrial Claim Appeals Office (Panel) which disqualified him from the receipt of unemployment compensation benefits. We affirm.

After a hearing, the hearing officer found that claimant, when hired, was informed that his job duties entailed being both a warehouse worker and a relief driver and that claimant knew for at least a year prior to being terminated that his compensation for the two components of his job was calculated differently. As a warehouse worker, claimant earned a base salary of $390 per week, plus time and one-half for hours worked over 40 hours. As a relief driver, claimant earned his base salary plus three cents per case delivered, with no provision for overtime. Regular route salesmen earned a straight commission of 25 cents per case. Furthermore, while the frequency of relief driving because of illness or vacation of regular route salesmen increased, the calculation of compensation for relief drivers did not vary. Thus, from the time he was hired, claimant was aware that his normal duties as a relief driver would tend to reduce his income.

The hearing officer further found that, at the times pertinent here, claimant was assigned to work as a relief driver, that he refused to complete the assignment unless he was paid more, and that he was discharged for his refusal to complete his route assignment. He finally found claimant was at fault for his separation and disqualified him from the receipt of benefits pursuant to Sec. 8-73-108(5)(e)(XX), C.R.S. (1986 Repl.Vol. 3B) (failure to meet established job performance or other defined standards). The Panel affirmed, concluding that claimant "was discharged because he refused to perform his normal duties as a relief driver." (emphasis added)

Claimant contends that the findings of the hearing officer do not support the application of Sec. 8-73-108(5)(e)(XX). We disagree.

In determining whether findings of fact support the application of a section, we are to examine the findings and the record as a whole to determine whether the decision is justified. See Southwest Forest Industries, Inc. v. Industrial Commission, 719 P.2d 1098 (Colo.App.1986). The fact-finder is not held to a crystalline standard when it articulates its findings. If the decision is justified, it may not be set aside on the technicality of unclarity of expression. See In re Claim of Allmendinger v. Industrial Commission, 40 Colo.App. 210, 571 P.2d 741 (1977).

From our review of the record and the findings, we are satisfied that the findings demonstrate that the relevant statutory factors for the application of Sec. 8-73-108(5)(e)(XX) were considered and that the hearing officer found, on substantial evidence, that claimant was discharged for failure to meet established job performance standards. We therefore find no merit to claimant's contention. See Southwest Forest Industries, Inc. v. Industrial Commission, supra.

Claimant also contends that the hearing officer erred as a matter of law in not awarding him benefits pursuant to Sec. 8-73-108(4)(d), C.R.S. (1986 Repl.Vol. 3B) (substantial unfavorable change in working conditions). Claimant asserts, relying on Wargon v. Industrial Claim Appeals Office, 787 P.2d 668 (Colo.App.1990), that when the frequency with which he was called upon to be a relief driver increased, the change in compensation during that time from that of a warehouse worker constituted a substantial change in his working conditions which is less favorable to him. Again, we disagree.

In Wargon, this court held that "a change in the method of compensation from a salary plus bonus to a commission plus bonus constitutes a substantial change in ... working conditions as a matter of law." In so holding, the court noted that claimant there, who had left a job paying commissions to accept another job because she wanted the stability and security of a monthly salary, was given two days notice that her compensation structure would change from salary plus bonuses to strict commission plus bonuses. She resigned citing the change in compensation.

We hold that the Wargon rule does not apply in this case. Here, claimant knew from the outset that his normal duties as to each of the two components of his job would be compensated on a different basis. Thus, claimant experienced no "change" in the method

of compensation as the salesperson did in Wargon, and the objective standard test of Wargon has not been met by claimant. Therefore, Sec. 8-73-108(4)(d), C.R.S. (1986 Repl.Vol. 3B) cannot apply here.

Since the findings of evidentiary fact are not contrary to the weight of the evidence, and support the conclusion to apply Sec. 8-73-108(5)(e)(XX), we will not disturb that decision on review. See Federico v. Brannan Sand & Gravel Co., 788 P.2d 1268 (Colo.1990); Mountain States Telephone & Telegraph Co. v. Industrial Commission, 697 P.2d 418 (Colo.App.1985).

Order affirmed.

Sternberg and Ney, JJ., concur.

Paula M. Munoz-Navarette, Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado, and Colorado Division of Employment and

Training, Respondents.

No. 90CA2024.

833 P.2d 827

Colorado Court of Appeals,

Div. III.

Jan. 30, 1992.

As Modified Jan. 30, 1992.

Rehearing Denied March 12, 1992.

Certiorari Denied Aug. 3, 1992.

Colorado Rural Legal Services, Ann M. la Plante, Teresa Vaughn, Greeley, for petitioner.

Gale Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Tony Arguello, Asst. Atty. Gen., Denver, for respondents.

DUBOFSKY, Judge.

Paula M. Munoz-Navarette, claimant, seeks review of a final order of the Industrial Claim Appeals Panel which denied her request for waiver of the recovery of an overpayment of unemployment compensation benefits. We set aside the order.

Claimant lost her job in December 1988. She filed a claim for unemployment compensation that month and received benefits from December 1988 through March 1989.

The initial decision of the Labor Department granted claimant a full award of benefits from which the employer appealed. On that appeal, in March 1989, the referee reversed the Department's earlier award of full benefits after determining that claimant was disqualified and owed $2,586 for overpayment of benefits.

Claimant then requested from the Labor Department a waiver as to the overpayment amount on the basis that she was presently financially unable to repay it and that her situation was not likely to improve in the foreseeable future. Claimant also requested a waiver of repayment because, on the basis of the receipt of the unemployment benefits, she had foregone applying for certain other governmental benefits.

Claimant submitted a certified document which demonstrated her economic situation at the time she requested waiver. The document indicated that claimant's living expenses were significantly greater than her monthly income.

In initially denying claimant's waiver request, the Labor Department told claimant that she had been informed on several occasions that if she received an overpayment, she would have to repay the money. Thus, the initial denial did not address the merits of claimant's request for waiver.

Claimant appealed, and at a hearing, a Labor Department employee testified as to its reasons for denying claimant's waiver request. She indicated that claimant had not met the Labor Department requirements for waiver because claimant had not demonstrated detrimental reliance or relinquishment of a valuable right because of her receipt of the unemployment benefits. The witness also testified that claimant was denied waiver because she was not retired and was otherwise able to work. She also noted that claimant had not applied for public assistance.

The witness indicated that the Labor Department denied waiver requests unless the claimant had actually applied for and had been denied public assistance, i.e., welfare benefits, food stamps, and rent subsidy. Absent such an application, the Department did not consider that there had been detrimental reliance on the unemployment compensation benefits.

The witness further indicated that, irrespective of the ratio of a claimant's income compared to the expenses for her and her family, if, as here, a claimant is young and capable of working and earning money, then the Labor Department will not waive repayment of any overpaid unemployment compensation. The witness testified that, if a claimant is not on a fixed government income, she has control over how much money she can make and that, therefore, waiver is inappropriate.

Claimant testified she would have applied for food stamps and investigated rent assistance and utility assistance if she had not received unemployment benefits. She did not, however, formally apply for such benefits; nor did claimant present evidence which demonstrated she would have been eligible for these benefits without the unemployment compensation.

Claimant also submitted information concerning her economic situation as of the time of the hearing. This evidence indicated that during the school year, claimant made approximately $420 per month as a school bus driver, and in the summer, she earned approximately $225 per month working as a scorekeeper for baseball games. The

documents indicated that her normal expenses would be in excess of $1,000 per month. Claimant also testified that she was in the process of obtaining a divorce and that a child support/maintenance award had not yet been entered.

Claimant testified that the unemployment compensation benefits she received were used to help pay the rent for December and January. She further testified that at that time, she had two small children and that some of the money was used for food and milk for her oldest child, whereas some was used for various bills, baby food and formula, diapers, powder, and baby clothing. She also testified that part of the money was used to help pay for utilities and rent as well as gas for her car. Furthermore, while she was looking for employment, she paid some of the money to a babysitter. She also used the money for medical expenses for her children. Claimant also testified that her husband was out of work during much of the time she was receiving the unemployment benefits. There was, however, record evidence indicating that husband was out of work only for a brief part of this period.

The Labor Department does not contend that the expenses listed by claimant were excessive or unreasonable. Therefore, it is uncontested that claimant spent her unemployment benefits for the necessaries of living for her and her children, i.e., food, rent, utilities, and medical expenses. The Labor Department employee testified, however, that in her view the expenditure of unemployment benefits by the claimant for necessary living expenses was not sufficient to justify a waiver.

I.

Claimant argues that because of her financial situation at the time of the repayment hearing and because she had spent all the unemployment money on necessary living expenses, it was inequitable, as a matter of law, for the referee and Panel not to waive the repayment of her unemployment compensation benefits. While we disagree with claimant that she was entitled to have her repayment obligation waived as a matter of law, we do conclude that proper consideration was not given to these factors by the referee and the Panel.

The referee and Panel denied claimant's waiver request primarily on the basis that she had not applied for other governmental benefits and because she did not otherwise prove her eligibility for such benefits had she applied. Neither the referee nor the Panel addressed claimant's argument that use of unemployment benefits for necessary living expenses, coupled with her poor economic state at the time of the hearing, was also a basis for waiving the repayment of unemployment benefits. This was error.

In Hesson v. Industrial Commission, 740 P.2d 526 (Colo.App.1987), this court held that if a claimant's financial condition required unemployment benefits to be spent on essential living expenses, this factor must be considered in determining if it would be inequitable to require repayment of those benefits by the claimant. Similarly, in Kalkbrenner v. Industrial Claim Appeals Office, 801 P.2d 545 (Colo.App.1990), this court stated:

[T]he referee here improperly focused upon Kalkbrenner's failure to give up any rights or to change her position as a result of her receipt of benefits. He also failed to consider other relevant factors including Kalkbrenner's financial problems and dire financial condition.

Hence, this issue should have been addressed here.

Furthermore, although the exact amount necessary for the support of claimant and her family is not clear from this record, it does appear that her monthly income at the time of the hearing placed her below the United States Department of Health and Human Services poverty income guidelines for a family of three for 1989. See 54 Fed.Reg. 7097 (1989). Moreover, since her husband's contribution to the family income was not ascertainable at the time of the hearing, on remand his contribution should be added.

Thus, Duenas-Rodriguez v. Industrial Commission, 199 Colo. 95, 606 P.2d 437 (1980), Hesson, and Kalkbrenner have all rejected the view implicitly espoused by the Labor Department that only people on subsidized fixed incomes, i.e., elderly people on social security, may be considered for a waiver on the basis of their economic situation. Furthermore, the Labor Department's assumption that poor working people are able to earn more money than they are presently earning is without support in the record.

Here, for example, claimant testified that she was unable to secure other higher paying employment, and there is no evidence to rebut this testimony. In our view, the claimant's evidence, if true, indicates that at the time of the hearing, claimant's reasonable expenses to meet her family's basic needs were more than her income. Furthermore, since it appears the family is below the federal poverty guidelines, the result of collecting the previously paid unemployment benefits may well deprive claimant and her children of food, clothing, utilities, and a place to live. These are important factors in determining if it would be inequitable to require repayment.

Since the referee and Panel did not address either the issue of claimant's having spent the overpaid funds on basic necessities or her impoverished status at the time of the repayment hearing, the order cannot stand and the matter must be remanded for further proceedings.

II.

Claimant next argues that, since she testified that she did not apply for food stamps and rent subsidies, she has demonstrated detrimental reliance as a matter of law. We disagree with claimant on this issue, but since the case is being remanded for determination on other aspects of the case, we also remand for clarification on the question of detrimental reliance/estoppel.

In this regard, we reject the Labor Department's contention that a person must first apply for and then be rejected for other governmental benefits before they can prove detrimental reliance/estoppel as a basis for waiver. We agree with claimant that a

requirement that she apply for and be denied other benefits is an unnecessary waste of time and not required by case law. See Mugrauer v. Industrial Commission, 709 P.2d 47 (Colo.App.1985).

However, we do agree that a claimant relying on detrimental reliance/estoppel theory as the basis for a claim of waiver must prove by a preponderance of the evidence that he or she was eligible for such benefits. See Hesson, supra. We, therefore, agree that to the extent claimant relies on detrimental reliance/estoppel, on remand she must prove her eligibility for such benefits by establishing her economic situation at the time she was receiving the unemployment benefits as well as what the requirements were for receiving such benefits.

We note that one reason why claimant may not have been clear as to what she must prove at the hearing to establish her waiver right was the initial denial from the Labor Department. The Labor Department's initial denial of her request for waiver did not address the merits of claimant's claim and did not point out to her why she was ineligible for a waiver. The Department's denial merely stated that claimant had been previously informed she would have to repay any overpayment.

The order is set aside, and the cause is remanded for further proceedings consistent with this opinion.

Tursi and Ruland, JJ., concur.

Linda S. Musgrave, Petitioner,

v.

Eben Ezer Lutheran Institute and the Industrial Commission

of the State of Colorado, Respondents.

No. 86CA0446.

731 P.2d 142

Colorado Court of Appeals,

Div. III.

Oct. 23, 1986.

Ann M. la Plante, Colorado Rural Legal Services, Inc., Greeley, for petitioner.

Brandenburg & Schultz, Helena Schultz, Brush, for respondent Eben Ezer Lutheran Institute.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Aurora Ruiz-Hernandez, Asst. Atty. Gen., Denver, for respondent Industrial Comn.

BABCOCK, Judge.

Linda S. Musgrave, claimant, seeks review of a final order of the Industrial Commission (Commission) disqualifying her from receiving unemployment compensation benefits. We set aside the order, and remand for further findings.

Claimant was employed as dietary department head at Eben Ezer Lutheran Institute (employer). Pursuant to a management reorganization of this department, claimant's responsibilities were divided, her salary cut, and her title and job changed to co-department head.

A month and a half later, claimant's supervisor showed her a letter citing deficiencies in her performance, which claimant disputed, and requesting remedial action within 30 days. When claimant attempted to discuss the letter, the supervisor was unavailable, and he refused to let her have a copy of it. Fearing her supervisor was developing a case to discharge her, claimant did not pursue employer's internal grievance procedures, but quit two weeks later.

The deputy initially determined that although claimant resigned because of dissatisfaction with her supervisor, the supervisor's actions were unreasonable and need not have been tolerated by claimant. She was awarded full benefits, and the employer appealed the decision.

The hearing officer found that claimant quit after reading the letter criticizing her job performance. He further found that, although claimant was dissatisfied with her supervisor's actions, she did not discuss the matter with him or utilize the employer's internal grievance procedures. Based on these findings, the hearing officer disqualified her from receiving benefits under Sec. 8-73-108(5)(e)(I), C.R.S. (1986 Repl.Vol. 3B).

Section 8-73-108(5)(e)(I) provides that an employee is disqualified from receiving benefits if the employee quits because of dissatisfaction with "standard working conditions." Relying on Martinez v. Industrial Commission, 657 P.2d 457 (Colo.App.1982), and Warburton v. Industrial Commission, 678 P.2d 1076 (Colo.App.1984), claimant contends that, since she quit subsequent to a substantial unfavorable change in her working conditions, the Commission erred in not awarding her full benefits pursuant to Sec. 8-73-108(4)(d), C.R.S. (1986 Repl.Vol. 3B).

Section 8-73-108(4)(d), C.R.S. (1986 Repl.Vol. 3B) provides for a full award of benefits if a claimant resigns because of a substantial change in working conditions that is less favorable to the claimant. A change in duties or demotion is a substantial change in working conditions less favorable to claimant, Martinez v. Industrial Commission, supra, as is the situation in which a claimant has been relieved of administrative or supervisory responsibilities, Warburton v. Industrial Commission, supra, and as is a reduction in salary. Cf. Sec. 8-73-108(4)(e), C.R.S. (1986 Repl.Vol. 3B).

If an employee's termination follows such a substantial change in working conditions, the statutory provision concerning dissatisfaction with standard working conditions is inapplicable. Martinez v. Industrial Commission, supra; Industrial Commission v. McIntyre, 162 Colo. 227, 425 P.2d 279 (1967). However, this does not preclude an employee from acquiescing in changes, thereby establishing new "standard working conditions," and it may bar benefits if the claimant thereafter quits because of dissatisfaction with the new working conditions. Jennings v. Industrial Commission, 682 P.2d 518 (Colo.App.1984).

Because the claimant had suffered a "substantial change in working conditions," the Commission incorrectly disqualified claimant under Sec. 8-73-108(5)(e)(I). See Martinez v. Industrial Commission, supra; Warburton v. Industrial Commission, supra; Industrial Commission v. McIntyre, supra. Moreover, the Commission made no findings on whether claimant had acquiesced in the new working conditions and, thus, had no basis for applying Sec. 8-73-108(5)(e)(I) to disqualify claimant.

Claimant correctly argues that her failure to pursue employer's grievance procedures and discussions with her supervisor should not have been dispositive of her eligibility for

benefits. Neither course of action is required by statute as a prerequisite to an award of benefits.

An order may be set aside if it is not supported by sufficient findings of fact. Stern v. Industrial Commission, 667 P.2d 244 (Colo.App.1983). Because the Commission failed to make the necessary findings to support a denial of benefits, the order is set aside and the cause is remanded to the Industrial Claim Appeals Office for further findings consistent with this opinion.

Van Cise and Metzger, JJ., concur.

Linda S. Musgrave, Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado and Eben Ezer Lutheran Institute,

Respondents.

No. 87CA0346.

762 P.2d 686

Colorado Court of Appeals,

Div. VI.

March 24, 1988.

As Modified on Denial of Rehearing May 19, 1988.

Certiorari Denied Oct. 11, 1988.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Aurora Ruiz-Hernandez, Asst. Atty. Gen., Denver, for respondent The Industrial Claim Appeals Office.

Brandenberg and Schultz, Helena Schultz, Brush, for respondent Eben Ezer Lutheran Institute.

Ann M. la Plante, Greeley, for petitioner.

BINDER, Judge.*

Claimant, Linda S. Musgrave, seeks review of the denial of her claim for unemployment benefits by the Industrial Claim Appeals Office (Panel) following a remand from this court. We affirm.

After claimant terminated her employment with Eben Ezer Lutheran Institute (employer) in March 1985, she applied for unemployment compensation benefits but was disqualified pursuant to Sec. 8-73-108(5)(e)(I), C.R.S. (1986 Repl.Vol. 3B). She sought review in this court, and in Musgrave v. Eben Ezer Institute, 731 P.2d 142 (Colo.App.1986) (Musgrave I), we held that the Industrial Commission (now Panel) had made insufficient findings to support its order of denial. We set aside that order and remanded the matter for further findings consistent with our opinion.

After remand, the Panel reviewed the record once more and again entered an order denying benefits to claimant. This petition for review followed.

The Panel found that claimant had experienced a change in working conditions in December 1984, when employer reduced her salary and changed her position from department head to co-department head. It further found and concluded that claimant acquiesced in the changed conditions when she continued to work after the changes were effected.

The Panel then determined that claimant terminated her employment because of dissatisfaction with a letter she had been given on February 18, 1985, expressing employer's concerns with her work performance. It concluded that delivery of that letter constituted reasonable supervision, notwithstanding the fact that employer's agent had not been available on one occasion when claimant wanted to discuss the letter's contents.

Based upon these findings, the Panel ruled that claimant was disqualified from the receipt of benefits under Sec. 8-73-108(5)(e)(II), C.R.S. (1986 Repl.Vol. 3B) in that she had resigned because of dissatisfaction with reasonable supervision.

Claimant contends that the Panel went beyond this court's mandate by considering issues in addition to those mentioned in the decision in Musgrave I. She asserts further that she was denied due process because she was not afforded an opportunity to present her position on such additional issues. Finally, claimant argues that there was insufficient evidence to support the Panel's findings.

We do not agree that the order of remand limited the Panel to making findings solely on the issue of claimant's acquiescence to changed working conditions. In Musgrave I, we ruled that claimant had suffered a substantial change in her working conditions in December 1984. Thus, it was error to deny her benefits under Sec. 8-73-108(5)(e)(I) absent a finding that claimant had acquiesced in the changed conditions. We remanded for further findings consistent with our opinion.

When an appellate court remands a case with specific directions to enter a particular judgment or to pursue a prescribed course, a trial court has no discretion except to comply with such directions. Galbreath v. Wallrich, 48 Colo. 127, 109 P. 417 (1910). However, when a case is remanded for further proceedings consistent with the appellate court's opinion, it is a general remand. A general remand authorizes the trial court to make new findings and conclusions so long as there is no conflict with the ruling of the appellate court. See In re Medway, 23 Wall. 504, 90 U.S. 160, 23 L.Ed. 160 (1875). Cf. In re Estate of Painter, 671 P.2d 1331 (Colo.App.1983).

The order in Musgrave I was a general remand and authorized the Panel to reexamine the record and to make new findings and conclusions. We find no error in the procedure employed by the Panel in this regard.

Claimant next asserts that she should have been given an opportunity to present additional evidence and argument before the Panel considered the issue of reasonable supervision following remand. We do not agree.

The record discloses that claimant argued the issue of the reasonableness of employer's supervision on a number of occasions. Indeed, resolution of that issue was the determining factor in the initial order awarding claimant full benefits. In that order, dated October 17, 1985, the deputy ruled that claimant was entitled to benefits on the ground that she had resigned because of dissatisfaction with actions of her supervisor which were "unreasonable and need not be tolerated."

When this order was set aside following a de novo hearing before a referee, claimant included the unreasonable supervision issue in her appeal to the Industrial Commission. She raised this point again when she requested the Industrial Commission to reconsider its affirmance of the referee's order. Additionally, claimant's notice of appeal to this court in Musgrave I cited employer's unreasonable supervision as one of the reasons why the Industrial Commission's decision should be overturned.

Our review of the record leads us to conclude that claimant had ample opportunity to advance her claim that she resigned her position because of unreasonable supervision by employer. There was no denial of due process.

Contrary to claimant's contention, there was ample evidence to support the finding that claimant acquiesced in her changed working conditions. She continued to work after she was, in effect, demoted. Although she contacted the Labor Board with respect to her salary reduction, she made no further protest.

We do not find it significant under the circumstances that claimant worked less than two months after her position and salary were changed. Acquiescence is a matter of intent and does not necessarily depend upon the lapse of time. Claimant testified at the de novo hearing that she would not have quit her job had it not been for the written reprimand. The Panel did not err in finding that the record established claimant's acquiescence to her changed working conditions.

The reasonableness of employer's supervision as it affects claimant's eligibility for benefits is a separate issue. Claimant's contention that she was subject to unreasonable supervision is based solely upon the letter which she was given on February 18, 1985. She complains that she was refused a copy of the letter, that her immediate supervisor was unavailable to discuss the contents, and that she was given insufficient information and inadequate time to correct the alleged deficiencies.

We agree that it would have been a better practice to have given claimant her own copy of the letter of reprimand, particularly since it requested correction of specified matters. However, that fact, in and of itself, would not justify claimant's resignation. There was evidence that she had the letter in her possession in her own office at least overnight, so she could have copied all or any part of it had she desired.

The evidence showed that claimant made only one attempt to discuss the matter with employer's administrator. The administrator did not have time to discuss fully claimant's concerns at that point, and claimant did not follow through on his invitation to return at a later date. Instead, claimant consulted with a lawyer within a few days, took an unscheduled vacation, and quit her job by a telephone call to a fellow employee on the day before she was scheduled to return to work.

With reference to claimant's assertion that she was not given sufficient time to correct numerous alleged deficiencies, the evidence discloses that the letter of February 18, 1985, demanded only improvement in claimant's performance, not total correction of all the problem areas within thirty days as claimant implies.

There was sufficient evidence to support the Panel's findings and conclusion that claimant terminated her employment because of dissatisfaction with reasonable supervision. Accordingly, those findings are binding on review. See Baca v. Marriott Hotels, Inc., 732 P.2d 1252 (Colo.App.1986).

Order affirmed.

Silverstein and Wilson*, JJ., concur.

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const., art. VI, Sec. 5(3), and Sec. 24-51-607(5), C.R.S. (1982 Repl.Vol. 10).

COLORADO COURT OF APPEALS **2015COA51**

DATE FILED: April 23, 2015
CASE NUMBER: 2014CA1636

Court of Appeals No. 14CA1636
Industrial Claim Appeals Office of the State of Colorado
DD No. 11866-2014

Jonathon R. Nagl,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Destination Vail Hotel, Inc.,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by CHIEF JUDGE LOEB
Plank* and Ney*, JJ., concur

Announced April 23, 2015

Bryan Cave, LLP, Richard L. Nagl, Colorado Springs, Colorado, for Petitioner

No Appearance for Respondents

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2014.

¶ 1 In this unemployment compensation case, petitioner, Jonathan R. Nagl (claimant), seeks review of a final order of the Industrial Claim Appeals Office (Panel) affirming the hearing officer's decision disqualifying him from unemployment benefits based on earnings from a previous employer under section 8-73-108(5)(e)(IV), C.R.S. 2014 (quitting to move to another area as a matter of personal preference). He also asserts that the hearing officer's application of that statutory section violated his constitutional right to travel. We affirm, and perceive no violation of claimant's constitutional rights.

I. Background

¶ 2 Claimant worked as a front desk agent for Destination Vail Hotel, Inc. He quit this employment to be located closer to his girlfriend in Telluride, Colorado. Claimant found new employment in Telluride, but he was subsequently laid off from that position.

¶ 3 Claimant then sought unemployment insurance benefits. A deputy for the division of unemployment insurance denied claimant's request for benefits based on his employment with Destination Vail Hotel. It is not disputed, however, that claimant

received unemployment benefits based on his work for the Telluride employer.

¶ 4 Claimant appealed, and following an evidentiary hearing, the hearing officer affirmed the deputy's decision. The hearing officer found that claimant voluntarily quit his employment with Destination Vail Hotel to be closer to his girlfriend. The hearing officer rejected claimant's arguments that he was entitled to benefits from Destination Vail Hotel because he was not at fault for losing his subsequent job. Consequently, the hearing officer concluded that claimant was at fault for his separation from Destination Vail Hotel and disqualified him from receiving benefits from this employer under section 8-73-108(5)(e)(IV).

¶ 5 Claimant appealed the hearing officer's decision to the Panel, which affirmed upon review. The Panel concluded that claimant's separation from the subsequent employer was not relevant to the issue of his separation from Destination Vail Hotel. The Panel noted that each separation from a base period employer must be individually adjudicated in order to determine a claimant's entitlement to benefits attributable to that employment. Therefore, because claimant did not contest that he left his job with

Destination Vail Hotel for personal reasons, the Panel upheld the hearing officer's decision.

¶ 6 Claimant now brings this appeal.

II. Standard of Review

¶ 7 We may set aside the Panel's decision if the findings of fact do not support the decision or the decision is erroneous as a matter of law. *See* § 8-74-107(6), C.R.S. 2014; *Colo. Div. of Emp't & Training v. Parkview Episcopal Hosp.*, 725 P.2d 787, 790 (Colo. 1986).

III. Discussion

A. Fault

¶ 8 Claimant first contends that the Panel's decision is inconsistent with the express purpose of the Colorado Employment Security Act (CESA), which is to provide unemployment benefits to persons who are unemployed through no fault of their own. Claimant argues that the wages attributable to his employment with Destination Vail Hotel should be included in determining the amount of his unemployment benefits because he was not at fault for the separation from his subsequent employer. We disagree.

¶ 9 In construing a statute, we ascertain and effectuate the General Assembly's intent by applying the plain meaning of the

statutory language, giving consistent effect to all parts of a statute, and construing each provision in harmony with the overall statutory design. *Found. for Human Enrichment v. Indus. Claim Appeals Office*, 2013 COA 175, ¶ 14. We review the Panel's interpretation of a statute de novo. *Hoskins v. Indus. Claim Appeals Office*, 2014 COA 47, ¶ 13.

¶ 10 As claimant notes, section 8-73-108(1)(a) provides as a guiding principle in granting an award of benefits that "unemployment insurance is for the benefit of persons unemployed through no fault of their own; and that each eligible individual who is unemployed through no fault of his own shall be entitled to receive a full award of benefits."

¶ 11 However, this statute then provides:

> [E]very person has the right to leave any job for any reason, but that the circumstances of his separation shall be considered in determining the amount of benefits he may receive, and that certain acts of individuals are the direct and proximate cause of their unemployment, and such acts may result in such individuals receiving a disqualification.

Id.

¶ 12 And, as pertinent here, section 8-73-108(3)(a) specifically provides that "[t]he most recent separation and *all separations from base period employers* . . . shall be considered." (Emphasis added.) This principle is buttressed by section 8-73-108(5)(g) which explains how the adjudication of different separations from employment affects the payment of benefits.

¶ 13 An apparent purpose of adjudicating each separation is to prevent the "depletion of the insurance fund account of the past employer who in no way contributed to the job separation of the worker who voluntarily separates under conditions of disqualification." *Harding v. Indus. Comm'n*, 183 Colo. 52, 61, 515 P.2d 95, 100 (1973). As the court in *Harding* noted:

> It is not unreasonable to protect an employer's account, established for the express purpose of supporting employees during periods of involuntary unemployment, from diversion to former employees who brought about their unemployment by their voluntary acts. A different rule would be inequitable, unjust and contrary to the expressed purposes of the [CESA].

Id. at 61-62, 515 P.2d at 100.

¶ 14 Contrary to claimant's contention, all separations from base period employers must be individually considered in determining a

claimant's entitlement to benefits. *See Debalco Enters., Inc. v. Indus. Claim Appeals Office*, 32 P.3d 621, 623 (Colo. App. 2001) (citing § 8-73-108(3)(a)). Consequently, the hearing officer did not err in refusing to consider the circumstances of claimant's subsequent separation from employment in determining whether he was entitled to unemployment benefits from Destination Vail Hotel. *See id.* ("Whether a claimant is entitled to unemployment benefits attributable to wages paid by a particular employer depends upon the reason for the separation from that employment.").

¶ 15 Therefore, because it was undisputed that claimant voluntarily quit his employment with Destination Vail Hotel, and, thus, was at fault for that separation, we conclude that the hearing officer and the Panel did not err in determining that he was disqualified from receiving benefits from that employer under section 8-73-108(5)(e)(IV).

B. Section 8-73-108(4)(n)

¶ 16 Claimant next contends that under section 8-73-108(5)(e)(IV) a person may still be entitled to benefits if the reason for the move fell within one of the circumstances provided for in section 8-73-108(4). Claimant argues that section 8-73-108(4)(n) specifically recognizes

the right to quit employment without being disqualified from receiving benefits so long as quitting would not result in a denial of benefits under section 8-73-108(5)(b). Claimant contends that section 8-73-108(5)(b), in turn, provides that a claimant will be denied benefits only if the claimant has refused suitable work at any relevant time after being laid off.

¶ 17 However, as we recognized above, the hearing officer properly limited the proceeding to the circumstances surrounding claimant's reasons for leaving Destination Vail Hotel, not his subsequent employer. Section 8-73-108(5)(b) pertains to the refusal to accept suitable work after the last separation. Consequently, there is no indication that it would apply to claimant's separation from Destination Vail Hotel.

¶ 18 Thus, we conclude that section 8-73-108(4)(n) does not provide a basis for awarding benefits to claimant based on his employment with Destination Vail Hotel.

C. Section 8-73-108(3)(d)

¶ 19 Claimant also argues that section 8-73-108(3)(d) limits when a disqualification or reduction in benefits can be imposed under the circumstances presented here. We decline to address this

argument because claimant did not raise it before the Panel. *See QFD Accessories, Inc. v. Indus. Claim Appeals Office*, 873 P.2d 32, 33-34 (Colo. App. 1993) (declining to address arguments not raised before the Panel).

D. Section 8-73-102(1)

¶ 20 Claimant further argues that, under section 8-73-102(1), C.R.S. 2014, benefits are to be calculated based upon wages for insured work and that the work he performed for each employer was insured work. He asserts that because there is no provision permitting wage credits for insured work to be removed from the calculation formula under the facts of this case, he should also receive unemployment benefits based on his work for Destination Vail Hotel. However, there is no indication that claimant did not receive wage credits for the work he performed for both employers. Rather, the hearing officer determined that he was not entitled to benefits based on the credits he earned while working for Destination Vail Hotel because he left for personal reasons. *See* § 8-73-108(5)(e)(IV). Consequently, we conclude that section 8-73-102(1) does not provide grounds for claimant to receive an award of unemployment benefits from Destination Vail Hotel.

E. Constitutional Right to Travel

¶ 21 Finally, claimant contends that the hearing officer's application of the CESA violates his right to travel as protected by the Privileges and Immunities Clause of the United States Constitution and article II, section 3 of the Colorado Constitution. We disagree.

1. Legal Framework

¶ 22 The United States Constitution protects the right to interstate travel. *See Shapiro v. Thompson*, 394 U.S. 618, 629-30 & n.8 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Robertson v. City & Cnty. of Denver*, 874 P.2d 325, 340 (Colo. 1994) (noting that the right to interstate travel is a fundamental right). Nothing regarding the hearing officer's application of the CESA affected claimant's right to interstate travel. *Cf. Shapiro*, 394 U.S. at 631 (statute denying welfare assistance to residents who had not resided within jurisdiction for at least a year was unconstitutional); *Jeffrey v. Colo. State Dep't of Soc. Servs.*, 198 Colo. 265, 269, 599 P.2d 874, 877 (1979) (denial of old-age pension benefits based on durational residency requirements violated fundamental right to travel). Rather, at most, it only affected his

right to intrastate travel. *See Mayo v. Nat'l Farmers Union Prop. & Cas. Co.*, 833 P.2d 54, 58 (Colo. 1992) (noting cases involving state action that directly inhibited right to travel intrastate); *People in Interest of J.M.*, 768 P.2d 219, 221 (Colo. 1989) (the right of freedom of movement is a basic value protected by article II, section 3 of the Colorado Constitution); *People v. Allman*, 2012 COA 212, ¶ 8 n.1 ("The parameters of the right to intrastate travel are less developed under United States Supreme Court and Colorado law.").

2. Analysis

¶ 23 Claimant argues that section 8-73-108(5)(e)(IV) violates his constitutional right to travel because it effectively penalizes his right to move within the state. As presented by claimant, we construe his argument to be an "as applied" rather than a "facial" challenge to the constitutionality of section 8-73-108(5)(e)(IV). *See Pepper v. Indus. Claim Appeals Office*, 131 P.3d 1137, 1139 (Colo. App. 2005) (noting differences between an "as applied" and "facial" challenge to a statute), *aff'd on other grounds sub nom. City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006).

¶ 24 We begin our analysis with the presumption that section 8-73-108(5)(e)(IV) is constitutional. *See id.* To succeed on an "as

applied" challenge, a party must show that the statute is unconstitutional under the circumstances in which the party acted. *Sanger v. Dennis*, 148 P.3d 404, 410 (Colo. App. 2006). We review an as-applied challenge to the constitutionality of a statute de novo. *Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007).

¶ 25 The question we must first determine is whether section 8-73-108(5)(e)(IV), as applied to claimant here, interferes with the exercise of his constitutional right to travel. *See Allman*, ¶ 8; *J.M.*, 768 P.2d at 221. We conclude there is no such interference here.

¶ 26 In analyzing whether a statute interferes with a party's exercise of a fundamental right, the courts have looked at the significance of the interference. *Compare Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (since the means selected by the State for achieving its interests unnecessarily impinge on the right to marry, a fundamental right, the statute cannot be sustained), *with Califano v. Jobst*, 434 U.S. 47, 54-55 (1977) (upholding constitutionality of statute that denied benefits to a claimant who married a person who was not entitled to benefits under the same statute). In general, the statute must have more than an incidental effect on the ability to exercise that right. *See Jobst*, 434 U.S. at 58 (recognizing

that the statutory provisions "may have an impact on a secondary beneficiary's desire to marry, and may make some suitors less welcome than others.").

¶ 27 In Colorado, the supreme court addressed whether a statute authorizing household exclusion clauses in automobile insurance policies violated the fundamental right to travel. *See Mayo*, 833 P.2d at 56-57. The court concluded that neither the household exclusion clause nor the statute upon which it was based adversely affected the fundamental right to travel in a constitutionally significant sense. *Id.* at 59.

¶ 28 The court noted that the Mayos could travel both interstate and intrastate without limitation and that the household exclusion clause, at most, denied the Mayos insurance coverage for claims against each other when they drive their cars. *Id.* Consequently, the court concluded that while it may inhibit their decisions to travel together by automobile, it imposed no constraint on separate travel by automobile or joint or separate travel by other means. *Id.*

¶ 29 Similarly, we conclude that section 8-73-108(5)(e)(IV) does not prevent a person from moving either interstate or intrastate. Rather, it precludes a claimant from receiving unemployment

benefits only when the claimant quits to move to another area as a matter of personal preference. We note that other CESA provisions permit an award of benefits if a claimant moves to another area when, among other things, a spouse is transferred, a spouse is killed in combat, or there is illness in the family. *See* § 8-73-108(4)(s) to -108(4)(v).

¶ 30 Like the court in *Mayo*, we thus conclude that section 8-73-108(a)(IV), as applied to claimant here, does not adversely affect the fundamental right to travel in a constitutionally significant sense. Conditioning governmental payments of monetary benefits upon a showing that claimant has not caused his own unemployment has, at most, only an incidental effect on claimant's right to travel. To the contrary, the very ability of claimant to quit and travel to another location and find a job demonstrates the lack of interference with this right. While claimant's decision to quit his job to move closer to his girlfriend is certainly understandable, the loss of benefits resulting from this decision is not a constitutionally significant restriction. Clearly, it does not involve the type of "invidious classification" the supreme court has held violates the right to travel. *See Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250,

269 (1974) ("Arizona durational residence requirement for eligibility for nonemergency free medical care creates an 'invidious classification' that impinges on the right of interstate travel by denying newcomers 'basic necessities of life.'"); *Shapiro*, 394 U.S. at 627, 631-32 (statutory provision denying welfare assistance to residents of less than a year creates a classification which constitutes an "invidious discrimination" that violates the constitutional right to travel).

¶ 31 Therefore, we conclude that, although section 8-73-108(5)(e)(IV) penalizes certain claimants who voluntarily quit to move to another area, the effect on the right to travel is a secondary impact and does not render the statute unconstitutional as applied in this case. *See Jobst*, 434 U.S. at 58; *Mayo*, 833 P.2d at 59-60.

¶ 32 This conclusion is consistent with several other jurisdictions that have considered this issue. *See Pyeatt v. Idaho State Univ.*, 565 P.2d 1381, 1382-83 (Idaho 1977) (denial of claim for unemployment benefits when person voluntarily left employment did not violate person's constitutional right to travel); *Wadlington v. Mindes*, 259 N.E.2d 257, 262-63 (Ill. 1970) (statute precluding award of unemployment benefits when worker moved to area that

lacked job opportunities did not violate the right to travel); *Jenkins v. Whitfield*, 505 So.2d 83, 87 (La. Ct. App. 1987) (denial of benefits for worker who left job for a better job did not impose restrictions on the rights of interstate or intrastate travel); *Robinson v. Young Men's Christian Ass'n*, 333 N.W.2d 306, 308 (Mich. Ct. App. 1983) (restriction on award of benefits for an employee who quit to accept noncovered out-of-state employment did not impinge upon employee's right to travel); *see also Norman v. Unemployment Ins. Appeals Bd.*, 663 P.2d 904, 905 (Cal. 1983) (holding that denial of unemployment compensation benefits to claimant who voluntarily terminated employment to follow nonmarital loved one does not violate claimant's right to privacy or freedom of association).

¶ 33 Therefore, we conclude that the denial of claimant's request for benefits does not violate his right to travel as protected by the United States Constitution or article II, section 3 of the Colorado Constitution.

IV. Conclusion

¶ 34 The Panel's order is affirmed.

JUDGE PLANK and JUDGE NEY concur.

Charles J. Nelson, Petitioner,

v.

The Industrial Claim Appeals Office of the State of Colorado,

The Colorado Division of Employment and Training,

and Continental Mechanical System, Inc.,

Respondents.

No. 91CA1145

826 P.2d 436

Colorado Court of Appeals,

Div. III.

January 16, 1992.

William E. Benjamin, Boulder, for Petitioner.

Gale A. Norton, Attorney General, Raymond T. Slaughter, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Evelyn Bachrach Makovsky, Assistant Attorney General, for Respondents Industrial Claim Appeals Office and Colorado Division of Employment and Training.

No Appearance for Respondent Continental Mechanical System, Inc.

CRISWELL, Judge.

Charles J. Nelson, claimant, seeks review of a final order of the Industrial Claim Appeals Panel which disqualified him from the receipt of unemployment compensation benefits. We affirm.

The question presented is whether claimant's employment termination occurred under the circumstances described in § 8-73-108(4)(b)(I), C.R.S. (1991 Cum. Supp.). That statute provides for an award of unemployment compensation benefits if "the health of the worker, his spouse, or dependent child is such that the worker must leave the vicinity of his employment. . . ." (emphasis supplied)

In contrast to this provision, § 8-73-108(5)(e)(IV), C.R.S. (1991 Cum. Supp.) requires a denial of benefits if the employee quits his employment "to move to another area as a

matter of personal preference or to maintain contiguity with another person or persons, unless such move was for health reasons. . . ."

Here, both claimant and wife were employed. Both also suffered health problems. Through the wife's employment, however, both were enrolled in a health insurance program that paid a substantial portion of the medical expenses necessitated by these problems.

The wife's employer required her to transfer to California in order to continue her employment. After discussing the matter, claimant and his wife jointly decided that she should accept this transfer so that both of them would continue to receive the health insurance benefits that they had previously enjoyed. Claimant therefore quit his job to accompany his wife to California.

It is undisputed that nothing in the "vicinity" of either claimant's or his wife's employment contributed to or aggravated the health problems of either. Likewise, no contention is made that the medical care available in that area is in any manner inadequate to treat their condition or that the care that either he or his wife will receive in California will be significantly superior to that available here.

Based on these undisputed facts, the Panel held that § 8-73-108(4)(b)(I) did not apply and that, because the health problems of claimant and his wife did not require their move to California, claimant's move was a matter of "personal preference" under § 8-73-108(5)(e)(IV). As a result, claimant's application for unemployment benefits was denied.

Claimant argues that the Panel erred in reaching this conclusion. He asserts that, while medical treatment was theoretically available in Colorado, if wife's employment had been terminated, with the consequent loss of the health insurance benefits he and his wife received as a result of that employment, they would not have been able to pay for such treatment. Thus, he maintains that it was their health problems which required their move to California. We disagree.

The statute requires that it be the "health" of the worker that requires him or her to "leave the vicinity of his [or her] employment." Thus, the statute contemplates that the worker's health problems be work-related, see Public Service Co. v. Ingle, 794 P.2d 1374 (Colo. App. 1990), or caused or aggravated by the climatic or other conditions in or near the location where the worker is employed. Alternatively, as the ALJ concluded, the absence of appropriate, on-going medical treatment for a health problem within a reasonable distance from the site of employment might also fall within the contemplation of the statute.

Here, however, neither circumstance exists. Rather, it is claimant's alleged financial condition, not his health, that was the direct motive for his decision to move to California. Thus, we agree with the Panel that § 8-73-108(5)(e)(IV) required that his claim for benefits be denied.

Order affirmed.

Judge Metzger and Judge Ney concur.

Johnnie R. Nielsen, Petitioner,

v.

AMI Industries, Inc., Division of Employment and Training,

and The Industrial Claim Appeals Office of the

State of Colorado, Respondents.

No. 87CA1899.

759 P.2d 834

Colorado Court of Appeals,

Div. II.

June 9, 1988.

Rehearing Denied July 7, 1988.

Tremaroli & McCready, P.C., Guy M. McCready, Colorado Springs, for petitioner.

No appearance for respondent AMI Industries, Inc.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Karen E. Leather, Asst. Atty. Gen., Denver, for respondents Div. of Employment and Training and the Industrial Claim Appeals Office.

NEY, Judge.

Johnnie R. Nielsen, claimant, seeks review of a final order of the Industrial Claim Appeals Office (Panel) which disqualified him from the receipt of unemployment compensation benefits. We set aside the order and remand.

The claimant was employed by AMI Industries, Inc., for over twelve years. During the three months prior to his termination, claimant was employed in the maintenance department.

On the day of the incident which precipitated his termination, claimant was helping his supervisor move and repower machinery. The claimant was asked if he felt "comfortable" working with electrical wiring while the power remained on. Although he did not have much experience in working with "hot" wires or in repowering machinery and would have preferred to shut the power down, claimant said that it would be "no problem."

The claimant was directed to pull a live 220-volt electrical cable through a conduit. Because the claimant mistaped the wires, they short-circuited, causing a shock to the claimant and creating a hazard that could have seriously injured or killed someone. The claimant was terminated after this incident.

Although claimant was initially awarded full benefits by a deputy, the employer appealed that decision and a hearing was held before a referee. At the hearing, the employer testified to an unwritten policy that an employee would not be forced to perform a duty that the employee did not feel comfortable doing. There was no evidence that this policy had ever been communicated to the claimant. The claimant testified that he only agreed to work with the live wires because he was afraid that he would lose his job if he refused.

The referee reversed the deputy's determination and concluded that the claimant was at fault for his separation and thus disqualified from receiving benefits, pursuant to Sec. 8-73-108(5)(e)(XX), C.R.S. (1986 Repl. Vol. 3B). On review of the referee's determination, the Panel upheld the decision.

The claimant contends that the evidence was insufficient to support the Panel's finding that he was at fault for his separation from employment. We agree.

The referee's finding of fault, affirmed by the Panel, was based on claimant's creation of a safety hazard by agreeing to perform a job duty that he was aware he might not be capable of performing. The Panel concluded that since the claimant was not required to perform the job duty in question, and did not feel capable of performing it, he did not act reasonably in agreeing to do so.

Although the Panel's findings of fact may not be altered on review if supported by substantial evidence, Sec. 8-74-107(6), C.R.S. (1986 Repl. Vol. 3B) provides that a decision by the Panel must be set aside if the findings of fact do not support the decision, or if the decision is erroneous as a matter of law.

The intent expressed by statute in granting benefit awards is "that each eligible individual who is unemployed through no fault of his own shall be entitled to receive a full award of benefits." Section 8-73-108(1)(a), C.R.S. (1986 Repl. Vol. 3B) (emphasis added). "Fault" means that the claimant, at a minimum, must have performed some volitional act resulting in the discharge from employment. Gonzales v. Industrial Commission, 740 P.2d 999 (Colo.1987); Zelingers v. Industrial Commission, 679 P.2d 608 (Colo.App.1984).

Here, the referee made no finding as to whether the claimant acted volitionally; thus the case must be remanded for such a finding. See City & County of Denver v. Industrial Commission, 756 P.2d 373 (Colo.1988). Because the basis of the referee's finding of fault was that the claimant unreasonably agreed to perform a job duty which he was not required to perform, the referee must make a finding of whether the claimant was aware of the unwritten policy that he would not be dismissed if he refused to work with the live wires. If the unwritten policy was never communicated to the claimant, the claimant

could not be aware that he had a choice on how to proceed, and thus could not act volitionally. Zelingers, supra; City and County of Denver v. Industrial Commission, supra.

In addition, if the policy was not communicated to claimant, the Panel must consider whether an unwritten, uncommunicated policy constitutes an "established job performance or other defined standard" as is required by Sec. 8-73-108(5)(e)(XX), C.R.S. (1986 Repl. Vol. 3B). Finally, in light of the employer's testimony that there were no written safety rules or regulations, the Panel must consider whether there were any such rules which claimant violated.

The order is set aside and the cause is remanded for further proceedings.

Smith and Van Cise, JJ., concur.

Monard A. Nimmo, Petitioner,

v.

Town of Monument, and the Industrial Commission of the

State of Colorado, Respondents.

No. 86CA1252.

736 P.2d 435

Colorado Court of Appeals,

Div. II.

March 26, 1987.

Cole, Hecox, Tolley, Keene & Beltz, P.C., Thomas L. Kennedy, Colorado Springs, for petitioner.

Don H. Meinhold, P.C., Don H. Meinhold, Colorado Springs, for respondent Town of Monument.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Gregory K. Chambers, Asst. Atty. Gen., Denver, for respondent Industrial Com'n.

SMITH, Judge.

Unemployment compensation claimant, Monard Nimmo, seeks review of an order of the Industrial Commission awarding reduced benefits on the basis that his termination fell within Sec. 8-73-108(5)(e)(I), C.R.S. (1986 Repl. Vol. 3B) (dissatisfaction with standard working conditions.) We set aside the order.

When claimant was employed as an assistant maintenance supervisor for the town of Monument, he was placed on probation for six months pursuant to the town's personnel rules. After six months, claimant's supervisor recommended to the town council that claimant be granted permanent status, be removed from probation, and be given a pay raise of $100 a month. Instead, the town council abolished the position of assistant maintenance supervisor, but retained claimant as a permanent maintenance worker at the same pay level as a probationary assistant maintenance supervisor.

Shortly thereafter claimant filed a grievance with the town personnel board, and when that proved unsuccessful filed suit in district court alleging a breach of employment contract. Claimant testified that as a maintenance worker he no longer spent two days a

week supervising other employees and allocating tasks, but that the remainder of his duties remained essentially the same at first. However, claimant stated that after the maintenance supervisor left, he was asked to do many trivial errands for the town administrator, and was removed from working on the water system. He also testified that approximately one month after the supervisor left, the town council promoted claimant's co-worker to maintenance supervisor even though claimant had been informed that the job would remain open indefinitely. When claimant was informed of that promotion, he quit.

Since claimant's old position was abolished and since claimant's duties other than supervision were unchanged, the referee found no substantial change in claimant's working conditions. The referee further found that the claimant acquiesced in the change by continuing to work for the employer for six months. The referee, therefore, ordered a maximum reduction in benefits. The Industrial Commission adopted and affirmed the referee's decision, and the Industrial Claim Appeals Panel ordered that the Commission's order remain in effect.

On review, claimant contends that the Commission erred in applying Sec. 8-73-108(5)(e)(I), C.R.S. (1986 Repl.Vol. 3B), because the claimant's separation from employment followed a change in job duties. We agree.

A finding that a claimant quit because of dissatisfaction with standard working conditions is proper only when there has been no substantial change in working conditions or duties. Martinez v. Industrial Commission, 657 P.2d 457 (Colo.App.1982). A change in job title is sufficient to constitute a substantial change in working conditions, see Martinez v. Industrial Commission, supra, as is the removal of supervisory duties, even if the claimant's rate of pay remains the same. Warburton v. Industrial Commission, 678 P.2d 1076 (Colo.App.1984).

Here, it was undisputed that claimant's job title had changed and that he had been relieved of his supervisory responsibilities. Therefore, the Commission erred when it found no substantial change in working conditions.

Claimant also contends that there was insufficient evidence to support the Commission's finding that claimant had acquiesced in the changes that occurred. We agree.

Even if there has been a substantial change in working conditions, a claimant can acquiesce in the changes and thereby establish new standard working conditions. Jennings v. Industrial Commission, 682 P.2d 518 (Colo.App.1984).

Here, however, the only support for the finding that claimant acquiesced in the new working conditions is the fact that he continued to work for the employer for six months after the change occurred. In the face of the undisputed evidence that claimant filed a grievance and a district court action protesting the change, the evidence of his continued employment is insufficient as a matter of law to establish acquiescence. Therefore,

claimant has established that he quit because of a substantial change in working conditions, and is entitled to full benefits.

The order is set aside and the cause is remanded to the Industrial Claim Appeals Office with directions to award claimant full benefits pursuant to Sec. 8-73-108(4)(d), C.R.S. (1986 Repl.Vol. 3B).

Tursi and Babcock, JJ., concur.

COLORADO COURT OF APPEALS

Court of Appeals No. 11CA0665
Industrial Claim Appeals Office of the State of Colorado
DD No. 3180-2011

John A. Norman,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; and GMRI, Inc., d/b/a Red Lobster and Olive Garden Restaurants,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division C
Opinion by JUDGE LICHTENSTEIN
Hawthorne and Bernard, JJ., concur

Announced September 1, 2011

John A. Norman, Pro Se

No Appearance for Respondents

In this unemployment compensation benefits case, petitioner, John A. Norman (claimant), seeks review of a final order of the Industrial Claim Appeals Office (Panel) denying his request for a new hearing. The Panel ruled that claimant had not shown good cause for excusing his failure to appear for the hearing previously held and scheduling a new hearing. We disagree, set aside the Panel's order, and remand for a new hearing on the job separation issues.

The relevant facts are not in dispute. On January 10, 2011, claimant was awarded unemployment compensation benefits in a deputy's decision based on his separation from employment with GMRI, Inc. (employer). The deputy's decision included an advisement to claimant that a party could appeal within twenty days of the deputy's decision.

Employer timely appealed the deputy's decision to the Division of Employment on January 25, 2011. As there is no provision for service on the parties, employer's appeal was not served on claimant. The first notice sent to claimant that employer had appealed the deputy's decision was the Division's notice of hearing that was sent to claimant on February 3, 2011. This notice informed claimant that the hearing on employer's appeal was set for February 15, 2011. Claimant failed to appear for the hearing, which was held as scheduled.

The record shows that the notice was sent to claimant two days after he left on a temporary trip: he went to Arizona on February 1, 2011, and returned on February 17, 2011. Claimant was unaware of the hearing until it had already taken place, and he promptly requested a new hearing upon receiving the hearing officer's decision disqualifying him from benefits. Claimant stated that it was a "complete shock" to him that employer had appealed. He was not expecting any important mail while he was away, and therefore did not make any arrangements concerning his mail during that time.

The Panel denied claimant's request for a new hearing, ruling that good cause had not been shown to excuse his absence from the February 15 hearing, and this appeal followed.

The substantive guidelines governing the determination as to whether a party has shown good cause to excuse a failure to act as required are set forth in Department of Labor and Employment Regulation 12.1.8, 7 Code Colo. Regs. 1101-2. One relevant factor in Regulation 12.1.8 is whether the party acted in a "reasonably prudent" manner under the circumstances.

The Panel concluded that claimant did not act reasonably because he did not make arrangements concerning his mail or otherwise contact the employment office while he was away. We cannot agree with this conclusion.

Contrary to the Panel's analysis, the advisement given in the deputy's decision that a party could appeal within twenty days of the decision would not give a reasonable and prudent person any reason to expect a hearing to be set and held within days of that deadline, or to make arrangements to cover that possibility. We note that the advisement given in the deputy's decision informed the parties that an appeal may or may not be accepted by the Division. This language suggests that a discretionary decision must be made after the receipt of an appeal request, further evidencing that a reasonable and prudent person would not have expected a hearing to be held within days of the appeal deadline. In our view, a reasonable and prudent person would not be expected to have another person check and open his or her mail to see if a hearing had been set during a temporary absence of short duration without being given any previous indication of any appeal. We also conclude that claimant acted reasonably in *not* anticipating further proceedings on his unemployment claim, including a hearing, during his brief time away, when he had previously been awarded benefits and left on his trip after employer's appeal deadline had expired without any indication given to him of any pending proceedings.

Moreover, other regulatory factors also support a determination that good cause was shown. The record shows that claimant failed to appear for the February 15 hearing because he lacked timely actual notice of the need to act. Further, "the overall interests of an accurate and

fair resolution of the underlying issue to be decided" support scheduling a new hearing with an opportunity for claimant's participation, and there is no indication in the record that employer would be prejudiced by scheduling a new hearing. *See* Reg. 12.1.8.

Although the Panel generally has discretion to weigh the various factors in Regulation 12.1.8 in making its good cause determination, we conclude that it abused its discretion in denying claimant's request for a new hearing under these circumstances. Rather, we conclude that good cause was shown under the regulatory criteria for excusing claimant's failure to appear and scheduling a new hearing, and the Panel erred in ruling otherwise. *See* § 8-74-107(6)(d), C.R.S. 2010 (Panel's decision may be set aside when it is erroneous as a matter of law); *Davis v. Indus. Claim Appeals Office*, 982 P.2d 330, 332-33 (Colo. App. 1999).

The Panel's order is set aside, and the case is remanded to it with directions to vacate the hearing officer's decision and to remand the case for a new hearing on the merits of employer's appeal from the deputy's decision.

JUDGE HAWTHORNE and JUDGE BERNARD concur.

190 Colo. 472

Owen M. OLSGARD, Petitioner,
v.
INDUSTRIAL COMMISSION and Colorado Springs Auto Parts Company, Respondents.

No. 26962.
Supreme Court of Colorado, En Banc.
April 19, 1976.
Rehearing Denied May 10, 1976.

Review was sought of an order of the Industrial Commission affirming decision of referee which imposed a 26-week disqualification from unemployment compensation. The Supreme Court, Erickson, J., held that substantial evidence supported determination that claimant's employment was terminated for rudeness, insolence, or offensive behavior not reasonably to be countenanced by supervisor or fellow workers.

Affirmed.

Loa E. Bliss, Colorado Springs, for petitioner.

J. D. MacFarlane, Atty. Gen., Jean E. Dubofsky, Deputy Atty. Gen., Edward G. Donovan, Sol. Gen., John Kezer, Asst. Atty. Gen., Denver, for respondent, Industrial Commission.

ERICKSON, Justice.

In this unemployment compensation case, the Industrial Commission affirmed a decision of the referee which imposed a 26-week disqualification from unemployment compensation upon the appellant, Owen M. Olsgard, pursuant to 1965 Perm. Supp., C.R.S. 1963, 82-4-8(6)(b)(xvi). (FN1) The statutory subsection in issue limits the receipt of unemployment benefits by a claimant when termination of employment results from: '(r)udeness, insolence, or offensive behavior of the worker not reasonably to be countenanced by a customer, supervisor, or fellow worker.' We affirm.

Olsgard was hired as a machinist on an hourly basis by Colorado Springs Auto Parts. He began work in February of 1973 and was terminated in July of 1974. The events leading up to his termination involved a controversy between Olsgard and the owner of Colorado Springs Auto Parts regarding the refusal of the owner to pay Olsgard for a day missed from work because of illness. Olsgard had called in sick and had been told by a foreman that he

should not report for work if he was sick. The company had no fixed policy on sick leave, although generally employees had been paid on an ad hoc basis.

The claimant approached the owner three different times about not being paid for the day he was sick. The owner, who was elderly and in poor health, refused to make a decision the first time. The second time, the claimant became upset when the owner told him, 'Here is your check. If you don't like it get out.' During this confrontation, the claimant told the owner

---------- Page 548 P.2d 911. follows ----------

that he was 'going to puke right in (the owner's) face the next time he got sick.' Coming back a third time, the claimant stated again, this time in the presence of other employees, that he would puke in the owner's face. The owner's son, James Kramer, who was the general manager, terminated Olsgard at that point.

In this review, we must determine whether the claimant was discharged due to rudeness, insolence, or offensive behavior not reasonably to be countenanced by his supervisor or fellow workers. The legislative intent behind the Colorado Employment Security Act is clear. The funds reserved pursuant to the statute are to be used to benefit persons 'unemployed through no fault of their own.' C.R.S. 1963, 82-1-2. (FN2) The expressed policy is made effective by C.R.S. 1963, 82-4-8(6), (FN3) which describes the circumstances where 'no award is to be given.'

In this case, the Industrial Commission reviewed the record before the referee and concluded that the referee's findings, denying the employee unemployment compensation, were supported by competent and substantial evidence, and that the referee's decision was made in accordance with the statutory test. Since there is substantial evidence in the record to justify the findings of fact and the conclusions of the commission, the commission's determination should not be disturbed by us on appeal. *Morrison Rood Bar, Inc. v. Industrial Comm.*, 138 Colo. 16, 328 P.2d 1076 (1958); *See also Industrial Commission v. Bennett*, 166 Colo. 101, 441 P.2d 648 (1968).

The other errors asserted by the claimant in this case are without merit.

Accordingly, we affirm the order of the Industrial Commission.

PRINGLE, C.J., and DAY, J., do not participate.

FN1. Now section 8-73-108(6)(p), C.R.S. 1973.

FN2. Now section 8-70-102, C.R.S. 1973.

FN3. Now section 8-73-108(6), C.R.S. 1973.

Kendal J. Pabst, Petitioner,

v.

The Industrial Claim Appeals Office of

the State of Colorado, Respondent.

No. 91CA1682.

833 P.2d 64

Colorado Court of Appeals,

Div. I.

May 21, 1992.

Kendal J. Pabst, pro se.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., John R. Parsons, Asst. Atty. Gen., Denver, Colo., for respondent.

HUME, Judge.

Kendal J. Pabst, claimant, seeks review of a final order of the Industrial Claim Appeals Panel which disqualified him from the receipt of unemployment compensation benefits. We affirm.

The deputy disqualified claimant for failure to meet established job performance standards. See Sec. 8-73-108(5)(e)(XX), C.R.S. (1986 Repl.Vol. 3B).

On administrative review of that ruling, a hearing officer found that claimant was not performing his job in a manner which satisfied employer and that claimant knew about employer's concerns following a discussion on January 14, 1991 about his performance. The hearing officer further found that claimant was discharged in February 1991 because he had not made the desired improvement in his performance. However, she nevertheless concluded that claimant had not been made aware that his job "was in jeopardy" if he failed to improve. Consequently, she concluded that claimant had failed to act volitionally and was not at fault for his separation.

Thus, the hearing officer awarded claimant benefits pursuant to Sec. 8-73-108(4), C.R.S. (1986 Repl.Vol. 3B). The Panel, however, reversed the hearing officer and disqualified claimant for failure to meet established job performance standards.

Claimant contends the Panel erred in disqualifying him from the receipt of benefits. Relying on Zelingers v. Industrial Commission, 679 P.2d 608 (Colo.App.1984), he argues that because he was not warned that his job was in jeopardy, he did not act volitionally in failing to meet any job performance standards and therefore was not at fault for his separation. Consequently, he argues that he should be awarded benefits pursuant to Sec. 8-73-108(4). We find no merit to this argument.

Section 8-73-108(5)(e)(XX) provides for a disqualification if a claimant has been discharged for failing to meet established job performance standards. All that is required to establish a disqualification pursuant to Sec. 8-73-108(5)(e)(XX) is that claimant did not do the job for which he was hired and which he knew was expected of him. See Dawson v. Industrial Commission, 660 P.2d 924 (Colo.App.1983).

Here, the hearing officer found that claimant knew what was expected of him, at least as of January 14, 1991. The hearing officer further found that claimant did not satisfactorily perform the job thereafter. These findings are sufficient to support a disqualification pursuant to Sec. 8-73-108(5)(e)(XX).

Contrary to claimant's argument, we hold that, if the Dawson criteria are met, there is no requirement that a claimant be explicitly warned that his "job is in jeopardy" if his performance does not improve in order to support a disqualification for failure to meet established job performance standards. Further, we are unpersuaded that our decision in Zelingers v. Industrial Commission, supra, mandates an award of benefits to claimant. That case concerned an employee who was granted at least tacit permission to miss work prior to being terminated. No such misleading inconsistency exists here.

Since the hearing officer's findings support a disqualification pursuant to Sec. 8-73-108(5)(e)(XX), we will not disturb the Panel's order. Section 8-74-107(6), C.R.S. (1986 Repl.Vol. 3B).

We have considered and find no merit in claimant's other arguments.

Order affirmed.

Pierce and Rothenberg, JJ., concur.

Craig W. Parker, Petitioner,

v.

Daniels Motors, Inc., and the Industrial Commission

of the State of Colorado, Respondents

No. 86CA0131

738 P.2d 68

Colorado Court of Appeals,

Div. I.

April 23, 1987

Stephen J. Sletta, Attorney for Petitioner.

Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General, Jill M. M. Gallet, Assistant Attorney General, Attorneys for Respondent Industrial Commission.

No appearance for Respondent Daniels Motors, Inc.

KELLY, Judge.

Craig W. Parker (claimant) seeks review of a final order of the Industrial Commission denying him unemployment benefits under § 8-73-108(5)(e)(XX), C.R.S. (1986 Repl. Vol. 3B) (failure to meet established job performance standards). We affirm.

Claimant, a service advisor for a Chevrolet dealership, was discharged when he returned to work after a sick leave. Claimant's supervisor testified that claimant was fired because he had made excessive errors in repair estimates and also gave a customer an unauthorized warranty on a part. The supervisor stated that claimant was not careful and attentive to detail in his work. Claimant admitted making errors, but asserted that he was not at fault or that the errors were not excessive for his level of experience. The supervisor testified that claimant's errors were excessive and greater than those of the other service advisors. The supervisor also stated that he had warned claimant about his performance, but claimant did not improve.

The Commission concluded that claimant was discharged for failure to meet established job performance standards, and denied all benefits attributable to the employer or twenty-five times claimant's weekly benefit amount, whichever was less.

On review, claimant contends that the Commission erred in denying him benefits based on failure to meet established job performance standards. Claimant argues that the Commission did not adequately define the standards applicable to claimant's job. We disagree.

"Failure to meet established job performance standards" means that claimant did not do the job for which he was hired and which he knew was expected of him. Dawson v. Industrial Commission, 660 P.2d 924 (Colo. App. 1983). Here, although claimant presented contrary testimony, there was ample testimony from the supervisor about the performance standards for service advisors, his warnings to claimant, and claimant's excessive errors. The Commission's resolution of this conflicting evidence is binding on review. In re Claim of Krantz v. Kelran Constructors, Inc., 669 P.2d 1049 (Colo. App. 1983). It was not necessary that the Commission describe the job performance standard in any greater detail. See In re Claim of Allmendinger v. Industrial Commission, 40 Colo. App. 210, 571 P.2d 741 (1977).

Claimant also contends that the Commission erred in denying him benefits, arguing that under § 8-73-108(5)(g), C.R.S. (1986 Repl. Vol. 3B), his benefits could be deferred for ten weeks, but not denied. We disagree.

The purpose of the unemployment compensation act is to provide protection to those unemployed through no fault of their own. Section 8-70-102, C.R.S. (1986 Repl.Vol. 3B). Unemployment compensation benefits are not provided to an employee whose separation from employment is voluntary or for cause. Section 8-73-108(5)(e), C.R.S. (1986 Repl. Vol. 3B); see Industrial Commission v. Moffat County School District, 732 P.2d 616 (Colo. 1987); Denver Post Corp. v. Industrial Commission, 677 P.2d 436 (Colo. App. 1984).

Section 8-73-108(5)(e) provides:

"Subject to the maximum reduction consistent with federal law, and insofar as consistent with interstate agreements, if separation from employment occurs for [failure to meet established job performance standards], the employer from whom such separation occurred shall not be charged for benefits which are attributable to such employment and, because any payment of benefits which are attributable to such employment out of the fund as defined in Section 8-70-103(13) shall be deemed to have an adverse effect on such employer's account in such fund, no payment of such benefits shall be made from such fund . . . ."

By the language of this provision, except to the extent required by federal law, a claimant is not entitled to any benefits attributable to employment terminated voluntarily or for cause, since neither the employer nor the fund can be charged for those benefits.

Claimant, however, argues that § 8-73-108(5)(g) overrides the above disqualification provision; that section provides:

"If a separation from employment subject to adjudication under this subsection (5) occurs for any of the reasons enumerated in paragraph (e) of this subsection (5) and such separation is the most recent separation from employment, any benefits to which the claimant is entitled shall be deferred for ten weeks."

These two subsections must be read together to give meaning and effect to both. See Colorado Department of Social Services v. Board of County Commissioners, 697 P.2d 1 (Colo. 1985). Section 8-73-108(5)(e) provides that claimant is not entitled to benefits attributable to the terminated employment, while § 8-73-108(5)(g) provides the time for payment of "any benefits to which the claimant is entitled." We hold that § 8-73-108(5)(g) refers to the deferral of any benefits attributable to other employments to which claimant may be entitled, and does not negate the plain disqualification provisions of § 8-73-108(5)(e).

Order affirmed.

Judge Pierce and Judge Metzger concur.

George L. Patterson

v.

Industrial Commission of Colorado (Ex-Officio

Unemployment Compensation Commission

of Colorado) and Colorado Interstate

Gas Company

Nos. 76-709, 76-879

39 Colo. App. 255, 567 P.2d 385

Colorado Court of Appeals

Div. I.

April 28, 1977

Theodore M. Smith, for petitioner.

J. D. MacFarlane, Attorney General, Jean E. Dubofsky, Deputy Attorney General, Edward G. Donovan, Assistant Attorney General, John Kezer, Assistant Attorney General, for respondent Industrial Commission of Colorado.

Geddes, MacDougall & McHugh, P.C., Robert C. McHugh, for respondent Colorado Interstate Gas Company.

COYTE, Judge.

In this unemployment compensation proceeding, the claimant, George Patterson, seeks review of the order of the Industrial Commission reducing claimant's entitlement to benefits. We set aside the order.

The following facts are uncontroverted. Claimant had been employed by respondent, Colorado Interstate Gas Company, for approximately twenty years prior to his termination. In April 1976, claimant became involved in a verbal altercation with a company supervisor. As a result of the incident, the company determined that for disciplinary purposes claimant should be transferred to its Kansas offices. The order of transfer was communicated to claimant, who, relying on a company policy to the effect that transfers would not be accomplished absent an employee's consent, declined to report to the Kansas facility. The company thereupon discharged claimant.

Claimant subsequently initiated a claim for unemployment compensation benefits and was awarded full benefits by the deputy. After hearing, the referee concluded the claimant had deliberately refused to accept a reasonable order of the employer. Accordingly, the referee reversed the deputy's decisions, and, pursuant to § 8-73-108(6)(h), C.R.S. 1973, disqualified claimant from the receipt of benefits for a 13-week period.

On September 23, 1976, the Commission issued its decision affirming the findings and award of the referee. Within 10 days, claimant filed a petition for review before the Commission and also before this court. On October 20, 1976, the Commission issued a "supplemental award" which affirmed its previous decision. While a certificate of mailing is appended to the supplemental award, the certificate bears no signature attesting that a copy of the decision had, in fact, been properly deposited in the mail.

In December 1976, claimant filed a notice of appeal and a second petition to review with this court. By motion and order, the two petitions were consolidated, and the company's request that the consolidated appeal be dismissed was denied with leave to argue the issue in briefs.

I.

The company maintains that, inasmuch as claimant's notice of appeal was not timely filed, this court lacks jurisdiction to proceed in the matter. In view of the circumstances presented here, we disagree with this argument.

Section 8-74-109, C.R.S. 1973, provides that an action to review a final order of the Commission must be commenced within 20 days of the date of issuance of the order. Compliance with the statutory procedures is mandatory. Washburn v. Industrial Commission, 153 Colo. 500, 386 P.2d 975 (1963).

However, the Commission is required by statute to "promptly notify" interested parties of a decision, § 8-74-105, C.R.S. 1973, and a failure to do so may constitute error of constitutional dimension. Where an attorney through no fault of his own is denied notice of a critical determination in a proceeding and consequently does not complete the procedural requisites necessary to preserve his client's right to appeal, procedural due process requires that the appeal be allowed. Mountain States Telephone & Telegraph Co. v. Department of Labor, 184 Colo. 334, 520 P.2d 586 (1974); see also Zimmerman v. Industrial Commission, 108 Colo. 552, 120 P.2d 636 (1941).

In this case, the irregularity in the certificate of mailing establishes a prima facie lack of notice, cf. Zimmerman v. Industrial Commission, supra, and, in conjunction with claimant's denial of receipt of the supplemental award, sufficiently rebuts any inference to be drawn from the affidavits of the company's counsel asserting that they had received copies of the award. Fundamental fairness thus dictates that claimant's review be permitted. Mountain States Telephone & Telegraph Co. v. Department of Labor, supra.

II.

Claimant argues that in light of the company rules regarding transfers, the Commission erroneously found that he had been discharged for insubordination and thus erroneously reduced his award. We agree.

While § 8-73-108(6)(h), C.R.S. 1973, does permit reduced awards for a claimant separated from employment by reason of his insubordination, there is no evidence to support the Commission's finding that the claimant here had deliberately disobeyed a reasonable instruction. To the contrary, the uncontroverted evidence in the record reveals that claimant was terminated as a consequence of the employer's violation of the employment contract, which circumstance entitled claimant to a full award of benefits provided that he had exhausted any contractual remedies. See § 8-73-108(4)(h), C.R.S. 1973; Wade v. Hurley, 33 Colo. App. 30, 515 P.2d 491 (1973).

It is not disputed that the alleged act of insubordination leading to claimant's termination was his refusal to accept a transfer. Nor does the company deny that its stated policy of permitting an employee to decline a transfer, a copy of which directive is a part of this record, was in effect at the time of claimant's refusal. Further, uncontradicted testimony and documentary evidence in the record show that claimant attempted to resolve the dispute through available company procedures.

Accordingly, it is immaterial to the issues here that claimant's employment contract was one terminable at will, see Justice v. Stanley Aviation Corp., 35 Colo. App. 1, 530 P.2d 984 (1974), or that the company might have discharged claimant immediately following the altercation without affording him an opportunity to transfer. By selecting claimant's refusal to accept transfer as the ground of termination, the company directly contravened its own rule. Therefore, § 8-73-108(4)(h), C.R.S. 1973, was dispositive of the claim for benefits, and the Commission erred in reducing claimant's award under § 8-73-108(6)(h), C.R.S. 1973.

The order is set aside and the cause remanded with directions to award claimant a full entitlement of benefits.

Judge Smith and Judge Van Cise concur.

David J. Paul, Petitioner,

v.

Industrial Commission of the State of Colorado and

F. A. Heckendorf, Inc., Respondents.

No. 80CA0737.

632 P.2d 638

Colorado Court of Appeals,

Div. III.

May 14, 1981.

Rehearing Denied June 11, 1981.

Geoffrey deWolfe, Carol Glowinsky, Colorado Springs, for petitioner.

J. D. MacFarlane, Atty. Gen., Richard F. Hennessey, Deputy Atty. Gen., Mary J. Mullarkey, Sol. Gen., David L. Lavinder, Asst. Atty. Gen., Denver, for respondents.

KIRSHBAUM, Judge.

Unemployment compensation claimant, David J. Paul, seeks review of a final order of the Industrial Commission requiring him to repay previously awarded benefits. We affirm.

Having been discharged from employment, claimant filed a claim for unemployment compensation benefits in August 1979. On September 10, 1979, claimant was awarded benefits in the amount of $81 per week by a deputy. The employer appealed, and a hearing before a referee was scheduled October 15, 1979. Claimant's notice of that hearing contained the following statement:

"A hearing ... is conducted to determine why the employee was separated from his job and whether he is entitled to, or is qualified for benefits. All issues and factual matters affecting claimant's eligibility and qualifications for benefits will be heard...."

The notice also advised claimant that he might confer with his local employment office if he did not understand the law and his rights respecting the appeal from the deputy's ruling.

On the basis of the evidence adduced at the October 15, 1979, hearing, the referee modified the deputy's award, concluding that claimant was disqualified from receiving benefits for 14 weeks. Claimant did not appeal that ruling.

On November 5, 1979, claimant received a notice from the Commission that he had been overpaid in the amount of $567 in unemployment benefits. After a hearing and other proceedings not here relevant, the Commission determined that claimant had been overpaid in that amount, that claimant did owe the Commission that sum, and that repayment should be made as an offset against future benefits to which claimant might be entitled.

Claimant contends that the provisions of 42 U.S.C. § 503(a)(1) prohibit any offset against future benefits to be assessed against a claimant who is not at fault in creating an overpayment of benefits. We disagree.

42 U.S.C. § 503(a)(1) requires state unemployment compensation programs to "be reasonably calculated to insure full payment of unemployment compensation when due ...." The statute provides a means to insure prompt payments in lieu of wages to eligible individuals who become unemployed through no fault of their own. California Department of Human Resources v. Java, 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666 (1971). Colorado's unemployment compensation statutes are intended to further the same goals. Section 8-74-109(1), C.R.S. 1973 (1980 Cum.Supp.).

Nothing in the language of the federal statute nor its stated purposes suggests that Congress intended to provide a permanent windfall to individuals who receive initial benefits to which, it is later determined, they are not entitled. Colorado's statutory program of authorizing immediate payment of unemployment compensation benefits prior to any formal hearing and permitting repayment of sums subsequently found to have been improperly advanced in the form of offsets against future awards furthers the policies of ensuring fair treatment for the unemployed which underlie the provisions of the federal act. See Cardenas v. Commonwealth Unemployment Compensation Board of Review, 36 Pa.Cmwlth. 543, 388 A.2d 765 (1978).

Claimant also argues that the notice he received respecting the referee's hearing was fatally defective and violative of due process of law because it did not specifically inform him that he might be required to repay his previously awarded benefits. We again disagree.

The General Assembly has provided specifically for the recovery of benefits by the Commission when the benefits are paid in error. Sections 8-74-109(2), 8-81-101(4), C.R.S. 1973 (1980 Cum.Supp.). Claimant, having requested benefits pursuant to the unemployment compensation statutes, must be presumed to have knowledge of the contents of that statute. See Jensen v. Jensen, 92 Colo. 169, 18 P.2d 1016 (1933); Pomeranz v. Class, 82 Colo. 173, 257 P. 1086 (1927).

Claimant concedes that the notice he received advised him of a possible disqualification and a potential loss of unemployment benefits. Such warnings were sufficient to put claimant on reasonable notice that his previously awarded benefits might be forfeited. See Tucker v. Caldwell, 608 F.2d 140 (5th Cir. 1979). We conclude that an express warning of the results of such adverse determinations was not constitutionally required.

Order affirmed.

Berman and Kelly, JJ., concur.

Pepsi-Cola Bottling Co. of Denver, Petitioner,

v.

The Colorado Division of Employment and Training,

The Industrial Claim Appeals Office of the State of

Colorado and Michael A. Turpin, Respondents.

No. 87CA1231.

754 P.2d 1382

Colorado Court of Appeals,

Div. III.

April 7, 1988.

Fairfield and Woods, P.C., Brent T. Johnson, Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Robert C. Lehnert, Asst. Atty. Gen., Denver, for respondents Colorado Div. of Employment and Training and Industrial Claim Appeals Office.

Zuckerman & Kleinman, P.C., Amado L. Cruz, Denver, for respondent Turpin.

JONES, Judge.

Pepsi Cola Bottling Company, employer, seeks review of a final order of the Industrial Claim Appeals Office (Panel) which awarded unemployment compensation benefits to Michael A. Turpin, claimant. We affirm.

Claimant was employed as a mechanic for employer from August 1978 to October 17, 1986, the date of termination. At the time of termination his work shift was 6 a.m. to 2:30 p.m. After his last full day of work on October 15, claimant consumed a tranquilizer and alcohol for purposes of relieving stress. He became comatose and required emergency treatment at a hospital. After his stomach was pumped and other treatment given, claimant was discharged in the early morning hours of October 16, and was taken home by his parents in a soporiferous state, with instructions that he have strict bedrest for 1-2 days.

Claimant slept until approximately one p.m. on October 16, at which time he briefly awakened. He was cognizant of a need to call employer concerning his absence, but determined it was too late as little more than one hour remained on his shift. He

immediately fell asleep again and did not awaken until approximately 8:35 a.m. on October 17. Claimant called his supervisor to report his absence at that time but was informed that he had been terminated at 8:30 a.m. that morning. Claimant's supervisor would not allow claimant to give a full explanation for his failure to report and did not request medical documentation. Claimant had no record of absence or tardiness with the exception of one failure to justify an absence from work, in advance, in January 1979.

Arguing that the evidence was insufficient to support a finding that claimant was not at fault for his separation, employer contends that the Panel erred in awarding claimant benefits. We reject this contention.

Fault under the statute is not necessarily related to culpability, but must be construed as requiring a volitional act. Zelingers v. Industrial Commission, 679 P.2d 608 (Colo.App.1984). As claimant's shift began at six a.m. on October 16, company policy dictated that he call his supervisor before that time. But he had been discharged from the hospital in a state of dulled awareness only five hours earlier. Under these circumstances, the Panel's finding that claimant's failure to call his supervisor was not a volitional act is reasonable, and is an appropriate resolution based on the conflicting evidence presented on this issue. See Mohawk Data Sciences Corp. v. Industrial Commission, 660 P.2d 922 (Colo.App.1983).

There was sufficient evidence to support the Panel's findings that claimant was physically unable to telephone employer to report his absence from work and that claimant therefore was not at fault for his termination. See Zelingers v. Industrial Commission, supra. Consequently, on review we will not disturb either these findings or the Panel's conclusion to award claimant benefits pursuant to Sec. 8-73-108(4), C.R.S. (1986 Repl.Vol. 3B). See Santa Fe Energy Co. v. Baca, 673 P.2d 374 (Colo.App.1983); Mohawk Data Sciences Corp. v. Industrial Commission, supra.

We also reject employer's contention that the Panel erred in not disqualifying claimant from the receipt of benefits pursuant either to Sec. 8-73-108(5)(e)(VIII) (off-the-job use of not medically prescribed intoxicating beverages or controlled substances resulting in interference with job performance) or Sec. 8-73-108(5)(e)(XX), C.R.S. (1986 Repl.Vol. 3B) (a general disqualifying subsection for conduct such as excessive tardiness and absenteeism, sleeping or loafing, or failure to meet established job performance). Even if we assume the evidence would support the application of either subsection, the record reflects that employer, in its discretion, terminated claimant prior to its discovery of any such grounds.

In Gandy v. Industrial Commission, 680 P.2d 1281 (Colo.App.1983), we interpreted Kortz v. Industrial Commission, 38 Colo.App. 411, 557 P.2d 842 (1976), to hold "that where an employee is separated for reasons justifying compensation, the employer may not rely on later discovered evidence of misconduct as a basis to contest an award of benefits." And, since the Panel's decision to award benefits pursuant to Sec. 8-73-108(4), C.R.S., was supported by substantial evidence, we will not disturb it on review. Mohawk Data Sciences Corp. v. Industrial Commission, supra.

Finally, we are without authority to impose sanctions for a frivolous review petition in an unemployment proceeding, see Haynes v. Interior Investments, 725 P.2d 100 (Colo.App.1986), and even if we did have such authority we would conclude that employer's petition is not frivolous, and so would deny claimant's request for attorney fees.

Order affirmed.

Van Cise and Sternberg, JJ., concur.

Public Service Company of Colorado, Petitioner,

v.

Michael H. Ingle and the Industrial Claim Appeals Office of

the State of Colorado, Respondents.

No. 89CA1637.

794 P.2d 1374

Colorado Court of Appeals,

Div. II.

June 14, 1990.

Kelly, Stansfield & O'Donnell, Marla S. Petrini, Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Carolyn A. Boyd, Asst. Atty. Gen., Denver, for respondent Industrial Claim Appeals Office.

No appearance for respondent Michael H. Ingle.

SMITH, Judge.

Public Service Company, employer, seeks review of a final order of the Industrial Claim Appeals Office (Panel) which awarded unemployment compensation benefits to claimant, Michael H. Ingle. We set aside the order of the Panel and remand.

Claimant worked for employer as a computer operator. Management initially placed claimant on the day shift, but later told him he was being transferred to the night shift for cross-training purposes. Claimant told his supervisor that he did not believe he could work the night shift and sleep days because he had a sleep disorder. Management requested written medical verification of claimant's medical condition. Claimant decided not to provide the verification, but instead attempted to work the night shift. He so advised management.

Claimant worked the night shift for about two weeks, during which time his work performance was affected because he had trouble sleeping. Claimant tendered verbal and written resignations, citing his medical problems as the reason for his resignation. Employer did not request written medical substantiation of claimant's assertion that he was quitting for medical reasons.

The hearing officer found that claimant quit his job for health reasons and that employer was fully informed of these reasons when claimant quit. The hearing officer then concluded that claimant's state of health required him to seek a different kind of work.

The hearing officer also found that, once employer accepted claimant's decision to work the night shift and did not request written verification of claimant's medical condition again when claimant quit, employer waived, in essence, any request it had made that claimant provide written verification of his medical condition. Accordingly, the hearing officer granted claimant benefits pursuant to Sec. 8-73-108(4)(b)(I), C.R.S. (1986 Repl.Vol. 3B). The Panel affirmed.

I.

Employer contends that the Panel erred as a matter of law in interpreting the phrase "new occupation" and in awarding claimant benefits pursuant to Sec. 8-73-108(4)(b)(I). We agree.

Section 8-73-108(4)(b)(I) provides for an award of benefits if a worker's health is such that he "must seek a new occupation." (emphasis supplied)

In affirming, the Panel noted it applied a very broad definition of "occupation." The Panel concluded that the requirement that claimant seek a "new occupation" was satisfied when the health of the worker prevented him from continuing in a specific job because of the conditions of that particular employment, even though the claimant could continue in the same line of work. Under the Panel's interpretation, then, a claimant would satisfy the requirement of seeking a "new occupation" if he simply had to seek a new job because of work-related health reasons. This would be true even if the new job were in the same line of work as the job he quit.

Employer argues, however, that claimant's health did not prevent him from seeking and performing the same type of work he had been performing as a computer operator under different employment conditions. Therefore, employer asserts, claimant was not required to seek a "new occupation" and benefits were improperly awarded.

The primary task in construing a statute is to ascertain the intent of the General Assembly. People v. Beyer, 768 P.2d 746 (Colo.App.1988). To do so, we must consider the statute as a whole, construe the entire act to give consistent, harmonious, and sensible effect to all its parts, and consider the ends the statute is designed to accomplish. See Redin v. Empire Oldsmobile, Inc., 746 P.2d 52 (Colo.App.1987).

In ascertaining the legislative intent, meaning is to be given to every word, phrase, clause, sentence, and section, if possible. Denver v. Taylor, 88 Colo. 89, 292 P. 594 (1930). Further, in determining the meaning of the word "occupation," we must give effect to its plain and ordinary meaning and avoid strained interpretations. See Cache La Poudre Reservoir Co. v. Industrial Claim Appeals Panel, 757 P.2d 173 (Colo.App.1988).

Upon consideration of these principles, we conclude the Panel misinterpreted the phrase "new occupation" as it is used in Sec. 8-73-108(4)(b)(I). We conclude that "occupation," in its plain and ordinary meaning, generally refers to the particular type of business, profession, or employment in which a worker regularly engages, i.e., the particular type of work a worker performs. It has no relationship to specific employers. Thus, a worker could be engaged in an occupation as a doctor, computer operator, plumber, electrician, secretary, bus driver, etc., either on his or her own or for any employer who employs a person who performs that type of work.

On the other hand, "employment," "job," or "work" usually connotes a particular position held by an individual at a particular place of work at a given time. Therefore, "occupation," has a different meaning than "job," "employment," and "work," as it is used in the statutory sections relating to qualifications for unemployment compensation.

That the General Assembly intended such a result is supported by a review of the specific statutory sections involved here.

Pursuant to Sec. 8-73-108(4)(b)(I), a claimant may be awarded benefits when his termination is health related under three general categories: (1) the health of the worker requires him to be separated from his employment for a period of time; (2) the worker's health requires him to seek a new occupation; or (3) the health of the worker, his spouse, or his dependent child requires him to leave the vicinity of his employment. Thus, by this provision, the General Assembly twice premised an award of benefits on a claimant's having been separated from his employment and once on a claimant's having been required to seek a new occupation.

By its choice of words, the General Assembly has indicated its intention to differentiate between "employment" and "occupation." See State v. Borquez, 751 P.2d 639 (Colo.1988). Consequently, we conclude that the General Assembly intended that a claimant be required to seek a new "occupation" or line of work, and not just new employment, in order to be eligible for benefits under the second condition of Sec. 8-73-108(4)(b)(I). Hence, the Panel erred in granting claimant an award of benefits pursuant to this section.

II.

Although an award of benefits premised on the "new occupation" portion of the statute was improper, claimant could be entitled to benefits if his sleep disorder caused him to be unable to continue his job. Employer, however, contends that claimant has not satisfied the requirements of the statute for such eligibility because he did not provide a written medical statement substantiating that he was quitting because of his health condition. We reject employer's contention.

Pursuant to Sec. 8-73-108(4)(b)(I), a claimant who quits for health reasons must inform his employer of the condition of his health prior to his separation from employment and substantiate the cause by a competent written medical statement issued prior to his

separation if so requested by his employer prior to his separation or within a reasonable time thereafter.

Employer contends that because it requested a medical statement from claimant when he asked not to be transferred to the night shift because of health reasons, and claimant refused to provide any medical documentation at that time, it was not required to ask for medical substantiation again when claimant resigned, citing the same health reasons. It argues that it was entitled to assume claimant would again refuse to provide the documentation. Therefore, employer concludes that claimant failed to comply with the statutory requirement of providing written substantiation of his medical condition when so requested by employer. We disagree.

We construe Sec. 8-73-108(4)(b)(I) to require an employer to request a claimant to provide competent written medical substantiation that health reasons are the cause of his separation from employment after the claimant informs the employer that he is resigning for health reasons.

Here, the employer did request a medical statement when the claimant objected to the transfer to the night shift, but the employer did not request a statement to "substantiate the cause" of his resignation when claimant subsequently notified the employer several weeks later that he was quitting because of his health condition. Consequently, since employer failed to request written substantiation as is required by the statute, claimant is not precluded from being entitled to unemployment benefits by virtue of not having provided the written medical statement concerning the reasons for his resignation.

The order of the Panel is set aside, and the cause is remanded to the Panel for re-consideration under the more appropriate statutory provisions referred to herein.

Metzger and Plank, JJ., concur.

Pueblo School District No. 60, Petitioner,

v.

Prescilla Martinez, Colorado Division of Employment and

Training and the Industrial Claim Appeals Office of

the State of Colorado, Respondents.

No. 87CA0294.

749 P.2d 1005, 45 Ed. Law Rep. 281

Colorado Court of Appeals,

Div. II.

Dec. 31, 1987.

Petersen & Fonda, P.C., Kathleen K. Hearn, Pueblo, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Mary Ann Whiteside, First Asst. Atty. Gen., Denver, for respondents Div. of Employment & Training and Indus. Claim Appeals Office.

No appearance for respondent Prescilla Martinez.

VAN CISE, Judge.

Pueblo School District No. 60 seeks review of an order of the Industrial Claim Appeals Office (Panel) which granted an award of unemployment benefits to Prescilla Martinez (claimant). We affirm.

Testimony at claimant's unemployment hearing established that claimant, a janitor, was charged by school officials with taking toilet paper and was "suspended indefinitely without pay pending investigation for dismissal," pursuant to the school district work rules. Two weeks later, after a school disciplinary hearing and administrative review, a school district associate superintendent ordered claimant's termination to be processed before the board of education. Claimant's termination would have been processed immediately but for claimant's request, through her union representative, that no further action be taken until she exhausted her grievance rights. Grievance procedures, and claimant's suspension, lasted about three months longer. During this time claimant applied for unemployment benefits. The day before claimant's final grievance hearing, the school reinstated claimant.

While on suspension, claimant performed no services for and received no wages from the school district. However, her fringe benefits, such as health insurance and leave time, were continued. Further, she was subject to being recalled to work, at any time, subject to the suspension by the school district. Claimant testified, though, that she understood that she had no assurance of ever being returned to work and that she was free to seek other employment, which she did. The school district not only confirmed this, but admitted that her suspension was open-ended, that particularly after the termination recommendation the school district had no intention to return claimant to work, and that her only opportunity of returning to work was based upon her prevailing when her case was heard by the board of education.

Upon conflicting testimony, the Panel found that, upon leaving work one evening, claimant discovered a school trash bag lodged under the side of her car. After determining that the trash bag contained aluminum cans, claimant placed the bag in her trunk. She was not surprised to find the bag because she collected aluminum cans with the school's permission, and thought that perhaps student helpers had placed the bag there for her. Claimant willingly allowed the school district representatives to investigate the contents of the bag when they stopped her as she was driving out of the parking lot. Claimant testified it was then she discovered the toilet paper in the bag.

From this evidence, and the inferences drawn therefrom, the Panel found that claimant had not committed theft, that during her suspension she was "partially unemployed," pursuant to Sec. 8-73-103(1), C.R.S. (1986 Repl. Vol. 3B), and that she was not at "fault" for her partial unemployment. The Panel therefore concluded that Sec. 8-73-107(1)(i), C.R.S. (1986 Repl.Vol. 3B) was inapplicable and awarded claimant benefits pursuant to Sec. 8-73-108(4), C.R.S. (1986 Repl.Vol. 3B). See Santa Fe Energy Co. v. Baca, 673 P.2d 374 (Colo.App.1983).

I.

Arguing that claimant was not working because of a disciplinary suspension, the school district contends that the Panel erred in not denying claimant benefits pursuant to Sec. 8-73-107(1)(i), C.R.S. (1986 Repl.Vol. 3B). We disagree.

Pursuant to Sec. 8-73-107(1)(i), a claimant may be denied benefits when the claimant "is not working due to a disciplinary suspension as provided in the contract of employment." The term "disciplinary suspension" is not defined by the unemployment act or case law. Therefore, this phrase must be construed according to its familiar and generally accepted meaning. Harding v. Industrial Commission, 183 Colo. 52, 515 P.2d 95 (1973).

We agree with the Panel that the intent of this statutory section is to deny the payment of unemployment benefits to workers who are temporarily removed from working for disciplinary reasons where the worker is reassured of reinstatement to work. We hold, therefore, that a disciplinary suspension is a suspension imposed for a defined period for the purpose of penalizing an employee for a specific act, after which period the employee is scheduled to return to work.

Here, although the school district argues defendant's removal was a disciplinary suspension pursuant to its work rules, we conclude her removal was not a "disciplinary suspension" as contemplated by the statute. The school district did not suspend claimant for a specific period of time as punishment for a specific charge of wrongdoing, after which time it would return claimant to work. Instead, claimant's removal from work or "suspension" was open-ended in duration, was used by the school district to determine the penalty, i.e. termination, it actually intended to impose, and carried with it no guarantee claimant would be returned to work. Indeed, her disciplinary suspension was imposed with the intent that she never return to work. The school district penalty for claimant's alleged theft was termination, not a disciplinary suspension as contemplated by the statute. Therefore, the Panel did not err in granting benefits pursuant to Sec. 8-73-107(1)(i), C.R.S. (1986 Repl.Vol. 3B).

II.

The school district further contends that the Panel's findings of fact and conclusions of law are not supported by the evidence. Again, we disagree.

Here, although claimant performed no services and received no wages during the period of her suspension, the school district continued her employee benefits such as health insurance, and her sick and vacation leave continued to accrue. Further, claimant was able to perform and was available for other suitable work. Consequently, we conclude there was substantial evidence to support the finding that claimant was "partially unemployed" pursuant to Sec. 8-70-103(18), C.R.S. (1986 Repl.Vol. 3B). Denver Post, Inc. v. Department of Labor & Employment, 199 Colo. 466, 610 P.2d 1075 (1980); Frontier Airlines, Inc. v. Industrial Commission, 734 P.2d 142 (Colo.App.1986); Bartholomay v. Industrial Commission, 642 P.2d 50 (Colo.App.1982).

Further, we conclude there was substantial, albeit conflicting, evidence to support the findings that claimant had not committed any theft, and that claimant was not at fault for her separation. We therefore will not disturb these findings or the conclusion that claimant was entitled to a full award of benefits pursuant to Sec. 8-73-108(4), C.R.S. (1986 Repl.Vol. 3B). See Zelingers v. Industrial Commission, 679 P.2d 608 (Colo.App.1984); Santa Fe Energy Co. v. Baca, supra; In re Claim of Krantz v. Kelran Constructors, Inc., 669 P.2d 1049 (Colo.App.1983).

Order affirmed.

Smith and Kelly, JJ., concur.

Larry R. Richards, Petitioner,

v.

Winter Park Recreational Association, and the Industrial

Claim Appeals Office, Respondents.

No. 95CA2035.

919 P.2d 933

Colorado Court of Appeals,

Div. V.

May 16, 1996.

Larry R. Richards, pro se.

No appearance for Respondent Winter Park Recreational Association.

Gale A. Norton, Attorney General, Stephen K. ErkenBrack, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Jeannette W. Kornreich, Assistant Attorney General, Denver, for Respondent Industrial Claim Appeals Office.

CASEBOLT, Judge.

Petitioner, Larry R. Richards (claimant), seeks review of a final order of the Industrial Claim Appeals Panel (Panel) that disqualified him from the receipt of unemployment compensation benefits. At issue is whether a finding of "willful intent" is necessary before a claimant may be determined to be "at fault" for his own job termination. We conclude that no such finding is necessary and, therefore, affirm.

Winter Park Recreational Association (employer) discharged claimant from his job as a lift technician after he represented to his supervisor that he had performed a crucial pre-operational chairlift test, but had failed to do so. After a hearing, a hearing officer determined that claimant had not "willfully" forgotten to perform the test and, therefore, concluded that he was not at fault for his separation. Accordingly, claimant was awarded benefits.

On appeal, the Panel determined that the hearing officer had utilized the wrong legal standard in determining whether claimant was at fault and set aside the hearing officer's conclusion to that effect. The Panel disqualified claimant from the receipt of benefits based on its conclusion that he had failed to meet established job performance or other defined standards and was at fault for his separation. This review proceeding followed.

Claimant contends that he should have been awarded benefits because he was not at fault for his separation. We disagree.

Here, based on substantial evidence, the hearing officer found that claimant's duties as a lift technician included performing certain safety tests on ski lifts prior to their being operated for public use. In the incident leading to claimant's termination, claimant and his supervisor performed the pre-operational tests on one chairlift. The claimant responded affirmatively when his supervisor repeatedly asked him whether he had completed all of the tests.

However, the hearing officer further found that claimant had forgotten to perform an anti-collision test, a crucial test which was necessary to ensure that the lift chairs would not collide in an emergency. When his supervisor informed him that this test had not been performed, the claimant acknowledged his failure to perform the test. Claimant told his supervisor that he had been preoccupied and had forgotten to perform the test.

An individual is entitled to unemployment benefits if he or she is unemployed through no fault of his or her own. See § 8-73-108(1)(a), C.R.S. (1986 Repl.Vol. 3B). However, neither statutory nor case law has imposed a state of mind requirement that a claimant must act with "willful intent" before a determination of fault may be made. To the contrary, "fault" is not necessarily related to culpability, but only requires a volitional act or the exercise of some control or choice in the circumstances leading to the discharge from employment such that the claimant can be said to be responsible for the termination. See Gonzales v. Industrial Commission, 740 P.2d 999 (Colo.1987); Zelingers v. Industrial Commission, 679 P.2d 608 (Colo.App.1984).

We therefore agree with the Panel that the hearing officer used an erroneous legal standard in determining whether claimant was at fault, and thus, his conclusion was properly set aside.

We also agree with the Panel's conclusions that claimant was at fault for his separation and that he should be disqualified from the receipt of benefits pursuant to § 8-73-108(5)(e)(XX), C.R.S. (1986 Repl.Vol. 3B).

Section 8-73-108(5)(e)(XX) provides, inter alia, for a disqualification if a claimant has been discharged for failing to meet established job performance or other defined standards. All that is required to establish a disqualification pursuant to this subsection is a showing that the claimant did not do the job for which the claimant was hired and which the claimant knew was expected of him or her. See Pabst v. Industrial Claim Appeals Office, 833 P.2d 64 (Colo.App.1992).

Here, it was undisputed that claimant knew that he was required to perform the anti-collision test as part of the pre-operational lift safety tests, that he knew how to perform the anti-collision test, and that he had performed it many times in the past. It is also undisputed that he initially failed to perform it in this instance, despite his representations to his supervisor that he had done so.

Further, neither the hearing officer's evidentiary findings nor the undisputed evidence provides a basis to conclude that claimant's failure to perform this test was somehow nonvolitional. Cf. Nielsen v. AMI Industries, Inc., 759 P.2d 834 (Colo.App.1988) (claimant could not act volitionally because he had not been made aware of unwritten policy); Frontier Airlines, Inc. v. Industrial Commission, 719 P.2d 739 (Colo.App.1986) (unforeseen circumstances prevented claimant from working an entire shift after he turned in time card reporting that he had worked entire shift). Also, even if we assume, as the hearing officer found, that the claimant's supervisor was responsible for checking claimant's work, this would not absolve the claimant of his own responsibility to perform the test in the first instance.

The hearing officer's evidentiary findings and the undisputed record evidence support the conclusion that the claimant was discharged for failing to meet employer's established job performance or other defined standards and that he was at fault for his termination. Therefore, the Panel did not err in disqualifying claimant pursuant to § 8-73-108(5)(e)(XX), C.R.S. (1986 Repl.Vol. 3B). See Pabst v. Industrial Claim Appeals Office, supra.

Accordingly, the Panel's order is affirmed.

Rothenberg and Taubman, JJ., concur.

Rose Medical Center Hospital Association, Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado, and Fany Benzazon, Respondents.

No. 87CA1963.

757 P.2d 1173

Colorado Court of Appeals,

Div. III.

June 30, 1988.

Cordova, DeMoulin, Harris & Mellon, P.C., Donald E. Cordova, John S.L. Sackett, Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Karen E. Leather, Asst. Atty. Gen., Denver, for respondent Industrial Claim Appeals Office.

No appearance for respondent Fany Benzazon.

METZGER, Judge.

The employer, Rose Medical Center Hospital Association, seeks review of an order of the Industrial Claim Appeals Office (Panel) awarding unemployment compensation benefits to claimant. We set aside the order and remand with directions.

The referee disqualified claimant for benefits pursuant to § 8-73-108(5)(e)(VI), C.R.S. (1986 Repl.Vol. 3B) (insubordination such as deliberate disobedience of a reasonable instruction of an employer). On appeal, the Panel found that claimant had, indeed, refused to follow the employer's request that she be trained to push laundry carts. However, the Panel found claimant's testimony that she was unable to push the carts to be the more credible evidence and held that the employer's request was not reasonable; therefore, it reversed the disqualification imposed by the referee.

The Panel urges us to affirm its order on the basis that the record contains substantial evidence which is sufficient to support its decision. The employer, however, contends that the Panel applied an erroneous standard in determining whether the employer's request was reasonable. We agree with the employer.

In choosing to accept claimant's assertion that she would be unable to push laundry carts, the Panel used a subjective standard to determine whether the employer's request was reasonable; that is, it based its finding of unreasonableness on the employee's subjective belief that she could not perform the duty requested.

We have held in other cases involving eligibility for unemployment benefits that an objective standard is the appropriate measure for determining eligibility. See Action Key Punch Service, Inc. v. Industrial Commission, 709 P.2d 970 (Colo. App.1985); Gatewood v. Russell, 29 Colo. App. 11, 478 P.2d 679 (1970). We now hold that an objective standard is also the proper standard for reviewing the reasonableness of an employer's request under § 8-73-108(5)(e)(VI), C.R.S. (1986 Repl.Vol. 3B). In assessing the reasonableness of such a request, the Panel must consider the facts and circumstances of each case, using its independent judgment to determine whether the request which claimant refused was one which a reasonable person would have refused.

Here, the employer's willingness to accommodate claimant's concerns, as indicated by the delay in scheduling her for training, by the supervisor's assurance that claimant could request assistance if the carts proved too heavy, and by the offer to provide training by the occupational therapy department, evidences the reasonableness of the employer's request. Claimant's refusal to comply with such a request, in the face of uncontradicted medical evidence that she was physically able to do so, may constitute insubordination as defined in § 8-73-108(5)(e)(VI), sufficient to disqualify her from the receipt of benefits.

Accordingly, the order is set aside, and the cause is remanded with directions that the Panel reconsider the evidence and apply the objective standard in determining eligibility for benefits.

Sternberg and Hume, JJ., concur.

Leo J. Rotenberg, Petitioner,

v.

Industrial Commission of the State of Colorado (Ex-Officio

Unemployment Compensation Commission of Colorado),

and Rocky Mountain News, Respondents.

No. 78-885.

42 Colo.App. 161, 590 P.2d 521,

Colorado Court of Appeals,

Div. I.

Feb. 1, 1979.

Leo J. Rotenberg, pro se.

J. D. MacFarlane, Atty. Gen., David W. Robbins, Deputy Atty. Gen., Edward G. Donovan, Sol. Gen., David Aschkinasi, Asst. Atty. Gen., Denver, for respondents.

PIERCE, Judge.

Petitioner, Leo J. Rotenberg, seeks review of an order of the Industrial Commission disqualifying him from unemployment benefits for a period of 12 weeks. We affirm.

Petitioner was a computer programmer employed at the Rocky Mountain News. In March of 1978, he quit his job because of what he described in his letter of resignation as "unhealthy working conditions, to wit: stale and oxygen-depleted air in the office where I have been working." Petitioner testified that he resigned only after his employer refused to consider his request to set up work areas for non-smokers. The employer's personnel director, on the other hand, testified that petitioner:

"(D)emanded that everyone in the department cease smoking and we told him that while we would certainly discuss it with the people and see if it couldn't be moderated, that we just weren't in the position that we could demand that everyone in the department cease to smoke."

The personnel director also testified that petitioner did not mention any particular sensitivity to cigarette smoke when he interviewed for the position, and that no one who worked in petitioner's office had ever complained about the quality of the air.

Petitioner based his claim for benefits on § 8-73-108(4)(c), C.R.S.1973 (1976 Cum.Supp.), which provides that a full award shall be allowed when an employee quits his job because of "unsatisfactory or hazardous working conditions." However, the referee found that petitioner voluntarily resigned his job because of dissatisfaction with prevailing working conditions. The Commission concurred, and ordered a 12-week period of disqualification pursuant to §§ 8-73-108(2)(b)(I) and 8-73-108(5)(a) C.R.S.1973 (1976 Cum.Supp.).

Petitioner argues that the Commission erred in failing to investigate his claim of hazardous working conditions. In particular, he contends that the Commission was obligated to make objective, scientific tests of the air quality at his former work place. However, petitioner misunderstands the nature and functions of the Commission. It is essentially an adjudicatory body, and not an investigative one, whose function in this context is the neutral evaluation of the claims of unemployed persons. See Thompson v. Industrial Commission, 33 Colo.App. 369, 520 P.2d 139 (1974). The burden of demonstrating eligibility for unemployment benefits rests on the person claiming those benefits, and not on the Industrial Commission. Medina v. Industrial Commission, 38 Colo.App. 256, 554 P.2d 1360 (1976).

Here, petitioner presented no evidence indicating that the working conditions at his office were "unsatisfactory or hazardous" within the meaning of § 8-73-108(4)(c), C.R.S.1973 (1976 Cum.Supp.), other than his own subjective statements of discomfort. On this state of the evidence, we cannot overturn the Commission's determination. See Rathburn v. Industrial Commission, 39 Colo.App. 433, 566 P.2d 372 (1977).

Order affirmed.

Coyte and Kelly, JJ., concur.

Deborah K. Rulon, Petitioner,

v.

The Industrial Commission of the State of Colorado, and

T.M., Ltd., Respondents.

No. 86CA0386.

728 P.2d 739

Colorado Court of Appeals,

Div. I.

Oct. 2, 1986.

Colorado Rural Legal Services, Cynthia M. Hartman, Fort Collins, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Aurora Ruiz-Hernandez, Asst. Atty. Gen., Denver, for respondent Industrial Com'n.

No appearance for respondent T.M., Ltd.

STERNBERG, Judge.

Deborah K. Rulon, claimant, seeks review of a final order of the Industrial Commission which denied her unemployment benefits based on its finding that her termination was within the ambit of Sec. 8-73-108(5)(e)(I), C.R.S. (1985 Cum.Supp.) in that she quit because of dissatisfaction with her working conditions. We set aside the order.

Claimant worked for employer, a supermarket, for five years, full-time and, most recently, part-time. There was no uniformity of rates of pay for full- and part-time employees. When claimant began working in the office, her pay was raised above that of other full-time employees. Her rate of pay was not reduced when she left the office to return to work as a full-time checker in the summer of 1982, and it was also not reduced when she began working part-time four months before she quit.

A few weeks before claimant left, the store manager decided to reduce claimant's hourly wage to the same rate as other part-time workers, a reduction of 80 cents an hour. The Commission found that his reasons for this decision were that it had become difficult to schedule claimant's hours to accommodate her wish to work part-time, and that he felt she had become undependable by not always working the number of hours for which she had been scheduled. The store manager did not discuss with claimant his dissatisfaction

with her performance, and he did not tell her in advance that he was reducing her pay. The manager testified, further, that he would have been willing to continue to pay her the higher rate if her performance had continued to be satisfactory.

After she received a paycheck reflecting the cut in her hourly rate, claimant attempted, unsuccessfully, to discuss the reduction with the store manager. She then spoke to the store owner, who ordered that her former rate of pay be reinstated until she could be officially notified of the reduction. Claimant's next paycheck was for the higher rate of pay, but shortly afterwards, the office manager told her that her hourly rate would be reduced by 80 cents in the future.

This conversation took place in the presence of other employees, and became somewhat heated. During the discussion, the office manager told claimant that in her personal opinion, claimant was not a loyal employee. The next day, claimant resigned, citing the pay cut and what she considered to be insulting treatment by the office manager. Claimant testified at the hearing that the pay cut was the main reason for her resignation, and the Industrial Commission found that she would not have quit, despite the argument with the office manager, if her wages had not been reduced.

The Commission found that claimant quit because of dissatisfaction with her working conditions, concluding that her rate of pay was reduced to the prevailing rate for part-time clerks, and that her complaints about the treatment she received from the office manager amounted to dissatisfaction with her supervisor.

Claimant argues here that the Industrial Commission erred as a matter of law in applying Sec. 8-73-108(5)(e)(I) to the facts of her case. We agree.

The evidence presented shows that claimant's hourly rate was not reduced primarily for the purpose of bringing her pay into line with the prevailing rate in the supermarket. The store manager testified that he had instructed the office manager to leave claimant's salary at the higher rate when she began working part-time, and he stated that he would have been willing to continue to pay her the higher rate if her performance had continued to be satisfactory.

Section 8-73-108(5)(e)(I) permits a denial of benefits if a worker quits because of dissatisfaction with "prevailing rates of pay," and requires a determination whether that rate of pay is standard for that type of work in the industry. The real issue precipitating claimant's resignation, however, was not the rate to which her wages were cut. In fact, claimant testified that she would have accepted the pay cut had it been made when she moved from full-time office work to part-time checking. The issue which caused claimant to quit, as the Industrial Commission found, was the fact (and the manner) of the pay cut.

An eligible individual is entitled to a full award of benefits if she becomes unemployed through no fault of her own. Section 8-73-108(1)(a), C.R.S. (1985 Cum.Supp.); Sims v. Industrial Commission, 627 P.2d 1107 (Colo.1981). In this regard the concept of fault

means a volitional act, and is not necessarily related to culpability. Zelingers v. Industrial Commission, 679 P.2d 608 (Colo.App.1984); see also City & County of Denver v. Industrial Commission, 666 P.2d 160 (Colo.App.1983). Thus, in the absence of a volitional act by the employee, there can be no fault on her part within the meaning of the unemployment statute. Zelingers v. Industrial Commission, supra.

Undisputed testimony established that the reasons for claimant's pay cut were her undependability and scheduling problems, and that if these problems had not occurred, the store manager would have been willing to continue to pay her at the higher rate. The Commission found, further, that claimant was given no notice that her performance was unsatisfactory. Claimant, thus, had no opportunity to correct the problem and remain at her higher rate of pay. Under these circumstances, the lack of notice to claimant of allegedly unsatisfactory job performance rendered unreasonable the subsequent reduction in pay under the provisions of Sec. 8-73-108(4)(e), C.R.S. (1985 Cum.Supp.). It cannot be said, therefore, that claimant was at fault in her separation from employment.

Accordingly, the order of the Industrial Commission is set aside and the cause is remanded to the Industrial Claims Appeals Office for entry of an order awarding full benefits to claimant pursuant to Sec. 8-73-108(4)(e), C.R.S. (1985 Cum.Supp.).

Pierce and Metzger, JJ., concur.

Safeway Stores, Inc., Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado and Amos R. Varos, Respondents.

No. 87CA0964.

754 P.2d 773

Colorado Court of Appeals,

Div. III.

March 3, 1988.

Holland & Hart, Gregory A. Eurich, George "Skip" Gray, III, Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Angela M. Lujan, Asst. Atty. Gen., Denver, for respondent Industrial Claim Appeals Office.

The Law Offices of Jonathan Wilderman, Jonathan Wilderman, Thomas A. Feldman, Sharon Daly, Denver, for respondent Varos.

JONES, Judge.

Safeway Stores, Inc., employer, seeks review of an order of the Industrial Claim Appeals Office (Panel) which awarded unemployment compensation benefits to Amos E. Varos, claimant. We affirm.

Employer terminated claimant, a meatcutter, for alcohol usage prohibited by employer's work rules. Claimant applied for unemployment benefits. The Panel found that claimant's alcohol usage violated employer's work rule. However, the Panel further found claimant had been performing his work with no apparent difficulty on the day in question and that the evidence did not show that claimant would have been unable to continue performing his duties in a satisfactory manner. The Panel concluded that claimant did not act volitionally in causing his termination, that claimant therefore was not at fault for his separation and that claimant should be awarded full benefits pursuant to Sec. 8-73-108(4), C.R.S. (1986 Repl. Vol. 3B). See Santa Fe Energy Co. v. Baca, 673 P.2d 374 (Colo.App.1983).

On review, employer contends the Panel erred in failing to disqualify claimant pursuant to Sec. 8-73-108(5)(e)(VII), C.R.S. (1986 Repl. Vol. 3B) (violation of a company rule

which resulted or could have resulted in damage to the employer's property or interests) or Sec. 8-73-108(5)(e)(VIII), C.R.S. (1986 Repl. Vol. 3B) (off-the-job use of not medically prescribed intoxicating beverages which interfered with job performance). Employer argues that claimant's blood alcohol level raised a presumption of claimant's intoxication and inability to perform his job duties. We disagree.

No statutory presumption concerning the evidentiary effect of the results of a blood alcohol content test is included in the unemployment act and we decline to create such a presumption. Furthermore, we hold that the statutory presumptions set forth in Sec. 42-4-1202(2), C.R.S. (1984 Repl. Vol. 17), which arise from an individual's blood alcohol content in traffic cases, are not applicable to unemployment cases. Those presumptions apply only to the prosecution of driving offenses set forth in Secs. 42-4-1202(1)(a) and (1)(b), C.R.S. (1984 Repl. Vol. 17). See People v. Beltran, 634 P.2d 1003 (Colo.App.1981). Consequently, in unemployment compensation cases, an individual's blood alcohol content is only one evidentiary factor to be weighed along with all the other evidence presented at the hearing.

Here, claimant's store manager testified that, while speaking to claimant about an unrelated matter, he thought that he smelled alcohol on claimant's breath and that claimant's speech and actions might indicate alcohol usage. To confirm this, the store manager asked claimant to submit to a blood alcohol content test, to which claimant agreed. The test confirmed the presence of alcohol in claimant's bloodstream. Employer then terminated claimant for ingesting alcohol and then coming to work, which was prohibited by employer's work rules. Employee testified, however, that he had been at work at least one hour before the conversation with the store manager and that he had experienced no difficulty in performing his work that day. Employer presented no evidence to the contrary.

The Panel found that there was evidence that claimant's alcohol usage was in contravention of employer's policy, and that the question whether an employee is discharged in accordance with particular employer-generated guidelines is quite distinct from whether an employee's conduct should disqualify an employee from receiving unemployment compensation benefits. We agree.

Although there was evidence of claimant's alcohol usage, the evidence did not show that such usage either affected claimant's job performance or resulted or could have resulted in serious damage to employer's property or interests. Therefore, the Panel correctly declined to disqualify claimant pursuant either to Sec. 8-73-108(5)(e)(VII) or Sec. 8-73-108(5)(e)(VIII), C.R.S. Gonzales v. Industrial Commission, 740 P.2d 999 (Colo.1987).

The evidence arguably could have supported the inferences employer urges concerning claimant's job performance. However, since the Panel's findings and conclusions are based on evidence giving rise to differing inferences, we are bound by them on review. Sims v. Industrial Commission, 627 P.2d 1107 (Colo.1981); See Michals v. Industrial Commission, 40 Colo.App. 5, 568 P.2d 108 (1977).

Order affirmed.

Van Cise and Sternberg, JJ., concur.

Martin Sandoval, Petitioner,

v.

Colorado Division of Employment and Industrial Claim

Appeals Office of the State of Colorado, Respondents

No. 87CA0319

757 P.2d 1105

Court of Appeals of Colorado,

Div. II.

May 5, 1988

Rehearing Denied June 9, 1988;

Petition for Writ of Certiorari Denied Oct. 17, 1988.

Colorado Rural Legal Services, Inc., Dani Lisa Arck, Brian Patrick Lawlor, Denver, Colorado, Attorneys for Petitioner.

Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General, Mary Ann Whiteside, Assistant Attorney General, Denver, Colorado, Attorneys for Respondents.

PLANK, Judge.

Claimant, Martin Sandoval, seeks review of a final order of the Industrial Claim Appeals Office (Panel) holding that he was monetarily ineligible for benefits because of his immigration status during the base period. We set aside the order.

As a child, claimant accompanied his parents into the United States without inspection. About four years later, in 1978, claimant's parents, but not claimant, were issued work authorization permits by the Immigration and Naturalization Service (INS).

In early 1984, the INS initiated deportation proceedings against claimant, but claimant challenged that action pursuant to 8 U.S.C. § 1254 based on seven years continuous presence in the U.S., good moral character, and extreme hardship to the applicant or legally present family members.

On December 14, 1984, claimant married a U.S. citizen, and on March 7, 1985, his wife filed a petition in his behalf for immediate relative immigration status. The petition was

granted on May 16, 1985. On February 20, 1986, claimant's status was adjusted to lawful permanent resident.

Meanwhile, claimant was separated from his employment, and on April 29, 1986, applied for unemployment compensation benefits based on wages earned in the period from January 1, 1985, to December 31, 1985.

The Panel denied claimant's request for benefits on the grounds that at all times during his base period claimant failed to meet the criteria set forth in § 8-73-107(7)(a), C.R.S. (1986 Repl. Vol. 3B).

Claimant contends that the provisions of § 8-73-107(7)(a)(I) through (VI), C.R.S. (1986 Repl. Vol. 3B) are illustrative rather than exhaustive of the categories of aliens "permanently residing in the United States under color of law," and that he fell within the definition at all times during his base period. We agree.

Section 8-73-107(7)(a), C.R.S. (1986 Repl. Vol. 3B) provides that:

"Benefits shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, or was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed."

Effective July 1, 1985, before claimant filed his claim, the following provisions were added.

"For purposes of the 'Colorado Employment Security Act', 'permanent resident under color of law' shall mean:

(I) An alien admitted as a refugee under section 207 of the 'Immigration and Nationality Act', 8 U.S.C. § 1157, in effect after March 31, 1980;

(II) An alien granted asylum by the attorney general of the United States under section 208 of the 'Immigration and Nationality Act', 8 U.S.C. § 1158;

(III) An alien granted a parole into the United States for an indefinite period under section 212(d)(5)(B) of the 'Immigration and Nationality Act', 8 U.S.C. § 1182 (d)(5)(B);

(IV) An alien granted the status as a conditional entrant refugee under section 203(a)(7) of the 'Immigration and Nationality Act', 8 U.S.C. § 1153 (a)(7), in effect prior to March 31, 1980;

(V) An alien who entered the United States prior to June 30, 1948, and who is eligible for lawful permanent residence pursuant to section 249 of the 'Immigration and Nationality Act', 8 U.S.C. § 1259; or

(VI) An alien who has been formally granted deferred action or nonpriority status by the immigration and naturalization service.

Claimant falls within none of these provisions, and thus, if they represent a complete listing of all who qualify as being permanent residents under color of law, he is not eligible for any unemployment benefits.

In order to continue to receive federal incentives, each state's unemployment insurance program must be in substantial conformity with the federal statutory requirements. Industrial Commission v. Arteaga, 735 P.2d 473 (Colo. 1987). For example, 26 U.S.C. § 3304 (a)(10) (1976) provides that "compensation shall not be denied to any individual . . . . for any cause other than discharge for misconduct connected with his work . . . ." The state statutory scheme in § 8-73-108(5)(e), C.R.S. (1986 Repl. Vol. 3B) enumerates specific examples of "misconduct connected with . . . . work," but retains the federal statute's broad meaning by means of the catchall provision of § 8-73-108(5)(e)(XX), "for other reasons including, but not limited to" the enumerated examples of misconduct.

However, the General Assembly did not include a "catchall" provision in § 8-73-107(7)(a)(I) through (VI), C.R.S. (1986 Repl. Vol. 3B). Therefore, the subsections can be considered exhaustive rather than illustrative only if the six enumerated categories substantially cover the categories contemplated by Congress in the phrase "permanently residing in the United States under color of law." See 26 U.S.C. § 3304 (a)(14)(A) (1976).

Congress has defined "permanently" for purposes of the Immigration and Nationality Act as a "relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States, or of the individual, in accordance with law." 8 U.S.C. § 1101 (a)(31) (1976).

Congress, however, has not enacted a statutory definition of "color of law," and thus, to determine the meaning of that phrase, we examine federal case law, especially case law closely contemporaneous with Congress' enactment of the statute. See Industrial Commission v. Arteaga, supra.

Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947, 98 S. Ct. 1532, 55 L. Ed. 2d 545 (1978), decided the year after 26 U.S.C. § 3304 (a)(14)(a) (1976) was enacted, is the leading federal case defining the phrase. In Holley, the court defined "under color of law" as meaning:

"that which an official does by virtue of power, as well as what he does by virtue of right. The phrase encircles the law, its shadows, and its penumbra. When an administrative agency or a legislative body uses the phrase "under color of law" it deliberately sanctions the inclusion of cases that are, in strict terms, outside the law but are near the border."

This definition of "permanently residing in the United States under color of law" has been applied by the federal courts for ten years, see, e.g., Esparza v. Valdez, 612 F. Supp. 241 (D. Colo. 1985), and Congress has not, even in enacting the comprehensive Immigration Reform and Control Act of 1986, acted to change or reject it through legislation. See Industrial Commission v. Arteaga, supra (fn. 8).

The six categories listed in § 8-73-107(7)(a)(I) through (VI) represent some of the categories covered by the Holley definition. However, Industrial Commission v. Arteaga, supra; Division of Employment & Training v. Turynski, 735 P.2d 469 (Colo. 1987) are examples of cases dealing with aliens covered by the federal definition of permanently residing in the United States under color of law, but not covered by any of the provisions of § 8-73-107(7)(a)(I) through (VI).

If we were to rule that § 8-73-107(7)(a)(I) through (VI) is an exhaustive definition of permanently residing in the United States under color of law, our state statute would exclude many aliens which Congress intended to cover by its use of the phrase, and our statute, thus, would not substantially comply with the federal standards set forth in 26 U.S.C. § 3304 (a)(14)(A). Therefore, we construe § 8-73-107(7)(a)(I) through (VI) as merely being illustrative of the categories of persons included within the meaning of the phrase "permanently residing in the United States under color of law."

Next, we must determine whether claimant falls within the federal definition of "permanently residing in the United States under color of law." That definition was adopted by our state in Industrial Commission v. Arteaga, supra, and Division of Employment & Training v. Turynski, supra.

In Arteaga and Turynski, the court found that individuals who had filed petitions for adjustment of status, but had not yet been granted that adjustment were "permanently residing in the United States under color of law." Here, claimant had pending at all times during his base period at least one petition which would result in the adjustment of his status to lawful permanent resident. Thus, we conclude that claimant did as a matter of law have the necessary status to receive unemployment benefits.

Although the Panel found that claimant, unlike the claimants in Arteaga and Turynski, did not have a valid INS work authorization during his base period, claimant's lack of such an authorization is merely one factor to consider in determining whether he met the requirements of "permanently residing in the United States under color of law." See Ibarra v. Texas Employment Commission, 645 F. Supp. 1060 (E.D. Tex. 1986), rev'd on other grounds, 823 F.2d 873 (5th Cir. 1987). Because the other evidence so overwhelmingly establishes claimant's "permanent resident under color of law" status, we hold that here the lack of a work authorization permit is not determinative.

Claimant contends he is entitled to compensation on two additional statutory grounds. In view of our conclusion we need not address these contentions.

The order of the Industrial Claim Appeals Office is set aside, and the cause is remanded with directions to award claimant all benefits to which he is otherwise entitled based on the wages earned by him during the base period from January 1, 1985, to December 31, 1985.

Judge Tursi concurs.

Judge Babcock, dissenting.

I respectfully dissent because, in my view, the General Assembly intended the provisions of § 8-73-107(7)(a)(I) through (VI), C.R.S. (1986 Repl. Vol. 3B) to be exhaustive of the categories of aliens "permanently residing in the United States under color of law." Because claimant did not meet the criteria for inclusion in any of these categories during his base period, I would affirm.

Section 8-73-107(7)(a)(I) through (VI), became effective on April 30, 1985. Colo. Sess. Laws 1985, ch. 82 at 366-367. Before this statute's adoption, this court announced Arteaga v. Industrial Commission, 703 P.2d 654 (Colo. 1985), aff'd, Industrial Commission v. Arteaga, 735 P.2d 473 (Colo. 1987). Arteaga adopted the reasoning of Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), that "color of law" did not necessarily mean affirmative action, but could be evidenced by inaction by INS with full knowledge of the alien's illegal status.

In my view, the General Assembly's amendment of § 8-73-107(7)(a) "overruled" Arteaga to specify the only circumstances under which an alien may receive unemployment compensation benefits. The majority's interpretation of this statute as being non-exclusive represents a usurpation of the General Assembly's legislative function and renders its 1985 amendment meaningless.

Judy L. Sands, Petitioner,

v.

The Industrial Claim Appeals Office of the State of Colorado,

the Colorado Division of Employment and Training and

McData Corporation, Respondents.

No. 89CA1643.

801 P.2d 12

Colorado Court of Appeals,

Div. II.

Aug. 2, 1990.

Rehearing Denied Aug. 23, 1990.

Certiorari Denied Nov. 26, 1990.

William E. Benjamin, Boulder, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Michael J. Steiner, Asst. Atty. Gen., Denver, for respondents Indus. Claim Appeals Office and Colorado Div. of Employment and Training.

Hutchinson, Black, Hill & Cook, John B. Greer, Boulder, for respondent McData Corp.

STERNBERG, Chief Judge.

Judy L. Sands, claimant, seeks review of a final order of the Industrial Claim Appeals Office (Panel) which disqualified her from the receipt of unemployment compensation benefits. We affirm.

Claimant worked for McData Corporation as a systems test technician. She was to return from an authorized vacation on a Monday morning, but instead returned the next day, Tuesday. On Friday, employer terminated her for accumulated excessive absences and for failure to report back from vacation on time without notice.

Based upon conflicting evidence, the hearing officer concluded claimant was discharged for returning to work one day late after a scheduled vacation with no valid reason or permission for her delayed return. The hearing officer disqualified claimant from the

receipt of benefits pursuant to Sec. 8-73-108(5)(e)(XVII), C.R.S. (1986 Repl.Vol. 3B) (failure to return to work after authorized vacation), and the Panel affirmed.

We do not agree with claimant's contention that the hearing officer erred in excluding evidence she sought to present that illness prevented her from returning to work the day after her vacation. Division of Employment Regulation 11.2.9, 7 Code Colo.Reg. 1101-2, provides, in pertinent part:

"An interested party may not present factual issues at a hearing before a referee which have not been provided to the other interested party(ies) as shown by the claim file. If good cause, as set forth in subsection 12.1.8 of these regulations, is found for a party not providing proper notice of the factual issues it intends to present, the referee may adjourn the hearing. If good cause is not found, the hearing shall proceed as scheduled and those new factual issues raised shall not be considered. An interested party may at the hearing waive the requirement that it be provided with proper notice...."

This regulation reflects a change in wording so as to make inapposite the holding of earlier cases such as Anderson v. Industrial Commission, 29 Colo.App. 263, 482 P.2d 403 (1971).

The explanation of appeal rights set forth in the notice of decision given the claimant provided, in relevant part: "A party may not present evidence before a referee on factual issues which have not been provided to the other party as shown by the claims file or as provided in the notice of appeal unless good cause is shown...."

The relevant documents in the claim file which set forth claimant's basis for her claim were the request for separation; the Division's fact-finding supplement; and claimant's notice of appeal. None of these documents made reference to a specific health problem as the cause for claimant's absence. To the contrary, on the request for separation form, claimant stated that a delay in her travel arrangements had resulted in her not reporting for work on Monday. Consistent with that statement, claimant told a job service representative that her late arrival home had caused her to be "too tired and exhausted" to report on Monday. On her notice of appeal claimant simply stated, "I disagree with the deputy's findings."

The explanation that illness caused her absence was raised by claimant for the first time at the hearing. When asked by the hearing officer why she was absent that Monday, claimant replied that she had been incapacitated by diarrhea. The hearing officer then questioned whether the claimant's response raised a new factual issue concerning claimant's entitlement to benefits which had not been provided to employer either in the claims file or the notice of appeal and whether claimant had good cause for not providing the information.

After hearing arguments on the issue, the hearing officer found that claimant's testimony that a specific health problem prevented her from returning to work was a new factual issue which had not been provided to employer prior to the hearing. The hearing officer

also found that, since the day she returned to work, claimant had had a substantial number of opportunities to mention a specific health problem both to the employer and the Division and that she had not done so. The hearing officer concluded that claimant had not shown "good cause" for her failure to disclose the new issue prior to the hearing and refused to allow claimant to present evidence of a specific health problem at the hearing.

Claimant now argues she should have been allowed to present this testimony because it was not a new factual issue. We agree with the Panel that claimant's testimony concerning a "specific health problem" was a new factual issue which had not been adequately raised by claimant prior to the hearing.

Claimant argues that her statement of being "too tired and exhausted" provided adequate notice because "it is clear that fatigue and exhaustion are physical effects of diarrhea." Considered in context with her other statements concerning travel delays, we conclude that her reference to being exhausted was insufficient to put her employer on notice that a specific illness had been the reason for her failure to report for work. Consequently, claimant's argument is not persuasive.

We also find no merit to claimant's argument that she should have been allowed to present evidence of her specific illness as a defense to the application of Sec. 8-73-108(5)(e)(XVII), the section under which the deputy disqualified her. If claimant desired to raise her specific alleged illness as a defense to the application of Sec. 8-73-108(5)(e)(XVII), Division of Employment Regulation 11.2.9 required her to state her factual defense in her notice of appeal. Because she did not do so, there was no error in not accepting evidence on this point.

Finally, the claimant asserts that the hearing officer's order did not adequately address all factors raised in deciding whether claimant had shown good cause for raising a new issue at the hearing. The findings indicate that the relevant issues were considered. Thus, error is not to be inferred from the failure to enter written findings on every factor. See Mohawk Data Sciences Corp. v. Industrial Commission, 671 P.2d 1335 (Colo.App.1983).

The order is affirmed.

Hume and Ruland, JJ., concur.

SANTA FE ENERGY COMPANY, Petitioner,
v.
Michael L. BACA, Director of the Industrial Commission of the State of Colorado; The Industrial Commission of the State of Colorado (Ex-Officio Unemployment Compensation Commission of Colorado); and Walter Tycksen, Respondents.

No. 83CA0036.
Colorado Court of Appeals,
Div. III.

Oct. 27, 1983.

Employer sought review of final order of the Industrial Commission awarding claimant full unemployment compensation benefits. The Court of Appeals, Kelly, J., held that: (1) purported business memorandum which originated after claim was filed, was not mentioned during hearing, and was not submitted until employer filed petition to review referee's decision, was properly excluded as hearsay, and it was not abuse of discretion to decline to take additional evidence concerning that memorandum; (2) the Commission's finding that claimant was unemployed through no fault of his own was supported by substantial evidence that claimant was fired for incidents which were not his fault, or did not occur; (3) the Commission's findings of fact provided adequate basis for award; and (4) the Commission did not exhibit any unwillingness to grant fair hearing to employer.

Order affirmed.

---------- Page 673 P.2d 375 follows ----------

Grant, McHendrie, Haines & Crouse, P.C., Donald B. Gentry, John M. Spillane, Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Deputy Atty. Gen., Joel W. Cantrick, Sol. Gen., Alice L. Parker, Asst. Atty. Gen., Denver, for respondents.

KELLY, Judge.

Santa Fe Energy Company, employer, seeks review of a final order of the Industrial Commission awarding claimant full benefits pursuant to Sec. 8-73-108(4), C.R.S.1973 (1982 Cum. Supp.). The referee made a full award of benefits pursuant to Sec. 8-73-108(4), finding that the employer's evidence was hearsay and that the employer was "basically responsible" for claimant's separation. The Commission affirmed the award and made the additional finding that "claimant's firsthand testimony was sufficient to establish a prima facie case of qualification for benefits." The Commission concluded that claimant was unemployed

through no fault of his own within the meaning of Sec. 8-73-108(1)(a), C.R.S.1973 (1982 Cum. Supp.). We affirm.

The employer first contends that the Commission erred in disregarding the hearsay testimony of its witness. The employer argues that the testimony was based on a business memorandum admissible as an exception to the hearsay rule under Colorado Rules of Evidence 803(6). Alternatively, the employer argues that the hearsay was admissible because claimant corroborated it and because it possessed "probative value commonly accepted by reasonable and prudent men" within the meaning of Sec. 8-74-106(f)(II), C.R.S.1973 (1982 Cum. Supp.). We reject these arguments.

The Commission may, upon petition for review, enter an order based on the evidence submitted in the case, or it may require the submission of additional evidence. Section 8-74-104(1), C.R.S.1973 (1982 Cum. Supp.). Here, the purported business memorandum originated after the claim was filed, was not mentioned during the hearing, and was not submitted until the employer filed a petition to review the referee's decision. Under these circumstances, the Commission properly decided that the employer's testimony was hearsay and properly exercised its discretion in declining to require additional evidence concerning the memorandum. *Wilson v. Industrial Commission*, 30 Colo. App. 154, 490 P.2d 91 (1971).

Hearsay evidence may have probative force when corroborated by "evidence generally recognized as admissible at common law." *Johnson v. Industrial Commission*, 137 Colo. 591, 328 P.2d 384 (1958). However, the rule is inapposite here because the Commission found, and the record supports the conclusion, that claimant's testimony contradicted rather than corroborated the employer's testimony. While the parties agreed that certain incidents occurred, they were in complete disagreement concerning the significant details of these events.

Furthermore, the Commission did not abuse its discretion in declining to consider the hearsay testimony pursuant to Sec. 8-74-106(f)(II). This testimony, based on reports from other employees, is not so reliable that

---------- Page 673 P.2d 376. follows ----------

"reasonable and prudent men" would necessarily assign it probative value.

The employer next contends that the award was not based on substantial evidence because claimant's testimony failed to establish "any of the pertinent conditions" enumerated in Sec. 8-73-108(4). This argument is without merit.

The Commission has discretion to grant a full award even though none of the subsections of Sec. 8-73-108(4) is cited or applicable. Such discretion is necessary to effect

the legislative mandate that each individual who is unemployed through no fault of his own shall receive a full award of benefits. Section 8-73-108(1)(a), C.R.S.1973 (1982 Cum. Supp.); *see Sims v. Industrial Commission*, 627 P.2d 1107 (Colo.1981).

Here, the Commission accepted claimant's testimony concerning the circumstances of his employment. The gravamen of the testimony was that claimant was fired for incidents which were not his fault, or did not occur. Thus, the Commission's finding that claimant was unemployed through no fault of his own is supported by substantial evidence and may not be disturbed on review. Section 8-74-107(4), C.R.S. 1973 (1982 Cum. Supp.); *Sims v. Industrial Commission, supra*.

We also reject employer's contention that the Commission's findings of fact were inadequate. The basis of the award is apparent from the record and from the Commission's findings of ultimate fact. *In re Claim of Allmendinger v. Industrial Commission*, 40 Colo. App. 210, 571 P.2d 741 (1977).

The employer's assertion that the Commission exhibited an unwillingness to grant a fair hearing is without merit.

Order affirmed.

BERMAN and TURSI, JJ., concur.

Savio House and Continental Casualty Company, Petitioners,

v.

Viola M. Dennis and The Industrial Commission of

the State of Colorado, Respondents.

No. 82CA0746.

665 P.2d 141

Colorado Court of Appeals,

Div. II.

Jan. 20, 1983.

Knapp & Lee, Robert A. Weinberger, Denver, for petitioners.

Glasman, Jaynes & Carpenter, Ronald C. Jaynes, Denver, for respondent Viola M. Dennis.

J.D. MacFarlane, Atty. Gen., Alice L. Parker, Asst. Atty. Gen., Denver, for respondent Industrial Com'n.

PIERCE, Judge.

In this workmen's compensation case, Savio House and Continental Casualty Company (petitioners) seek review of a final order of the Industrial Commission awarding claimant permanent total disability benefits. We affirm.

Claimant sustained compression fractures of her vertebrae on August 13, 1976, while working as a housekeeper at a boys' home. Her orthopedic specialist gave her a permanent partial disability rating of 5 percent as a working unit, and in May 1978, petitioners admitted liability for 5 percent as a working unit.

On February 15, 1979, claimant filed a petition to reopen her claim contending that her condition had worsened. The petition was accompanied by a letter from her orthopedist stating that claimant was suffering from moderately severe to severe osteoporosis, a degenerative bone condition. The doctor opined that claimant was totally disabled from performing any work involving standing, stooping, or lifting over five pounds.

At a hearing on her petition, claimant testified that she had held various jobs since 1928, and had worked for the boys' home for 10 years prior to her injury. She stated that she had not had any problem with her back until the accident. Claimant also testified that her

condition had gotten worse after May 1978. Specifically, she became less able to bend over, reach, or lift and was in constant pain. Claimant testified that she had been disabled from working at the home after November 1976.

Claimant's doctor testified that the percentage of claimant's disability attributable to the compression fractures had not increased since his initial rating of 5 percent. He stated that the subsequent disability was attributable to claimant's extensive osteoporosis which had substantially increased her chances of incurring additional compression fractures during bending, stooping, and lifting activities.

The referee found that the claimant's condition had worsened since the date of petitioners' admission of liability and was continuing to worsen. He also found that claimant had worked steadily without significant or disabling back symptoms prior to the accident in August 1976. The referee concluded that claimant was totally disabled as a result of her "industrial injury in conjunction with her general physical condition of extensive osteoporosis and upon consideration of her advanced age of 70, her education which is limited to high school and her past work experience...." The referee found that claimant's total disability was fairly attributable to the industrial accident. The Commission affirmed and adopted the findings of the referee. Petitioners argue that the only medical evidence established that claimant's deteriorated condition was the result of her osteoporosis, not the industrial accident. Thus, petitioners contend that the Commission erred in reopening the claim and in awarding additional benefits because claimant had failed to establish, "by credible medical testimony," that her condition was caused by her industrial injury. We disagree.

In order to recover workmen's compensation benefits a claimant must demonstrate that the disability was "proximately caused by an injury ... arising out of and in the course of employment." Section 8-52-102(1)(c), C.R.S.1973 (1982 Cum.Supp.). Whether the claimant has established causation is a question of fact, the determination of which is within the determination of the fact finder. Wierman v. Tunnell, 108 Colo. 544, 120 P.2d 638 (1941). If the findings are supported by substantial evidence, they are binding upon appellate review. Casa Bonita Restaurant v. Industrial Commission, 624 P.2d 1340 (Colo.App.1981).

Contrary to the assertions of petitioners, substantial evidence of causation is not restricted to credible medical testimony. Industrial Commission v. Havens, 136 Colo. 111, 119, 314 P.2d 698 (1957); see Colorado Fuel & Iron Corp. v. Industrial Commission, 151 Colo. 18, 379 P.2d 153 (1962).

Claimant's testimony as outlined above was sufficient to establish with reasonable probability that her condition had worsened, and that the worsening was attributable to the accident. The fact that claimant's orthopedist attributed claimant's increasing disability to osteoporosis is not determinative. Even undisputed expert testimony is not necessarily conclusive on the Commission in its fact-finding role. Casa Bonita Restaurant v. Industrial Commission, supra. Petitioners argue that Industrial Commission Rule XII(3), 7 Code Colo.Reg. 1101-3 at 5, requires that claimant produce medical proof that

her disability was caused by the industrial injury. The rule provides that an applicant petitioning to reopen a claim on grounds of changed condition must submit a physician's report showing, among other things, "whether or not the impairment is due to the injury for which reopening is sought." The rule further provides that, if an applicant fails to provide the report, the "Director [of the Division of Labor] may deny the Petition to Reopen."

The cited rule only establishes a procedure to be used by applicants petitioning to reopen their claims, and gives the director authority to dismiss petitions unsupported by a medical report. The rule does not purport to establish an evidentiary standard requiring proof of causation by credible medical testimony. We decline to assign to the rule a meaning which the Commission itself has not adopted. See Timberline Sawmill & Lumber Inc. v. Industrial Commission, 624 P.2d 367 (Colo.App.1981).

Order affirmed.

Smith and Tursi, JJ., concur.

Calvin Emery Sayers, Plaintiff in Error,

v.

American Janitorial Service, Inc., a Colorado corporation,

and Industrial Commission of the State of Colorado

(Ex-officio Unemployment Compensation

Commission of Colorado),

Defendants in Error.

No 21954.

162 Colo. 292

Supreme Court of Colorado,

In Department.

April 3, 1967.

Harry L. Hellerstein, Samuel D. Menin, Denver, for plaintiff in error.

Duke W. Dunbar, Atty. Gen., Frank E. Hickey, Deputy Atty. Gen., James D. McKevitt, Asst. Atty. Gen., Denver, for defendants in error.

DAY, Justice.

Plaintiff in error made application for unemployment compensation by reason of being discharged from his employment with defendant in error American Janitorial Service. After a hearing before a referee of the Industrial Commission, the Ex-officio Unemployment Compensation Commission of Colorado, it was determined that the employee was not entitled to unemployment compensation and an order showing 'no award' was entered. Upon review this ruling was affirmed by the Industrial Commission. The district court of the City and County of Denver upon review of the Commission's record also affirmed the 'no award' order.

The question before this court is whether the record supports the determination of the Commission. We find that it does.

One who is discharged from his employment is entitled to unemployment compensation unless the reason for his discharge comes within one of the grounds provided for in the act. The referee and the Commission found that the employee 'was discharged because of

insubordination.' The actual words used by the referee were: 'Claimant was discharged by the employer for having failed to follow instructions. Under section 82-4-8(5)(b)(1)(i) of the law no award of benefits shall be granted.'

The pertinent section under which the Commission determined that the employee was not entitled to compensation reads as follows: 'Insubordination such as: * * * deliberate disobedience of a reasonable instruction of an employer or his duly authorized representative; * * *.' The precise words 'deliberate disobedience' have not been heretofore defined and interpreted in this jurisdiction nor are we favored with citation of authority in which these precise words have been before courts of other jurisdictions. Our own research has also failed to disclose any pertinent cases on the subject. Similar words, however, are used in the unemployment statutes in other states. For example, the act in Pennsylvania, 43 P.S. s 802, provides for ineligibility for compensation 'for willful misconduct connected with his work * * *.' In Riehl v. Unemployment Compensation Board of Review, 178 Pa.Super. 400, 116 A.2d 271, the Pennsylvania court, in dealing with the words 'willful misconduct' said that they do 'not necessarily require actual intent to wrong the employer. If there is a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer he can be discharged for 'willful misconduct' and will be denied compensation.' (Emphasis added.)

The court in Riehl v. Unemployment Compensation Board of Review, supra, further stated that it is difficult to mark the precise connotative boundaries of the term 'willful' as employed by the law since the word carries various shades of meaning; it takes on the color of its context, and that, therefore, what is 'willful' depends primarily upon a determination of factual matters.

In this case the evidence of reckless disregard of the employer's interest shows that the employee had been working as a janitor for the janitorial service which contracted its services with various business establishments, and that the employee's conduct resulted in the loss of some accounts. In the six months prior to his being discharged, the employee had been repeatedly warned 'on six or seven occasions' that in mopping the floor he was sloppily splashing up the walls, the bottom of doors, and the lockers on the premises of the customers; that he failed at another place to buff the floor as he knew he should; that when these matters were called to his attention he merely replied 'okay' but that he continued to carelessly leave splash marks around after his work had been done. There was further testimony that he was given precise instructions, which, if followed, would result in no splash marks being on the walls; specifically, he was told 'not to lay his water and don't take such a big area. Lay his on the floor, not raised up.' He was also on the floor, not raised up.' He was also instructed to use his wiping cloths around the lower portions of the area adjacent to the floor.

The employee does not deny that he was told about his unsatisfactory work and that he was warned several times (he stated two or three) not to leave splash marks on the bottom of walls and doors. He denied that he was leaving splash marks; contends that he was careful; and that he didn't believe 'to this day' that there were any splash marks around.

This case, therefore, presents a disputed question of fact to be resolved by the trier of the facts. We again reiterate that which is so axiomatic that we no longer cite authorities in support thereof, namely, that the Industrial Commission's determination of facts will not be disturbed on review either by the trial court or by this court. We hold that the trial court was correct in affirming the decision of the Industrial Commission.

The judgment of the Trial court is affirmed.

Moore, C.J., and Sutton and Pringle, JJ., concur.

Robert J. Short, Petitioner,

v.

Steves Holiday Liquors, Inc., and the Industrial

Commission of the State of Colorado, Respondents.

No. 86CA0340.

727 P.2d 415

Colorado Court of Appeals,

Div. III.

Sept. 4, 1986.

Miller, Makkai & Dowdle, Randall C. Arp, Denver, for petitioner.

No appearance for respondent Steves Holiday Liquors, Inc.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Aurora Ruiz-Hernandez, Asst. Atty. Gen., Denver, for respondent Industrial Com'n.

BABCOCK, Judge.

Claimant, Robert J. Short, seeks review of a final order of the Industrial Commission denying his claim for unemployment compensation benefits. We affirm.

As an employee of Steves Holiday Liquors, Inc. (employer), claimant checked employer's daily receipts and kept employer's books. At the end of each evening, claimant counted the money and ran an adding machine tape of the daily receipts.

Claimant was terminated by employer because of an incident which occurred at the end of his shift on July 30, 1985. The first adding machine tape run by claimant for that day indicated an overage of $16.35. Claimant testified that he felt such a large overage would make him and his employees look bad, so he modified two numbers on the tape and then ran a second tape using the modified numbers, which indicated an overage of only $1.35. After removing the $15 difference, claimant placed the second tape with the day's receipts. Before claimant's return to work, however, employer found the first tape on the floor. Upon comparing the first tape with the tape that was with the receipts, employer discovered the discrepancy and contacted claimant. The extra $15 was rung up as business for that day. Claimant was thereafter terminated.

The Commission found that claimant had not been instructed to make the books balance and that employer relied solely upon claimant's preparation of records of the business that was transacted. It further found that claimant intentionally falsified employer's records for his own reasons. The Commission concluded that claimant therefore was responsible for his separation from employment, and it reduced his benefits pursuant to Sec. 8-73-108(5)(e)(VII), C.R.S. (1985 Cum.Supp.).

Claimant contends that the Commission's decision was erroneous as a matter of law because there is no evidence in the record to support application of Sec. 8-73-108(5)(e)(VII), C.R.S. (1985 Cum.Supp.). That subsection states that an individual may be disqualified from the receipt of benefits if separation from employment results from "[v]iolation of a statute or of a company rule which resulted or could have resulted in serious damage to the employer's property or interests or could have endangered the life of the worker or other employees, such as ... intentional falsification of expense accounts, inventories, or other records or reports." Claimant argues that his intentional falsification of records alone is insufficient under this subsection to reduce benefits; rather, he asserts that it must further be shown that his action was a violation of a statute or company rule and that the violation resulted or could have resulted in serious damage to employer's property or interests. Claimant's argument is legally correct, but we affirm the order because the Commission reached the proper result under the wrong statutory subsection.

Here, the evidence established that the $15 temporarily unaccounted for following claimant's falsification of the tapes was rung up on the next day's business, and no other evidence was presented whether claimant's falsification could have resulted in any other damage to employer's property or interests. Therefore, although the Commission's finding that claimant intentionally falsified employer's records is supported by substantial evidence, the record does not support application of Sec. 8-73-108(5)(e)(VII), C.R.S. (1985 Cum.Supp.). See Ruby v. Yellow Cab, Inc., 163 Colo. 297, 430 P.2d 463 (1967); In re Claim of Damon v. Industrial Commission, 677 P.2d 431 (Colo.App.1983).

However, Sec. 8-73-108(5)(e)(XVI), C.R.S. (1985 Cum.Supp.) permits disqualification if separation from employment results from "[f]ailure to properly ... account for the employer's property when this obligation is an essential part of the job." Here, the Commission found that claimant was responsible for the separation because of his improper record keeping in the performance of his duties. These findings are supported by substantial evidence, and the Commission's decision is justified pursuant to Sec. 8-73-108(5)(e)(XVI), C.R.S. (1985 Cum.Supp.). Accordingly, although the Commission cited the wrong statutory subsection, we find no error in its order. See Stevenson v. Industrial Commission, 705 P.2d 1020 (Colo.App.1985).

Order affirmed.

Pierce and Tursi, JJ., concur.

Lloyd D. Smith, Petitioner,

v.

The Industrial Claim Appeals Office of the State of Colorado

and M.C. Reki, Inc., Respondents.

No. 91CA0368.

817 P.2d 635

Colorado Court of Appeals,

Div. IV.

Aug. 15, 1991.

Norman Aaronson, Legal Aid and Defender Program, Boulder, for petitioner.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Jeanne Labuda, Asst. Atty. Gen., Denver, for respondent Industrial Claim Appeals Office.

No appearance for respondent M.C. Reki, Inc.

HUME, Judge.

Lloyd D. Smith, claimant, seeks review of a final order of the Industrial Claim Appeals Panel which disqualified him from the receipt of unemployment benefits. We affirm.

Claimant, a production worker, failed to appear for work one day. The next day, he called his employer and reported that he was in county jail. Claimant stated that if employer would agree to participate, claimant could be granted work release status, thereby allowing him to continue working during his incarceration. Although employer had agreed to participate in the work release program on claimant's behalf on a prior incarceration, it declined to do so on this occasion. Instead, employer treated claimant's absence as unexcused and terminated his employment.

After hearing, the hearing officer found that claimant's incarceration occurred because of claimant's failure to pay previous fines and tickets and other self-created legal problems. The hearing officer concluded that claimant was at fault for the separation and disqualified him pursuant to Sec. 8-73-108(5)(e)(X), C.R.S. (1986 Repl.Vol. 3B) (incarceration after conviction of a violation of any law) from receiving benefits. The Panel affirmed the disqualification.

Claimant contends that the Panel erred in concluding that he was at fault for the separation. He argues that he was ready and willing to work through the work release program and that employer's refusal to participate in that program thus prevented his returning to work and caused his separation from employment. We disagree.

The crux of claimant's argument is that, even though his own actions caused his incarceration and resultant inability to work, employer was required to participate in the work release program to alleviate claimant's self-imposed disability or be held at fault for claimant's inability to work and ensuing separation from employment. We reject that argument.

We are unaware of any requirement that an employer participate in a work release program in order to allow employees to continue to work during periods of incarceration. Absent such a requirement, we perceive no basis to impute fault upon the employer for an employee's separation from work caused by his incarceration.

Defendant also argues that failure to impose such a requirement on employers will substantially weaken the work release program. We are unpersuaded by that argument.

First, we find nothing in the Colorado Employment Security Act, Sec. 8-70-101, et seq., C.R.S. (1986 Repl.Vol. 3B) to indicate that it was intended to promote jail work release programs. Additionally, nothing in this ruling prohibits or restricts employers' participation in such programs if they desire to do so. The ruling simply declines to construe the Employment Security Act in a manner that would coerce such employer participation.

The evidence and findings support the conclusion that claimant should be disqualified pursuant to Sec. 8-73-108(5)(e)(X), and thus, it is binding on review.

Order affirmed.

Metzger and Rothenberg, JJ., concur.

COLORADO COURT OF APPEALS

Court of Appeals No. 10CA1671
Industrial Claim Appeals Office of the State of Colorado
DD No. 9686-2010

Lauro Sosa,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Swift Beef Company,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE FURMAN
Gabriel and Richman, JJ., concur

Announced July 7, 2011

Ira A. Sanders, Greeley, Colorado, for Petitioner

John W. Suthers, Attorney General, A.A. Lee Hegner, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

Sherman & Howard, L.L.C., Vance O. Knapp, Heather Fox Vickles, Denver, Colorado, for Respondent Swift Beef Company

Sherman & Howard, L.L.C., Theodore A. Olsen, Denver, Colorado, for Amicus Curiae Mountain States Employers Council, Inc.

Petitioner, Lauro Sosa (claimant), seeks review of a final order of the Industrial Claim Appeals Office (Panel) disqualifying him from receiving unemployment benefits under section 8-73-108(5)(e)(IX.5), C.R.S. 2010 ("presence in an individual's system, during working hours, of not medically prescribed controlled substances"). The Panel reversed a hearing officer's decision that claimant was not at fault in connection with his separation from employment.

Because the hearing officer's findings, and the administrative record, demonstrate an absence of evidence that the laboratory performing claimant's drug test was licensed or certified as expressly required under section 8-73-108(5)(e)(IX.5), we need not decide claimant's claims regarding his use of medical marijuana. Accordingly, we set aside the Panel's disqualification order and remand with instructions to reinstate the hearing officer's decision.

I. Claimant's Discharge

Claimant worked as a production worker for a beef packing plant — Swift Beef Company (employer) — from February 2, 2009, until August 23, 2009, when employer discharged claimant for testing positive for marijuana while at work. Employer has a zero

tolerance policy regarding drugs and alcohol use because employees use knives and potentially hazardous machinery in the workplace.

A deputy of the Division of Employment and Training disqualified claimant from receiving unemployment insurance benefits for violating the company's zero tolerance policy. *See* § 8-73-108(5)(e)(VII), C.R.S. 2010 (employer not charged for benefits when claimant's separation from employment stems from violation of company policy "which resulted or could have resulted in serious damage to the employer's property or interests or could have endangered the life of the worker or other persons").

Claimant appealed. At the hearing, employer's human resources supervisor (HR supervisor) testified that on August 10, 2009, claimant was on light duty work. He asked claimant to take a urine test because claimant's foreman thought that claimant "had seemed unable to stand straight, that he was wobbling while standing, seemed overly tired, and his eyes seemed red." The urine test was done on site and was then sent to a lab for confirmation. The HR supervisor could not recall which lab confirmed the results and, at the hearing, did not have a copy of the lab results.

Claimant testified that his job duties on August 10 involved counting cows, that he did not ingest marijuana that day, and that he did not think that he was under the influence of marijuana while at work. He explained that he had eaten some marijuana for pain two days before he took the urine test and that he had a valid medical marijuana registration card.

Although the hearing officer determined that claimant "tested positive for marijuana," he also found that claimant was not impaired at work on August 10. Concluding that claimant had "a state constitutional right to use marijuana" and that employer "failed to prove that the test was performed at a certified laboratory" as required under section 8-73-108(5)(e)(IX.5), the hearing officer determined that claimant was not at fault for the separation and awarded claimant benefits on a no-fault basis. *See* § 8-73-108(4), C.R.S. 2010.

Employer appealed to the Panel but did not file a brief in support of its appeal. Nevertheless, the Panel entered a lengthy order reversing the hearing officer's decision. Despite the hearing officer's finding that employer failed to prove the laboratory conducting the drug test on claimant was certified, the Panel

concluded that "the hearing officer erred by not applying section [8-73-108(5)(e)(IX.5)]" to impose a disqualification. After the Panel conducted additional analysis concerning the relationship between the unemployment security laws and Colorado's constitutional amendment addressing medical marijuana, it further concluded claimant was disqualified from receiving benefits under section 8-73-108(5)(e)(IX.5).

Claimant challenges the Panel's conclusions.

II. Standard of Review

A decision by the Panel must be set aside if the findings of fact do not support the decision or the decision is erroneous as a matter of law. § 8-74-107(6), C.R.S. 2010; *Starr v. Indus. Claim Appeals Office*, 224 P.3d 1056, 1058 (Colo. App. 2009); *Nielsen v. AMI Indus., Inc.*, 759 P.2d 834, 835 (Colo. App. 1988).

III. Licensed or Certified Testing Laboratory

Claimant contends the Panel erred as a matter of law by imposing a disqualification under section 8-73-108(5)(e)(IX.5), given the hearing officer's finding that employer failed to prove the testing laboratory was licensed or certified. We agree.

Section 8-73-108(5)(e)(IX.5) provides for disqualification if, during working hours, an individual has in his or her system a

> not medically prescribed controlled substance[], as defined in section 12-22-303(7), C.R.S. [2010], . . . as evidenced by a drug . . . test administered pursuant to . . . a previously established, written drug or alcohol policy of the employer and conducted by a medical facility or laboratory licensed or certified to conduct such tests.

Thus, to support a disqualification, section 8-73-108(5)(e)(IX.5) expressly requires an employer to show the presence of a controlled substance through a drug test conducted by a facility or laboratory licensed or certified to conduct drug testing.

Based on an evidentiary finding that employer "failed to prove that the test was performed by a certified laboratory," the hearing officer determined that employer had not satisfied this statutory requirement for disqualification under section 8-73-108(5)(e)(IX.5). This evidentiary finding concerning employer's failure of proof is supported by the record. Employer's lone witness (the HR supervisor) could not recall the name of the testing laboratory, and the only evidence in the record describing the laboratory is an internal document of employer containing a handwritten notation of

the laboratory's name. Employer presented no evidence regarding whether the laboratory was licensed or certified to perform drug testing.

Employer nevertheless contends it was not required to show the laboratory was licensed or certified because claimant did not specifically challenge the test results at the hearing. Absent some form of waiver or stipulation by claimant, however, we are not persuaded that this express statutory requirement for disqualification under section 8-73-108(5)(e)(IX.5) may be deemed either inapplicable or satisfied without evidentiary proof.

In reviewing the record, we perceive no such waiver or stipulation by claimant in this case. Although claimant argued and presented evidence that he was authorized to use medical marijuana, he never stipulated that the positive test results referenced by employer were accurate. To the contrary, claimant's counsel noted at the hearing that employer had not presented the actual laboratory test results and, instead, had submitted only internal company documents to show a positive test result. Indeed, in cross-examining employer's witness, claimant's counsel implicitly challenged the existence of the laboratory test itself by asking why

employer had not submitted a copy of the actual report "from the lab where this [test] was allegedly done."

Nor are we persuaded by employer's assertion that this case is "very similar" to a precedential opinion issued by the Panel titled "Concerning Fault for Separations Caused by Off-the-Job Use of Medical Marijuana." *See* Dep't of Labor & Emp't Reg. No. 11.2.16.1, 7 Code Colo. Regs. 1101-2 (authorizing Panel, upon unanimous vote, to designate decision as precedential so as to be followed by hearing officers and deputies). In that decision, the Panel concluded that disqualification under section 8-73-108(5)(e)(IX.5) was proper despite the absence of findings as to whether the testing facility was licensed or certified. Critical to that decision, and unlike here, was the claimant's specific concession that "he had marijuana in his system during working hours."

Although claimant acknowledged consuming marijuana contained in bread two days before employer required him to take the test, he also testified that he had not ingested or used marijuana on the date he was tested and was not "under the influence" of the drug at that time.

Employer references the laboratory's website and asks us to accept its assertion that the laboratory is licensed or certified. We may not consider these assertions or outside materials, however, because our review in this case is limited to the evidentiary record made before the hearing officer. *See Goodwill Indus. v. Indus. Claim Appeals Office*, 862 P.2d 1042, 1047 (Colo. App. 1993).

Nor may we take judicial notice that the laboratory was licensed or certified or that the marijuana claimant admitted ingesting two days earlier was still in his system when he was tested. These factual issues are subject to reasonable dispute and are neither "generally known within the territorial jurisdiction" nor "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." CRE 201(b); *see Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850, 853-54 (Colo. 1983)(court of appeals erred in taking judicial notice of, and relying on, certain scientific propositions found in medical treatises not offered or admitted into evidence); *cf. Wright v. Kummerer*, 650 S.E.2d 67 (N.C. Ct. App. 2007)(unpublished table disposition)(district court did not err in refusing to take judicial

notice of length of time marijuana remains detectable in human system because that information is not a "generally known" fact).

We acknowledge there may be circumstances in which an employer need not affirmatively show the testing laboratory or medical facility was licensed or certified. These circumstances could include those when a claimant stipulates to the licensed or certified status of the facility or laboratory or when a claimant stipulates to having drugs in his or her system during working hours. On this record, however, we are not persuaded that claimant so stipulated or otherwise waived, or relieved employer of, the statutory requirement to establish a disqualification under section 8-73-108(5)(e)(IX.5). *See Universal Res. Corp. v. Ledford*, 961 P.2d 593, 596 (Colo. App. 1998)(to establish waiver, there must be a clear, unequivocal, and decisive act by party demonstrating relinquishment).

Because the record supports the hearing officer's findings that employer failed to prove the laboratory conducting claimant's drug test was licensed or certified to conduct such tests, the Panel erred in imposing a disqualification under section 8-73-108(5)(e)(IX.5). Given this error, and because employer does not contend that

claimant should be disqualified under any other statutory subsection, we conclude the Panel's order should be set aside and the matter remanded for reinstatement of the hearing officer's decision.

In light of our resolution of this issue, we need not address claimant's remaining contentions of error or his contention that employer "effectively abandoned" its appeal to the Panel by not filing a brief.

We deny employer's request for an award of appellate attorney fees. *See Pepsi-Cola Bottling Co. v. Colo. Div. of Emp't & Training*, 754 P.2d 1382, 1383-84 (Colo. App. 1988)(noting that court lacked authority to impose sanctions for frivolous appeal in unemployment matter and that, even if it had such authority, appeal was not frivolous).

The Panel's order is set aside, and the case is remanded to the Panel with instructions to reinstate the hearing officer's decision.

JUDGE GABRIEL and JUDGE RICHMAN concur.

Raymond N. Sproule, Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado, Division of Employment and Training, and

Valley Lab, Inc., Respondents.

No. 91CA1915.

830 P.2d 1152

Colorado Court of Appeals,

Div. II.

April 9, 1992.

William E. Benjamin, Boulder, for petitioner.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., James C. Klein, Asst. Atty. Gen., Denver, for respondents Industrial Claim Appeals Office and Div. of Employment and Training.

No appearance for respondent Valley Lab, Inc.

HUME, Judge.

Raymond N. Sproule, claimant, seeks review of the final order of the Industrial Claim Appeals Office affirming a hearing officer's decision that claimant had failed to establish good cause for an untimely appeal from a deputy's denial of his claim for unemployment compensation benefits. We affirm.

Under Sec. 8-74-103(1), C.R.S. (1986 Repl.Vol. 3B), an appeal from a deputy's decision must be postmarked or received by the Division of Employment and Training within fifteen calendar days from the mailing date of the decision. The deputy's decision was mailed to claimant's last reported address in Georgia on May 16, 1991. Claimant's appeal was postmarked August 22, 1991, more than two months past the fifteen day limit.

Section 8-74-106(1)(b), C.R.S. (1986 Repl.Vol. 3B) provides that a late appeal may be accepted for good cause shown, in accordance with the Division's regulations. Regulation No. 12.1.8, 7 Code Colo.Reg. 1101-2, sets out substantive guidelines for determining whether good cause has been shown for a late appeal. However, the regulation expressly provides that "good cause cannot be established to accept or permit an untimely action

which was caused by the party's failure to keep the Division directly and promptly informed in writing of his current and correct mailing address."

The only reason offered by claimant for his late appeal was that he had moved from Georgia and had "no delivery address/forwarding address" from the end of May to mid-July. The hearing officer and Panel concluded that claimant's appeal was late because he failed to keep the Division informed of his mailing address and that he could not establish good cause.

Claimant contends, however, that the mailing address provision could not apply to him because he had no mailing address. We disagree.

The purpose of the mailing address provision is clear; it requires claimants and employers to keep the Division informed of their whereabouts. In light of that purpose, we conclude that a party cannot evade that requirement by failing to maintain a mailing address.

Contrary to claimant's argument, the regulation did not penalize him for failure to perform an impossible act. It is not impossible for a person moving to a new location to maintain a mailing address. He can direct that mail be sent or forwarded to the address of a relative, a friend, or to general delivery at the new location.

For the same reason, we reject claimant's argument that the regulation is ambiguous. The mailing address provision does not conflict with the provision in the regulation that good cause may be based on factors outside the party's control. Also, such provision does not conflict with the legislative purpose to provide protection for persons who become unemployed through no fault of their own.

Nor was claimant entitled to an evidentiary hearing. Because the mailing address provision barred claimant from establishing good cause by proving his own failure to comply with established procedures, he was not entitled to a hearing on that issue.

The order is affirmed.

Smith and Ney, JJ., concur.

COLORADO COURT OF APPEALS

Court of Appeals No. 08CA2413

Industrial Claim Appeals Office of the State of Colorado

DD No. 13656-2008

Dana K. Starr,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Community Hospital Association,

Respondents.

ORDER SET ASIDE AND CASE

REMANDED WITH DIRECTIONS

Division VI

Opinion by JUDGE ROTHENBERG*

Hawthorne and Terry, JJ., concur

Announced December 10, 2009

Law Office of William Benjamin, William E. Benjamin, Boulder, Colorado, for Petitioner

John W. Suthers, Attorney General, A.A. Lee Hegner, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

Caplan and Earnest, LLC, W. Stuart Stuller, Boulder, Colorado, for Respondent Community Hospital Association

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2009.

Petitioner, Dana K. Starr (claimant), seeks review of a final order of the Industrial Claim Appeals Office (Panel) affirming a hearing officer's decision disqualifying her from receiving unemployment benefits. We set aside the Panel's order and remand for further findings.

I. Background

Claimant worked for twenty-six years as a data registrar for the Community Hospital Association (employer) until she was terminated for the alleged theft of the remnants of toilet paper rolls. Several witnesses testified at the hearing, including claimant herself. She admitted taking the remains of several small end rolls of toilet paper without asking her employer's permission, but testified that she had simply removed – either from the floor or on the toilet paper shelf above the toilet paper holders – what she believed was trash, that is, discarded and dirty toilet paper remnants that were, or had been, on the floor. She explained that her purpose in doing so was to donate the otherwise unusable toilet paper remnants to a nonprofit group that sent them to the troops in Iraq for their personal use in the field.

Claimant called as a witness a friend who had informed her of the soldiers' need for small rolls of toilet paper "that they could put in their pocket to go on missions." The friend told claimant, "[T]he roll would] have to fit in a pocket, and their pockets are already pretty full. So [the soldiers had] requested small rolls of toilet paper." She testified that when she had visited the hospital where claimant was employed, she (the friend) "saw in the bathrooms small rolls of toilet paper on the floor, repeatedly." She said she had "mentioned it to [the claimant] and [the claimant] started bringing [her] a few of the tiny rolls."

The friend brought to the hearing some of the actual rolls claimant had given her and testified that they were each about one and a half inches in diameter. She testified that before she sent a roll to Iraq, she would unroll "two or three lines just to make sure it's clean, because it's been on the floor."

The employer had five witnesses who testified by telephone, including an employer representative, a human resources manager, the manager of environmental services, and one of claimant's co-workers.

The employer's representative testified that claimant had admitted taking the remnants and had explained that "she considered it garbage." The representative stated: "We decided to discharge because the hospital has a zero tolerance policy on theft. So since [claimant] had admitted that she'd taken the toilet paper, we determined that it was theft, and so we terminated her."

However, when asked whether employer had a written policy on theft, she stated:

> We don't have a written policy specifically on theft. We do have, you know, a corrective action policy that says we can [discipline] people [unintelligible] up to an[d] including termination depending on the severity of the – severity of the issue. . . . We have terminated people for the theft of a hard boiled egg in the cafeteria, the theft of a can of pop in the cafeteria . . . .

The manager of environmental services testified that employer sought to reduce waste and that "the idea with this [type of coreless toilet paper roll] is so that you can use it right down to the very end." She also testified that she had seen rolls of toilet paper on the floor in the bathrooms. When asked whether employer recycled the small cores of the toilet paper rolls, she stated that her staff "probably more often would just throw them away, because they're small and they don't really collect them." She was asked if she considered "trash and even the cores of [the toilet paper rolls] to be hospital property" and she answered, "Yes. I would think – my staff would determine if they were truly trash and throw them away."

The co-worker testified that she saw claimant putting the small toilet paper rolls into a bag, and that claimant had told the co-worker "that she takes [the small end pieces of the toilet paper rolls] home and she packs them in a box" and "send[s] them to the soldiers in Iraq." The co-worker had responded, "I think our government can afford toilet paper for the soldiers." The co-worker confirmed that claimant said that "[the soldiers]

really love the little ones because they can put them in their pockets" and that she "only [took] the partly used ones." According to the co-worker, when she went home and told her husband about it, he told her she was "naive and gullible" and expressed his opinion that claimant was lying. Thereafter, the co-worker accused claimant of theft and reported her to management.

Following the testimony, the hearing officer found that (1) employer bought "coreless toilet paper [for use in its building] so no waste occurs"; (2) "[t]hese toilet paper rolls can be used almost completely"; (3) claimant "admitted taking the small or end rolls of toilet paper" and "that she had done so without requesting [employer's] authorization"; and (4) claimant was terminated because employer has a "zero tolerance policy" and will terminate any employee who takes any property belonging to it.

Based on these findings, the hearing officer found claimant at fault for the separation and disqualified her from receiving benefits pursuant to section 8-73-108(5)(e)(XI), C.R.S. 2009 (providing for disqualification where theft is the reason for the separation). The Panel upheld the hearing officer's decision.

II. Standard of Review

The Panel's findings of fact may not be altered on review if supported by substantial evidence, but a decision by the Panel must be set aside if the findings of fact do not support the decision, or if the decision is erroneous as a matter of law. § 8-74-107(6), C.R.S. 2009; *Nielsen v. AMI Industries, Inc.*, 759 P.2d 834, 835 (Colo. App. 1988).

III. Evidence of Value

Claimant contends the evidence does not support the hearing officer's finding that she was discharged for "theft" because there was no specific evidence or findings regarding the value of the toilet paper remnants that were taken. She maintains that the meaning of theft in section 8-73-108(5)(e)(XI) should be substantially the same as the criminal definition of theft in section 18-4-401, C.R.S. 2009, including the requirement that the item taken be a "thing of value." We agree section 18-4-401 offers guidance regarding the elements of theft, but disagree that specific evidence of value is required to support a disqualification from the receipt of benefits based on theft.

Section 18-4-401(1), C.R.S. 2009, provides, as relevant here:

> A person commits theft when he knowingly obtains or exercises control over anything of value of another without authorization . . . and . . . [i]ntends to deprive the other person permanently of the use or benefit of the thing of value; or . . . [k]nowingly uses . . . the thing of value in such manner as to deprive the other person permanently of its use or benefit.

In *Jefferson County v. Kiser*, 876 P.2d 122, 123 (Colo. App. 1994), it was undisputed that the claimant, who worked for the Jefferson County Sheriff's Department, had shoplifted while off duty. The dispositive issue was whether the Panel erred in determining that he was still entitled to unemployment benefits because § 8-73-108(5)(e)(XI) only contemplates theft from an employer which is committed in the course of employment. A division of this court concluded that the General Assembly did not intend to distinguish between theft in the course of employment and theft outside the course of employment, and therefore, that the claimant was not entitled to benefits. *Id*.

Although Kiser is factually distinguishable, it is instructive in determining the elements that must be shown when a theft is alleged in an unemployment compensation case as the basis for denying benefits. The division there applied a "plain and ordinary" meaning analysis in reaching its conclusion, and determined that, in the context of unemployment benefits, theft means "the act of stealing; the wrongful taking and carrying away of the personal goods or property of another; larceny." *Id*. The panel quoted the definition of theft in Webster's Encyclopedic Unabridged Dictionary of the English Language 1470 (1989); see § 18-4-401(1). Evidence of value is required in criminal theft cases because it affects the severity of the offense. *See* § 18-4-401(2)(b), C.R.S. 2009 (providing that theft is a "class 2 misdemeanor if the value of the thing involved is less than five hundred dollars"). In such cases, the value "of the thing involved" depends upon objective criteria, and the jury is not required to find the defendant was aware of the actual value of the stolen items. *See People v. Cowden*, 735 P.2d 199, 201 (Colo. 1987) (stating that the grade of theft is determined by the value of the items taken, not by the *mens rea* of the defendant). But this is a civil case, and we agree with the division in *Kiser* that the absence of a specific finding regarding the value of the items allegedly taken does not preclude a disqualification for theft under section 8-73-108(5)(e)(XI). *Kiser*, 876 P.2d at 123; *see also Wright v. Commonwealth*, 465 A.2d 1075, 1077 (Pa. Commw. Ct. 1983) (upholding disqualification for willful misconduct based on employee's theft of trash bags and toilet paper from employer, despite lack of evidence regarding exact amount of property taken or its value to employer and despite argument that theft was *de minimis*).

IV. The Mens Rea Requirement

Nevertheless, our resolution of the value issue does not end our inquiry regarding the sufficiency of the evidence in this case. The division in Kiser also concluded the evidence introduced at the hearing was sufficient because it "established that claimant took the items from the store without any intention of paying for them and the hearing officer so found." *Kiser*, 876 P.2d at 123. The division thus recognized that the *mens rea* of a larceny must be shown.

Theft or larceny requires a showing that the alleged perpetrator acted knowingly and with specific intent. *See People v. Mingo*, 181 Colo. 390, 392, 509 P.2d 800, 801 (1973) ("It is generally accepted in Colorado and elsewhere that larceny requires the specific intent to permanently deprive an owner or possessor of the property taken."); *People v. Sharp*, 104 P.3d 252, 256 (Colo. App. 2004).

As the supreme court explained in *Roberts v. People*, 203 P.3d 513 (Colo. 2009):

> Colorado is among the substantial majority of states that have consolidated the crimes of larceny, embezzlement, and theft under false pretenses in a single crime of theft. According to [the theft] statute, a person commits the crime of theft when he knowingly obtains or exercises control over anything of value of another without authorization . . . and in addition he either intends to permanently deprive the other person of its use or benefit; demands a consideration to which he is not legally entitled to return it; or uses, conceals, or abandons it with the intent to, or at least the knowledge that his conduct will, permanently deprive the other person of its use or benefit. *See* § 18-4-401(1), C.R.S. (200[9]). Whichever way the crime is committed, it constitutes the offense of "theft."
>
> Id. at 516 (additional citations omitted; emphasis added).

Except with respect to the element of value, virtually every civil theft and unemployment case we have found has required proof of the same *mens rea* contained in the criminal statutes, although the cases have only required the civil standard of proof, a preponderance of the evidence.

For example, in *Suarez-Negrete v. Trotta*, 47 Conn. App. 517, 520-21, 705 A.2d 215, 218 (1998), the court addressed a state statute permitting a plaintiff to bring a civil

action and obtain treble damages against a defendant who had stolen the plaintiff's property. The court concluded the civil action for statutory theft was "synonymous with larceny" under the state's criminal statute, stating that "statutory theft requires an intent to deprive another of his property," and therefore "requires a plaintiff to prove the additional element of intent over and above what he or she must demonstrate to prove conversion." *Id*. (quoting *Lawson v. Whitey's Frame Shop*, 42 Conn. App. 599, 605-06, 682 A.2d 1016 (1996), aff'd in part and rev'd in part on other grounds, 241 Conn. 678, 697 A.2d 1137 (1997)).

Florida cases have held that, to establish an action for civil theft, one must show criminal intent which is defined in Florida's criminal code as the intent to "temporarily or permanently" deprive or appropriate the property of another. The Florida Supreme Court has interpreted this section to require only the "intent to deprive," rather than the "intent to permanently deprive." *Florida Desk, Inc. v. Mitchell Int'l, Inc*., 817 So. 2d 1059, 1060 (Fla. Dist. Ct. App. 2002); *see Country Manors Ass'n v. Master Antenna Systems, Inc*., 534 So. 2d 1187, 1191 (Fla. Dist. Ct. App. 1988).

In *Oxley v. Medicine Rock Specialties, Inc*., 139 Idaho 476, 481, 80 P.3d 1077, 1082 (2003), the Idaho Supreme Court concluded there was insufficient evidence of employee theft in an unemployment compensation case, and stated: "To prove employee theft, the employer must establish by a preponderance of the evidence the employee stole property from the employer."

Similarly, in *Shively v. Gatson*, 185 W. Va. 660, 662, 408 S.E.2d 610, 612 (1991), the court rejected the claimant's argument that the employer had failed to prove she actually "took and carried away" money, "an element necessary to the proof of the crime of larceny." In reaching its conclusion, the court relied on *State v. Houdeyshell*, 174 W. Va. 688, 329 S.E.2d 53 (1985), a criminal case describing the elements of larceny. The court in *Shively* concluded the evidence was sufficient to support a finding that "claimant had stolen money from customers of the employer" and that her failure to pay them was not "an honest error." 185 W. Va. at 663-64, 408 S.E.2d at 613-14.

Likewise, in *Texas Employment Commission v. Ryan*, 481 S.W.2d 172, 175 (Tex. Civ. App. 1972), an employee was fired for taking home company property, namely an oxygen bottle. The court stated: [The employee] took the oxygen bottle and used oxygen from it for his own purposes without permission from anyone having authority to grant him that favor. The Company's posted rules, which were read to employees when hired, prohibited employees from purloining company property. The implication of the Commission's conclusion that the claimant was "subject to disqualification under the provisions of Sec. 5(b) of the Act" is that the Commission was satisfied from the

evidence presented to it that [the employee] appropriated the Company's property by theft. The elements of theft, as that offense is defined in Texas Penal Code, Article 1410, were proven by evidence the Commission apparently accepted as true. Evidence tending to show a lack of criminal intent and mitigating the seriousness of [the employee's] conduct appears to have been rejected by the Commission in deciding the company rule was breached . . . . Id. (emphasis added).

In *O'Keefe v. Commonwealth*, 18 Pa. Commw. 151, 156, 333 A.2d 815, 818 (1975), the issue was whether a claimant who admitted taking stale pastries from his employer on several occasions had committed theft or "willful misconduct" and was ineligible for unemployment compensation. The court concluded he did not commit theft, stating:

> O'Keefe made no attempt to conceal his actions, since both he, the other employees, and their immediate supervisor believed that the stale pastries were valueless waste material. . . . . [W]hile we do not condone theft by an employee, we simply cannot agree with the Board that this case shows any improper motive on the part of O'Keefe. In the peculiar circumstances of this case, we can find no indication of any wrongful conduct on O'Keefe's part. Indeed, it is difficult for us to see how O'Keefe can be said to have disregarded a "standard of behavior" when the record shows, without contradiction, that none of the other employees, or the immediate representative of management, had the slightest idea that anything was wrong with eating a piece of stale, apparently unsalable, pastry.
>
> We note that O'Keefe . . . "admitted" that he knew eating the pastries was wrong. . . . [He] offer[ed] to make restitution in the amount of $50 (to cover all of the pastries consumed by O'Keefe over a period of several months), and, in fact, O'Keefe did pay [the employer] $50. From this, the Board found that O'Keefe had been "stealing baked goods" from his employer. The entire balance of the record leaves us with no doubt that O'Keefe was not "stealing" as we understand the meaning of that term, and the statement containing the "admission" (which is the only evidence indicating O'Keefe knew his actions were disapproved of by his employer) does not constitute the substantial evidence necessary to support

> the finding of the Board. 18 Pa. Commw. at 155-57, 333 A.2d at 818-19 (emphasis added).

Kiser is the only published opinion in Colorado addressing the issue of employee theft under section 8-73-108(5)(e)(XI). But *Itin v. Ungar*, 17 P.3d 129 (Colo. 2000), offers guidance. There, the supreme court addressed section 18-4-405, C.R.S. 2009, the rights in stolen property statute, which provides a civil remedy to those who have had their property taken as the result of "theft, robbery, or burglary." The supreme court applied the definition of theft in the criminal theft statute, reasoning that the civil statute did not define "theft, robbery, or burglary" and that the "Rights in Stolen Property statute appears in the Criminal Code." 17 P.3d at 133.

The court explained that under the civil statute, "a plaintiff must prove the defendant took the property by theft, robbery, or burglary and not conversion," and further explained the difference between conversion and theft:

> [Common-law conversion] is distinct from the crime of theft in that it does not require that a wrongdoer act with the specific intent to permanently deprive the owner of his property. In other words, a good faith purchaser who acts without the knowledge that property has been stolen may be liable for conversion, but may not possess the specific intent to permanently deprive and thus may not be liable for a crime of theft.
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> Id. at 135-36 nn.10 & 12; *see Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1199 (Colo. App. 2009) ("[T]he tort [of conversion] does not require that a tortfeasor act with the specific intent to permanently deprive the owner of his or her property.").

The court in *Itin* did not reach the issue of the burden of proof, but it noted "that a majority of federal circuits have adopted a preponderance of the evidence standard of proof in [Racketeer Influenced and Corrupt Organizations Act] actions, which also provide civil remedies based on violations of criminal offenses," and that "the [United States] Supreme Court, while not expressly reaching this issue, appears to approve of the preponderance of evidence standard." 17 P.3d at 136 n.12 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985)); *see also Huffman v. Westmoreland Coal Co.*, 205 P.3d 501, 509 (Colo. App. 2009).

The only published decision we have found that has applied a different analysis in an employee theft case is *Scott v. Scott Paper Co.*, 280 Ala. 486, 195 So. 2d 540 (1967), reversing 43 Ala. App. 532, 195 So. 2d 536 (1966).

The claimant there was fired for "industrial misconduct" and filed a claim for unemployment benefits. At issue was whether his benefits should be denied because he was discharged for a dishonest act committed in connection with his work, specifically, the removal of company property without authorization. The facts were largely undisputed and described in the court of appeals decision:

> The claimant had a package of finished paper wrapped in some clothing in his possession when he was intercepted by a plant guard as he left the employer's premises through the main office. The plant guards had been alerted as it was suspected that some employees were removing paper from the premises without proper authorization. The claimant informed a company official that he had removed the paper from a trash container and had no intention of stealing company property. The main office was used as an exit from the plant but was not used by the production employees unless authorization had been issued. The claimant's reason for leaving through the office on the last day of employment was to go to a credit union office which was located in that vicinity. The package of paper was examined and found to contain letter size white bond. The paper was wrapped. However, the label had been removed.
>
> 43 Ala. App. at 533-34, 195 So. 2d at 537-38.

The referee denied the claimant unemployment benefits, finding that he had possession of a finished and wrapped product which he had concealed by wrapping it in some clothes; that he "did deliberately remove company property from the employer's premises without proper authorization"; and that this constituted "a dishonest act within the meaning of . . . Alabama Law." Id. at 534, 195 So. 2d at 538.

The court of appeals disagreed, stating that "the evidence . . . while suspicious, would not have sufficed to let a criminal case go to a jury on a charge of embezzlement. This is because of failure to prove reasonable market value. In a case of taking property or other things of value, we construe dishonest and criminal as synonymous." Id. at 535, 195 So. 2d at 539 (citation and footnote omitted).

However, the Alabama Supreme Court reinstated the hearing officer's decision, reasoning as follows:

> [T]he judgment was reversed because the evidence did not meet the technical requirements for a conviction of the crimes of larceny or embezzlement. The court [of appeals] said: "In a case of taking property or other things of value, we construe dishonest and criminal as synonymous." It is with this statement that we find ourselves in disagreement.
>
> There is no question but that an employee can be disqualified for benefits if he was discharged because of a criminal act committed in connection with his work. But we cannot say that the Legislature intended that all dischargeable acts must amount to a violation of the criminal law. If such were the case, there would have been no need to add the word "dishonest." . . .
>
> There are many acts which constitute fraud that are actionable at both law and equity which do not amount to violations of the criminal law. . . .
>
> We cannot agree that the Legislature intended that every time company property was found in the unauthorized possession of an employee, and there was proof that the possession was dishonest and unauthorized, the proof was to no avail unless it also was sufficient to support a conviction for larceny or embezzlement.
>
> Here, the employee was discovered with a package of finished bond paper concealed in his clothing as he was leaving the plant. His explanation was not plausible and his conduct was in conflict with company rules. We think . . . there was sufficient evidence to classify his action as a dishonest act committed in connection with his work. We do not construe '"dishonest" and "criminal," as used in the statute, as synonymous, either generally or in connection with the unauthorized possession of company property.

280 Ala. at 486-88, 195 So. 2d at 541-42.

We perceive no conflict between *Scott* and *Kiser* for several reasons. First, the *Kiser* division held, as did *Scott*, that evidence of value is not an essential element and need not be shown where the disqualification from employment benefits is based on an employee's theft. Second, in *Kiser*, *Scott*, and virtually every published opinion we have found where the employee's discharge was based on theft, the courts have required proof that the employees accused of theft had acted intentionally, or at least knowingly and deliberately. In *Scott*, the referee found the claimant "deliberately remove[d] company property from the employer's premises without proper authorization." 43 Ala. App. at 533-34, 195 So. 2d at 537-38 (emphasis added). A similar *mens rea* also has been required when the reason for the discharge was characterized as "willful misconduct" rather than theft. *See Gane v. Comm'n*, 41 Pa. Commw. 292, 293, 398 A.2d 1110, 1111 (1979) (the claimant's admission that he deliberately falsified his weekly remittance slips to his employer was sufficient to constitute "willful misconduct").

Two important but sometimes countervailing policies are involved in cases such as this one. On the one hand, employers must have the ability to protect themselves from employee theft and other forms of dishonesty, particularly where the employees handle cash. On the other hand, an allegation of theft has very serious consequences for an employee, whether or not criminal charges are filed. Even if the allegation is later shown to be unfounded, it may well affect the ability of the employee to earn a livelihood.

Indeed, Illinois not only looks to its criminal statutes for guidance but also has a specific statute providing that a disqualification from receiving unemployment insurance benefits "may not be imposed unless the employee has either admitted his commission of the felony or theft or has been convicted of the offense by a court of competent jurisdiction" and "in the case of a discharge based on job-related theft, [the statute] requires a showing that the employer was in no way responsible for the theft." *Cetnar v. Bernardi*, 145 Ill. App. 3d 511, 514, 495 N.E.2d 1128, 1131 (1986) (applying former codification of 820 Ill. Comp. Stat. 405/602(B)).

We are persuaded by the reasoning of *Kiser* and the numerous other cases that have concluded that, while evidence of the value of the item allegedly stolen by an employee is not required in unemployment cases, where a theft is alleged as the basis for disqualification of unemployment benefits, the employer must establish by a preponderance of the evidence the *mens rea* required in theft or larceny cases.

V. Defenses to an Allegation of Theft

In *Miller v. People*, 4 Colo. 182, 183 (1878), the Colorado Supreme Court recognized that "[n]ot every wrongful taking of property with intent to convert the same to one's own use is larceny. If the *animus furandi* is wanting, the act is not larcenous . . . ." Hence, a mistake of fact will relieve an individual of liability for theft if it negates the existence of that mental state. *See* § 18-1-504(1)(a), C.R.S. 2009.

In *People v. Bornman*, 953 P.2d 952, 954 (Colo. App. 1997), the defendant was convicted of theft of more than $400. But there was evidence he had been given the vehicle he was charged with stealing by a friend in satisfaction of an alleged lien. When confronted by the true owner, the defendant insisted that his exercise of control over the vehicle was the result of a "big misunderstanding." *Id*.

Defense counsel requested that the jury be instructed that, to be found guilty, the defendant must have been aware his exercise of control over the vehicle was not authorized. The trial court refused the instruction, concluding that the "knowingly" state of mind was to be based on an objective, reasonable person standard. *Id*. A division of this court reversed the judgment and ordered a new trial. The division held that if the defendant had entertained a good faith belief he was entitled to take the item in question, he would not have been guilty of theft:

> Both the wording of § 18-4-401(1) and the explicit provisions of § 18-1-504(1)(a), C.R.S. [2009] (mistake of fact relieves from criminal liability if it "negatives the existence of a particular mental state essential to commission of the offense"), make it clear that, if defendant entertained a good faith belief that he was entitled to take the vehicle, he was not guilty of theft. To apply an objective standard in such circumstances would be to authorize a conviction of theft based upon simple negligence.
>
> . . . [I]t was reversible error to give the elemental instruction in the above form and to prohibit counsel from arguing that defendant possessed the honest, good faith belief that he had the requisite authority, irrespective of the belief that a reasonable person might have formed under the same circumstances. *Bornman*, 953 P.2d at 954 (citation omitted); *cf. People v. Johnson*, 193 Colo. 199, 200, 564 P.2d 116, 118 (1977) ("The standard of culpability [of a defendant charged

> with felony by theft] must be what the state of mind of the particular defendant was, not what a jury concludes might be that of a fictional reasonably prudent man."); *State v. Cales*, 897 A.2d 657, 661 (Conn. App. Ct. 2006) (approving jury instructions providing that if a person took property honestly, although mistakenly believing that he had the right to do so or that the property was abandoned, the requisite intent for larceny would be lacking); *Summers v. Gatson*, 205 W. Va. 198, 203, 517 S.E.2d 295, 300 (1999) (awarding the claimant employment benefits after concluding he did not commit theft or larceny because he took a coin he believed had been abandoned).

VI. Application to this Case

In this case, the hearing officer apparently credited claimant's testimony because he found that she "did not speak with the EVS manager and request permission to take that toilet paper" because "[she] perceived the rolls of toilet paper she was taking as trash and not sufficient to be used." However, after defining theft as "the wrongful taking and carrying away of the personal goods or property of another," the hearing officer concluded:

> The claimant clearly was taking at least end rolls of toilet paper without permission. [She] never did request permission in spite of the fact that she believed she was performing a good deed by sending these remaining unused portion[s] of rolls of toilet paper to the troops in Iraq. Clearly in such a situation it would be reasonable to request permission to use these items for this purpose. The claimant failed to do so. Under these circumstances the separation was the result of volitional acts and omissions. The claimant is not entitled to benefits.
>
> (Emphasis added.)

We conclude that *Bornman* is dispositive of this issue, and that the hearing officer erred as a matter of law in applying a reasonable person standard to assess claimant's *mens rea*. The outcome should not have been determined based on what a reasonable person might have believed or what actions a reasonable person would have taken. It should have been made based on whether this claimant had a good faith but mistaken belief the end pieces

of the toilet paper rolls that she took had been discarded or abandoned by employer. If so, she is entitled to benefits. *Johnson*, 193 Colo. at 200, 564 P.2d at 118; *Bornman*, 953 P.2d at 954; *Cales*, 897 A.2d at 661; *Summers*, 205 W. Va. at 203, 517 S.E.2d at 300.

In reaching our conclusion, we recognize that the hearing officer also found that "the [claimant's] separation was the result of volitional acts and omissions." However, we conclude additional and specific findings regarding claimant's *mens rea* are required.

In *City & County of Denver v. Industrial Commission*, 756 P.2d 373 (Colo. 1988), the supreme court discussed the word "volitional." There, the claimant admitted she was discharged after repeatedly appearing for work in an intoxicated condition, but contended she was eligible for unemployment benefits. The court stated:

> When a claimant's alcoholism has advanced to the stage that the alcoholic is unable to abstain from drinking, the claimant's conduct may be considered nonvolitional and disqualification from benefits is not required. In contrast, when a claimant's alcoholism is such that the alcoholic is able to choose or decide whether to drink alcoholic beverages, the act of drinking is characterized as volitional. Because fault under the statute requires "a volitional act," this misconduct constitutes fault. The degree of impairment and the volitional or nonvolitional nature of a claimant's alcoholism can only be determined under the particular facts of each case. "At a minimum, the claimant must have performed some volitional act or have exercised some control over the circumstance resulting in the discharge from employment." *Gonzales v. Industrial Comm'n*, 740 P.2d 999, 1003 (Colo. 1987) (applying § 8-73-108(5)(e)(XX) to a claimant who was terminated for violating the employer's disciplinary guidelines). 756 P.2d at 378-79 (additional citation omitted; emphasis added).

The ability of a claimant to exercise control or to make a voluntary choice was also discussed in *Cole v. Industrial Claim Appeals Office*, 964 P.2d 617 (Colo. App. 1998), in its discussion of volitional behavior. There, the claimant quit her job because of her own and her children's health problems, but she was denied unemployment benefits because her resignation was found to be volitional. A division of this court addressed the meaning of "volitional" in this context and stated:

> Under the unemployment scheme, "fault" is a term of art which is used as a factor to determine whether the claimant or the employer is responsible overall for the separation from employment. In this context, "fault" has been defined as requiring a volitional act or the exercise of some control or choice by the claimant in the circumstances resulting in the separation such that the claimant can be said to be responsible for the separation.
>
> We also note that the determination of whether a claimant was responsible or "at fault" for his or her separation from employment is not a question of evidentiary fact, but rather is an ultimate legal conclusion to be based on the established findings of evidentiary fact.
>
> Here, although it is undisputed that various health problems motivated claimant's decision to quit, it is also clear that her separation from this employment resulted when she chose to resign. Thus, while claimant's health concerns may have provided her with subjectively compelling personal reasons for quitting this employment, she could not be entitled to an award of benefits on a "no fault" basis unless she established that her separation was essentially involuntary under the objective circumstances shown, notwithstanding her resignation. *Cf. Goddard v. E G & G Rocky Flats, Inc.*, 888 P.2d 369 (Colo. App. 1994) (quitting in the face of an otherwise imminent involuntary termination was not a separation from employment by claimant's volitional choice, and disqualification therefore unwarranted).
>
> Id. at 618-19 (emphasis added).

Decisions in other jurisdictions in both civil and criminal cases have generally used the term "acted volitionally" to mean the individual acted voluntarily, consciously, and not accidentally. *See Brice v. City of York*, 528 F. Supp. 2d 504, 512-13 (M.D. Pa. 2007) (upholding the dismissal of an excessive force claim against a police officer who accidentally discharged his weapon while arresting the plaintiff; court concluded the officer's act was not volitional); *Partee v. State*, 121 Md. App. 237, 260, 708 A.2d 1113, 1125 (1998) ("[T]he nature and location of appellant's wounds and his physical response to being shot . . . precluded an assumption essential to any inference that appellant acted

volitionally: that he possessed the degree of physical control over his body necessary to act wilfully to dispose of the pouch." (emphasis added)); *State v. Wendler*, 312 Minn. 432, 434, 252 N.W.2d 266, 267-68 (1977) (upholding the trial court's finding that defendant was not insane because he "was cognitive of his actions, acted volitionally, and had the capacity to control his behavior" (emphasis added)); *McGanty v. Staudenraus*, 321 Or. 532, 550, 901 P.2d 841, 852 (1995) (observing that the "Restatement (Second) of Torts § 8A (1965) defines the element of 'intent,' with respect to intentional torts" "to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it"); *State v. Warren*, 168 Or. App. 1, 5, 5 P.3d 1115, 1117 (2000) ("The statute [permitting consecutive sentences] focuses on a defendant's volition or the exercise of his or her will at the time of the commission of the crimes. . . . The statute requires more than an incidental violation . . . ." (emphasis added)); *Commonwealth v. Zacher*, 455 Pa. Super. 594, 599, 689 A.2d 267, 269 (1997) (concluding there was insufficient evidence of defense attorney's tardiness on date of trial to find him in contempt and finding that he acted volitionally because "[t]here is no evidence that [he] consciously and deliberately failed to appear for court," where "the surrounding circumstances tend to prove that [he] 'lost track of time' and was late for court inadvertently," which] "is not the equivalent of intent").

Thus, while the terms "intentionally," "knowingly," and "volitionally" sometimes overlap, they are not synonymous. When used in this context, acting with "volition" generally means having the power or ability "to choose and decide" or to exercise "some control over the circumstances," as opposed to acting in a manner that is "essentially involuntary" or accidental. *See Ward v. Industrial Claim Appeals Office*, 916 P.2d 605, 607 (Colo. App. 1995) (rejecting claimant's contention that his resignation was involuntary because of stress "which caused him to lose control of the situation and his surroundings," and concluding there was record support for the finding that he "acted volitionally in resigning"); *Nielsen v. AMI Industries, Inc.*, 759 P.2d at 835 ("If the unwritten policy was never communicated to the claimant, the claimant could not be aware that he had a choice on how to proceed, and thus could not act volitionally.").

In contrast, actions taken "intentionally" or "knowingly" are made purposefully and with design. Former Chief Justice Quinn explained the statutory requirements of acting "intentionally" and "knowingly" in his dissent in *People v. R.V.*, 635 P.2d 892, 896 (Colo. 1981):

Acting "knowingly" with respect to conduct or circumstance requires an awareness that one's conduct is of such a nature or that a particular circumstance exists and, in the case of result, an awareness that one's conduct is practically certain to cause the result. Section 18-1-501(6), C.R.S. [2009]. As defined in section 18-1-501(6) . . .

"knowingly" is both qualitatively distinct from and less culpable than the *mens rea* of "intentionally." "A person acts 'intentionally' or 'with intent' when his conscious objective is to cause the result proscribed by the statute defining the offense." Section 18-1-501(5), C.R.S. [2009].

Claimant here does not contend her actions were involuntary or coerced. She contends she acted based on a good faith, but mistaken, belief that the items she was taking had been abandoned or discarded. Hence, the hearing officer's finding that her "separation was the result of volitional acts and omissions" does not necessarily mean she acted with the knowledge and intent required to commit theft. *See Phelps Tointon, Inc. v. Division of Employment & Training*, 824 P.2d 827, 829 (Colo. App. 1991) (concluding a remand was required because the hearing officer's error affected the conclusion reached). It is also unclear what the hearing officer meant by claimant's "omissions" because a negligent act or omission would be insufficient to prove theft. *See Spaulding v. Florida Industrial Comm'n*, 154 So. 2d 334, 338 (Fla. Dist. Ct. App. 1963) (holding that an employee's inadvertence, ordinary negligence, poor judgment, or inattention does not constitute misconduct).

Therefore, we conclude further findings are required regarding claimant's *mens rea* at the time of the incidents that gave rise to her discharge from employment.

VII. Violation of Company Rule

We reject employer's argument that disqualification is appropriate under section 8-73-108(5)(e)(VII), C.R.S. 2009. That section permits disqualification, as relevant here, if there is evidence that claimant engaged in the [v]iolation of a statute or of a company rule which resulted or could have resulted in serious damage to the employer's property or interests or could have endangered the life of the worker or other persons, such as: Mistreatment of patients in a hospital or nursing home; serving liquor to minors; selling prescription items without prescriptions from licensed doctors; immoral conduct which has an effect on worker's job status; divulging of confidential information which resulted or could have resulted in damage to the employer's interests; failure to observe conspicuously posted safety rules; intentional falsification of expense accounts, inventories, or other records or reports whether or not substantial harm or injury was incurred; or removal or attempted removal of employer's property from the premises of the employer without proper authority.

Here, there is no evidence in the record that claimant's actions "resulted or could have resulted in serious damage to the employer's property or interests or could have endangered the life of the worker or other persons."

The Panel's order is set aside and the case is remanded to the Panel with instructions to remand the case to the hearing officer. On remand, the hearing officer shall determine, based on the evidence in the record, whether claimant had a good faith but mistaken belief the toilet paper remnants she took had been discarded or abandoned by employer. If so, the hearing officer shall award her benefits. If the hearing officer determines that claimant not only acted volitionally, but also had the requisite knowledge and intent to deprive her employer of its property at the time of the actions alleged in this case, she is not entitled to benefits.

JUDGE HAWTHORNE and JUDGE TERRY concur.

Bettye Stevenson, Petitioner,

v.

Industrial Commission of Colorado, and Lois V. Michopoulos, Inc.,

d/b/a Michelles, Respondents.

No. 84CA0608.

705 P.2d 1020

Colorado Court of Appeals,

Div. I.

April 25, 1985.

Pikes Peak Legal Services, R. Eric Solem, Colorado Springs, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Christa Taylor, Asst. Atty. Gen., Denver, for respondent Industrial Commission.

No appearance for respondent Michopoulos, Inc., d/b/a Michelles.

PIERCE, Judge.

Claimant, Bettye Stevenson, seeks review of a final order of the Industrial Commission awarding her reduced unemployment compensation benefits pursuant to Sec. 8-73-108(9)(a)(XX), C.R.S., then in effect (now found at Sec. 8-73-108(5)(e)(XX), C.R.S. (1984 Cum.Supp.)). Although the Commission applied the wrong statutory subsection, we nevertheless affirm the order.

Claimant was terminated from her position as a cook for Michelle's restaurant (the employer) after she refused to provide the employer with written verification of a trip to the hospital emergency room after an unexcused absence. She stated that she refused to submit the verification because the employer had not required it from other employees.

The hearing officer determined from conflicting evidence that the employer had a rule requiring such verification, and found that the employer's request for verification was reasonable. The Commission ordered a maximum reduction in benefits pursuant to Sec. 8-73-108(9)(a)(XX), C.R.S.

Claimant contends that that statutory section does not permit the Industrial Commission to deny unemployment benefits when termination results from a single unauthorized absence from work. We agree.

The statutory provision at issue provides for a maximum reduction of unemployment compensation benefits if termination results "[f]or other reasons including ... excessive tardiness or absenteeism ... or failure to meet established job performance or other defined standards...."

The facts of this case do not apply to that portion of the statute. It is obvious, however, that the Commission's findings apply directly to the statutory section now codified as Sec. 8-73-108(5)(e)(VI), C.R.S. (1984 Cum.Supp.), which allows maximum reduction for "[i]nsubordination such as: [d]eliberate disobedience of a reasonable instruction of an employer or his duly authorized representative...."

To return this case to the Commission for reconsideration under the proper section would be wasteful of time, both the Commission's and ours, because the conclusion it would have to reach under its factual findings is foregone. It has reached the proper legal conclusion under the wrong section of the statute.

The order is, therefore, affirmed.

Smith and Babcock, JJ., concur.

Survey Solutions, Inc., Petitioner,

v.

The Industrial Claim Appeals Office of the State of Colorado

and Bonnie R. Berg, Respondents.

No. 97CA1897.

956 P.2d 1275

Colorado Court of Appeals,

Div. V.

April 16, 1998.

Podoll & Podoll, P.C., Robert C. Podoll, Richard C. Hopkins, Denver, for Petitioner.

No Appearance for Respondent Industrial Claim Appeals Office.

No Appearance for Respondent Bonnie R. Berg.

KAPELKE, Judge.

Survey Solutions, Inc., (employer) seeks review of a final order of the Industrial Claim Appeals Office (Panel) which affirmed an order of the hearing officer awarding Bonnie R. Berg (claimant) unemployment compensation benefits. We set aside the order and remand for entry of an order denying benefits.

Following an evidentiary hearing, the hearing officer found that two events were the direct and proximate cause of the claimant's resignation from her employment. As to the first incident, the hearing officer found that when the claimant brought to work a dance trophy that had been awarded to her seven-year-old daughter, employer's president made a comment to the effect that the claimant had better watch out because soon the daughter would be performing "in a strip tease joint." The hearing officer further found that this was a clearly offensive comment and that, even if it had been intended in humor, the comment was in extremely bad taste.

With respect to the second incident, the hearing officer found that the president had made extremely "unpleasant and unflattering" comments to claimant's husband's new boss concerning the work abilities of claimant's husband, who had previously worked for employer.

The hearing officer concluded that claimant was entitled to an award of benefits pursuant to § 8-73-108(4)(o), C.R.S.1997, because she had quit her employment as a result of "personal harassment by the employer not related to the performance of the job."

On review, the Panel determined that the findings as to the first incident alone supported the award of benefits pursuant to § 8-73-108(4)(o). The Panel affirmed the award of benefits on that basis and did not address whether the president's comments about the claimant's husband also constituted "personal harassment" under the statutory subsection.

On appeal, employer contends that the Panel erred in determining that the first incident was "personal harassment" under the statute and a proximate cause of the claimant's resignation. We agree that the conduct did not amount to personal harassment within the meaning of the statute.

Under § 8-73-108(4)(o), a claimant may be awarded unemployment benefits if he or she quits "because of personal harassment by the employer not related to the performance of the job." The statute does not define personal harassment.

Webster's Third New International Dictionary 1031 (1986) defines "harassment" as the state of being "harassed," and defines "harass" as "to vex, trouble, or annoy continually or chronically."

Divisions of this court have held that an objective standard is the appropriate measure for determining a claimant's entitlement to benefits. See Wargon v. Industrial Claim Appeals Office, 787 P.2d 668 (Colo.App.1990); Rose Medical Center Hospital Ass'n. v. Industrial Claim Appeals Office, 757 P.2d 1173 (Colo.App.1988).

We conclude that an objective standard, rather than a subjective one based on the particular claimant's own sensitivities or reactions, should also govern the determination whether an employer's actions constitute "personal harassment" under § 8-73-108(4)(o). Thus, the issue is whether a reasonable person in the claimant's position would have found the employer's conduct to be so vexing, troubling, and annoying as to warrant resignation from employment.

As noted, the Panel addressed only the first incident. We conclude that this incident, standing alone, does not constitute personal harassment within the meaning of the statute. While the comment of employer's president relating to claimant's daughter may have been considered offensive by claimant, it was not, in our view, conduct that a reasonable person would find to be so vexing, troubling, and annoying as to warrant quitting a job.

While we recognize that a division of this court has indicated that conduct need not be continuous or ongoing in order to be personal harassment, see Marlin Oil Co. v. Industrial Commission, 641 P.2d 312 (Colo.App.1982), the isolated comment of the employer here nevertheless falls short of the required standard.

Although the Panel did not address the second incident--involving the criticism of claimant's husband--we conclude that such conduct also did not amount to personal harassment of the claimant.

In the hearing before the ALJ, the claimant testified that she had been told by her husband that he had been informed by his new boss that employer's president had "verbally slandered" the husband "and his work ability." Claimant did not elaborate on what the actual comments had been. Nor did she indicate that the comments of employer's president had been made to or in any way directed at her.

Under these circumstances, the record does not support a finding that this conduct amounted to personal harassment of the claimant.

We therefore conclude that the two incidents, considered either separately or collectively, do not constitute personal harassment of the claimant within the meaning of § 8-73-108(4)(o) and do not support an award of unemployment compensation benefits.

In view of our determination, we need not address employer's contention that the comments concerning claimant's husband's work performance were subject to a claim of qualified privilege.

The order is set aside, and the cause is remanded for entry of an order denying benefits.

Marquez and Rothenberg, JJ., concur.

Phillip C. TILLEY, Petitioner,
v.
The INDUSTRIAL CLAIM APPEALS OFFICE OF the STATE OF COLORADO and U.S. West Communications, Inc., Respondents.

No. 95CA2200.
Colorado Court of Appeals,
Div. II.
June 27, 1996.
Rehearing Denied Aug. 22, 1996.

Unemployment compensation claimant sought review of final order of Industrial Claim Appeals Panel which affirmed an order of hearing officer disqualifying him from receipt of benefits. The Court of Appeals, Plank, J., held that: (1) evidence supported disqualification of unemployment compensation claimant under statute allowing disqualification for engaging in rude, insolent, or offensive behavior which reasonably need not be countenanced by a customer, supervisor, or fellow worker, and (2) admission of hearsay evidence was not reversible error.

Affirmed.

Thomas F. Hassan, Denver, for Petitioner.

Parcel, Mauro, Hultin & Spaanstra, Raymond W. Martin, Nancy E. Berman, Denver, for Respondent U.S. West Communications, Inc.

No Appearance for Respondent Industrial Claim Appeals Office.

Opinion by Judge PLANK.

Petitioner, Phillip C. Tilley (claimant), seeks review of a final order of the Industrial Claim Appeals Panel (Panel) which affirmed an order of a hearing officer disqualifying him from the receipt of unemployment compensation benefits. We affirm.

U.S. West Communications, Inc., (employer) discharged claimant as a result of a confrontation between the claimant and a security guard on employer's premises. The hearing officer found that claimant had parked his car in a handicapped parking space, even though he was not handicapped. A security guard placed a note under the claimant's windshield wiper, advising the claimant that the police would be called if the claimant parked in the handicapped space again.

The hearing officer found the claimant then confronted the security guard and made a threat of violence against her. The hearing officer further found that the employer investigated the matter and determined that, by "threatening to commit physical injury" to the security guard, the claimant acted in violation of the employer's safe workplace policy. Employer therefore discharged the claimant.

The hearing officer further concluded that the claimant was responsible for his separation and disqualified him pursuant to § 8-73-108(5)(e)(XII), C.R.S. (1986 Repl. Vol. 3B) (discharge for threatening to assault under circumstances such as to cause a reasonably emotionally stable person to become concerned as to his or her safety). Upon review, the Panel affirmed the disqualification under § 8-73-108(5)(e)(XII). The Panel determined that the hearing officer's findings and the evidence also would support the disqualification under § 8-73-108(5)(e)(XIV), C.R.S. (1986 Repl. Vol. 3B).

I.

Claimant contends the Panel erred in affirming his disqualification under both § 8-73-108(5)(e)(XII) and § 8-73-108(5)(e)(XIV). As we agree with the Panel that the evidentiary findings and evidence would support claimant's disqualification under § 8-73-108(5)(e)(XIV), we find no reversible error.

Section 8-73-108(5)(e)(XIV) allows a claimant to be disqualified from the receipt of benefits for engaging in rude, insolent, or offensive behavior which reasonably need not be countenanced by a customer, supervisor, or fellow worker.

Here, the hearing officer found that the claimant engaged in physically threatening behavior toward the security guard and that this behavior violated the employer's safe workplace policy. Furthermore, the evidence and findings would support a determination that a reasonable person in the position of the security guard need not have countenanced the claimant's language and behavior. Thus, the Panel did not err in determining that the evidence and findings would support a disqualification pursuant to § 8-73-108(5)(e)(XIV). *See Davis v. Industrial Claim Appeals Office*, 903 P.2d 1243 (Colo. App.1995); *see also* § 8-74-104(2), C.R.S. (1995 Cum. Supp.); *Samaritan Institute v. Prince-Walker*, 883 P.2d 3 (Colo.1994) (Panel can make own determination as to ultimate facts).

We are not persuaded otherwise by claimant's argument that the security guard was not employed directly by employer and thus was not a "fellow worker" who fell within the protection of § 8-73-108(5)(e)(XIV). Neither the plain language nor the legislative history of the statute supports such a restrictive interpretation.

Statutes are to be construed in a manner which furthers the legislative intent for which they were drawn. And, to discern the intent of the General Assembly, we first examine the language of the statute. *Snyder Oil Co. v. Embree*, 862 P.2d 259 (Colo. 1993).

A plain reading of the statute at issue here shows that the General Assembly did not limit the "fellow workers" who fall within the scope of the statute to those who are employed by the same employer as the claimant. Accordingly, we will not infer the existence of such a limiting interpretation. *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480 (Colo. 1985).

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Further, the legislative history of the statute since its adoption does not support claimant's argument. *See Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988) (amendments to statute properly may be considered when determining legislative intent).

When originally adopted in 1963, this subsection provided for a disqualification for "rudeness, insolence, or offensive behavior of the worker not reasonably to be countenanced by a *customer*." Colo. Sess. Laws 1963, ch. 188, § 82-4-9(5)(b)(ix) at 675 (emphasis supplied).

In 1965, the scope of the statute was expanded to allow for a disqualification when a claimant engages in rudeness, insolence, or offensive behavior which reasonably need not be countenanced by a "customer, supervisor, or fellow worker." Colo. Sess. Laws 1965, ch. 213, § 82-4-8(6)(b)(xvi) at 840. By this amendment, the General Assembly indicated its intent to broaden the scope of the statute. This subsection has not been amended since then.

Consequently, we conclude that the "fellow workers" who fall within the ambit of the statute are not limited to those who are employed by the same employer as the claimant. *See also Davis v. Industrial Claim Appeals Office, supra* (security guard in workplace lobby and those within hearing distance included within statute). We therefore reject claimant's argument.

Since we have affirmed the disqualification pursuant to § 8-73-108(5)(e)(XIV), we need not address claimant's arguments concerning the applicability of § 8-73-108(5)(e)(XII).

II.

We further reject claimant's arguments concerning the hearing officer's evidentiary findings.

A.

Claimant initially argues, in essence, that the hearing officer erred in finding that he had threatened the security guard based solely on hearsay evidence. We find no reversible error.

In unemployment compensation hearings, the rules of evidence are somewhat relaxed. *See* § 8-74-106(1)(f)(II), C.R.S. (1986 Repl. Vol. 3B); *QFD Accessories, Inc. v. Industrial Claim Appeals Office*, 873 P.2d 32 (Colo.App.1993). Furthermore, hearsay evidence may support a decision if it is sufficiently reliable and trustworthy and as long as the evidence possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs. *See Industrial Claims Appeals Office v. Flower Stop Marketing Corp.*, 782 P.2d 13 (Colo.1989).

Here, the hearing officer expressly acknowledged that he was relying on hearsay evidence of the security guard and her supervisor. However, his decision reflects his consideration of relevant factors in assessing the reliability and trustworthiness of the hearsay evidence presented and admitted. From our review of the record, we perceive no reversible error in his conclusion that the hearsay evidence was reliable, trustworthy, and possessed probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs. *See Industrial Claims Appeals Office v. Flower Stop Marketing Corp., supra.*

We are not persuaded otherwise by claimant's arguments that the written statements of the security guard and her supervisor should not have been admitted. Contrary to claimant's argument concerning the supervisor's statement, there is no requirement in unemployment compensation hearings that a document containing hearsay be admissible under a hearsay exception before it may be admitted into evidence. *See Industrial Claims Appeals Office v. Flower Stop Marketing Corp., supra.* Furthermore, claimant's unsupported allegation that this document was not reliable or trustworthy does not convince us that reversible error occurred in admitting the document.

Furthermore, the hearing officer specifically weighed the security officer's absence at the hearing in determining whether he should rely on her hearsay testimony and

documentation. We find no reversible error in his conclusion to allow her hearsay statements to be admitted and considered.

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While it might have been preferable for the security guard to have been present and subject to cross-examination by the claimant, the claimant specifically objected to a continuance to allow employer to subpoena the security guard to testify and, also, failed to subpoena her as his own witness. Thus, we find no merit to his argument now that he was prejudiced by her absence and by the allowance of her hearsay testimony.

B.

We also reject claimant's contention that the hearing officer erred in his determinations concerning the credibility of the witnesses and the weight of the evidence.

In unemployment proceedings, the hearing officers are required to assess the evidence independently and reach their own conclusions concerning the reason for the separation from employment, the probative value of the evidence, the credibility of the witnesses, and the resolution of any conflicting testimony. *Goodwill Industries v. Industrial Claim Appeals Office,* 862 P.2d 1042 (Colo. App.1993).

Contrary to claimant's arguments, a hearing officer is not required to address specific evidence or testimony he or she does not find persuasive or make specific credibility determinations. *See Roe v. Industrial Commission,* 734 P.2d 138 (Colo. App.1986); *Crandall v. Watson-Wilson Transportation System, Inc.,* 171 Colo. 329, 467 P.2d 48 (1970).

Here, the hearing officer stated that he specifically considered the credibility of the parties who testified and the state of mind of the claimant at the time of the incident. By making evidentiary findings adverse to claimant's testimony, he implicitly determined claimant's testimony not to be credible on those issues. Contrary to claimant's arguments, we find no basis for disturbing the hearing officer's assessment of the credibility of the witnesses or his determinations concerning the resolution of the conflicting evidence and the probative value of the evidence. *See Goodwill Industries v. Industrial Claim Appeals Office, supra.*

The hearing officer's findings are supported by substantial, although conflicting, evidence and the reasonable inferences which may be drawn therefrom. Thus, we will not disturb them. *See Goodwill Industries v. Industrial Claim Appeals Office, supra.*

Accordingly, the Panel's order is affirmed.

NEY and MARQUEZ, JJ., concur.

Kathy Anne Toston, Plaintiff in Error,

v.

Industrial Commission of the State of Colorado (Ex-officio

Unemployment Compensation Commission of Colorado),

Defendant in Error.

No. 22064.

160 Colo. 281, 417 P.2d 1

Supreme Court of Colorado,

In Department.

July 25, 1966.

David W. Sarvas, L. L. Nathenson, Lakewood, for plaintiff in error.

Duke W. Dunbar, Atty. Gen., Frank E. Hickey, Deputy Atty. Gen., James D. McKevitt, Asst. Atty. Gen., Denver, for defendant in error.

PRINGLE, Justice.

This action is here on writ of error to review a final judgment of the district court affirming the findings and order of the Industrial Commission of the State of Colorado, Ex Officio Unemployment Compensation Commission, which denied plaintiff in error the unemployment compensation which she claimed under the Employment Security Act.

We will refer to plaintiff in error as Claimant and to defendant in error as the Commission.

The facts, which are not in dispute, are as follows: Claimant was employed as a comptometer operator with Beatrice Foods. Claimant was released from her employment, through no fault of her own, on March 6, 1965. Failing to find other employment, Claimant applied for unemployment compensation on March 16, 1965. A very short time thereafter, the State Employment Office referred her to a comptometer position with H & R Block Co. The job was, however, temporary and would have lasted no longer than thirty days. Although Claimant contacted H & R Block Co. with regard to the possibilities of obtaining a permanent job with them, the Block Company informed her that they were in need of someone for no longer than thirty days and would not continue her employment after the thirty days. Claimant, thereupon, explained to the State Employment Office that she did not want the temporary job. As her reason, she stated

that she was afraid of missing an opportunity of getting a permanent job which might become available during the thirty day period in which she might be employed by H & R Block.

The deputy of the Commission thereupon concluded that in refusing the temporary employment her action constituted a refusal by the Claimant to accept suitable work as provided in C.R.S. 1963, 82--4--8(5)(d), and that, under this section, no award of benefits should be granted.

Pursuant to the statutory procedure, the matter was ultimately heard by the Commission and upon appeal by the district court, and in each case the denial of benefits was affirmed.

The question presented to this Court by Claimant's appeal is whether her refusal to accept the temporary job under the circumstances of this case constituted, as a matter of law, a refusal of suitable work or refusal of referral to suitable work within the meaning of C.R.S. 1963, 82--4--8(5)(d). The question is answered in the negative. A refusal to accept an offer of temporary employment does not, in and of itself, end the period of unemployment.

In determining the suitability of the offered employment, the statute with which we are concerned offers the following considerations:

"* * * the degree of risk involved to his (claimant's) health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing work in his customary occupation and the distance of the available local work from his residence shall be considered. * * *" (Emphasis supplied.)

As applied to the instant case, the temporary job as comptometer operator at H & R Block Co. was not refused by claimant on the grounds that it constituted a measurable degree of risk to her health, safety and morals; nor was the job refused on the ground that it was incompatible with her physical fitness, prior training and experience or prior earnings. Not only did the job require her skills as a comptometer operator, but it also paid 23 cents more per hour than her former wage of $1.60 per hour at Beatrice. The job, however, was temporary, and, since claimant had been unemployed hardly more than two weeks, she assumed that the prospects of securing permanent work as a comptometer operator were good. Essentially, the claimant refused as unsuitable a thirty day job for the reason that it would have eliminated her, for that period of time, from the market of suitable permanent jobs which might have been made available to her by the State Employment Office or through her own efforts.

Under these circumstances, claimant's refusal to accept a temporary job, in our view, did not, in and of itself, constitute a refusal to accept suitable work since she was entitled to a reasonable time in which to compete in the labor market for available jobs of a permanent

nature for which she had the skill and at a rate of pay commensurate with her prior earnings. Bayly Mfg. Co. v. Department of Employment, 155 Colo. 433, 395 P.2d 216.

In Bayly, supra, the work which was refused was for a wage materially lower than the wage previously earned. Nevertheless, the rationale of that decision applies with equal force to the instant case wherein the claimant is seeking permanent employment but has been offered a temporary position.

Although claimant must be afforded a reasonable time within which to seek out jobs which are satisfactory to her, the status of jobs which are initially unsuitable does not remain constant. In other words, work which was unsuitable at the beginning of the employment may become suitable when consideration is given to the length of unemployment and the prospects of securing claimant's accustomed work. Hallahan v. Riley, 94 N.H. 48, 45 A.2d 886.

What constitutes a reasonable time in these cases is not a matter to be answered by rigid formulas. Rather, it must initially be determined as a question of fact under the circumstances of each individual case by the appropriate agency. Bayly, supra.

The judgment is reversed and the cause remanded to the district court with directions to remand the matter to the Commission for determination of such compensation as may be due claimant in accordance with the views herein expressed.

Day and McWilliams, JJ., concur.

Phil Trujillo, Petitioner,

v.

The Industrial Commission of the State of Colorado and

Safeway Stores, Inc., Respondents.

No. 86CA0557.

735 P.2d 211

Colorado Court of Appeals,

Div. I.

Feb. 12, 1987.

Law Office of Jonathan Wilderman, Eugene A. Duran, Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Jill M.M. Gallet, Asst. Atty. Gen., Denver, for respondent Indus. Comn.

Holland & Hart, Gregory A. Eurich, Sandra Goldman, Denver, for respondent Safeway Stores, Inc.

CRISWELL, Judge.

Claimant, Phil Trujillo, seeks review of a final order of the Industrial Commission (Commission) which dismissed his untimely appeal from the referee's denial of his unemployment compensation claim. We set aside the Commission's order and remand for further proceedings.

A deputy initially determined that claimant, who lived in Durango, was disqualified from receiving unemployment compensation benefits for the maximum statutory period. Claimant then timely appealed that decision to a referee.

By notice apparently mailed to claimant on September 9, 1985, he was advised that a "telephone conference hearing" would be held before an appeals referee in Grand Junction, on September 19. This notice required claimant to advise this appeals referee of a telephone number at which he could be reached at the time scheduled for this hearing. Claimant apparently contacted the referee in Grand Junction and requested a postponement of this telephone hearing. On September 12, therefore, a letter was sent to claimant advising that the September 19 hearing had been postponed and that a new time and date would be set later.

On September 16, another notice of a telephone conference hearing was sent to claimant, advising that such a hearing would be conducted by an appeals referee in Denver on September 26, and again requesting that claimant contact that referee, in writing, and provide to him the telephone number at which he could be reached.

On September 30, four days later, the appeals referee entered an order dismissing claimant's appeal because of his "failure to appear at the time and place scheduled" for the hearing. This order contained a notice to claimant that such dismissal order would become final after fifteen days unless he could demonstrate good cause for his failure to appear.

Claimant did nothing until December 19, when, acting pro se, he filed an appeal from the referee's decision, attaching a written statement (later sworn to) asserting that he had not received a copy of the notice of the dismissal of his former appeal until December 11, when he personally picked up a copy from the Durango employment office.

On March 5, the Commission, for reasons summarized below, entered its written order concluding that claimant had failed to establish good cause for the untimely filing of his appeal from the referee's order and, therefore, the order had become final.

On March 17, claimant petitioned the Commission to review its order. In doing so, he supplemented his previous written statement by asserting that he had not received either the notice which rescheduled the hearing or the referee's order dismissing his appeal.

On March 27, the Commission affirmed its previous order, making no reference to the additional facts alleged in claimant's petition for review.

The Commission's order notes that claimant denied receiving a copy of the referee's order until December 11. It also notes that he had presented no evidence that an "administrative error" in "incorrectly addressing the referee's decision had been made"; that the record showed that claimant had received all other notices sent to him at the same address; and that claimant had offered no reasonable evidence to demonstrate that "there was any problem with the delivery of his mail." It then concluded, generally, that there was no "administrative error"; that claimant had failed "to act reasonably and prudently"; that his untimely filing "was caused by factors solely within his control"; and that, as a consequence, he had not demonstrated the necessary "good cause."

If the Commission intended to label as false the specific factual allegations of claimant's affidavit without affording him an evidentiary hearing upon the issue, it erred.

Section 8-74-106, C.R.S. (1986 Repl. Vol. 3B) requires any petition for review of a referee's decision to be filed within 15 calendar days of the date either of personal service or of mailing of a copy of the decision. The statute authorizes untimely petitions to be accepted "only for good cause shown" and in accordance with administrative regulations.

Industrial Commission Regulation Sec. 12.1, 7 Code Colo. Reg. 1101-2 requires that a statement supporting or opposing the late filing of a petition to review be sworn and "demonstrate the basis" for a finding of good cause. This regulation, Sec. 12.1.8, sets forth a number of factors which may determine the existence of good cause, including whether the party received timely notice of the need to act. It specifically contemplates the holding of a hearing if the referee considers it necessary to resolve the question of good cause.

In this case, claimant's sworn statement--that he did not actually receive a copy of the referee's decision until eight days before filing his appeal--would, absent anything more, normally establish prima facie good cause for his filing of a late appeal from that decision. Moreover, nothing within this record directly contradicts that sworn statement.

We are not persuaded that the mere fact that an envelope bears a correct address and sufficient postage is a guarantee that it was properly and timely delivered. While a presumption of such delivery may arise from those facts, it is a rebuttable one. See Lucero v. Smith, 110 Colo. 165, 132 P.2d 791 (1942); Wiley v. Bank of Fountain Valley, 632 P.2d 282 (Colo.App.1981).

Here, even the bare record presented to us would support an inference that claimant did not receive the two notices which he claims he did not receive. When the deputy gave claimant notice of the initial denial of his claim, he responded by appealing that decision; he responded to the notice of the first scheduled hearing by contacting the designated appeals referee; and he responded to the Commission's order denying his petition for late filing by petitioning for review of that order. In short, claimant made an appropriate, timely response to every notice or decision mailed to him, except in the instances of the two notices which he claimed not to have received.

Under these circumstances, an adverse credibility inference of the nature drawn here must be based upon more than merely a review of the record itself. See Kriegel v. Industrial Commission, 702 P.2d 290 (Colo.App.1985) (as a general rule, good cause hearing necessary to establish the facts underlying any claim that notice was not received); Henderson v. Industrial Commission, 35 Colo.App. 124, 529 P.2d 651 (1974) (evidentiary hearing necessary before Commission can reject claimant's sworn statement that the hearing notice was not timely received because it had been sent to his old address after he had provided his new address to Division of Labor).

When a sworn statement rebutting the presumption of proper delivery of a mailed notice is presented, the affiant's credibility may well decide the ultimate question presented. But issues of credibility cannot adequately be resolved from the written word alone. An assessment of an affiant's credibility can only be made through consideration of his demeanor while testifying, the reasonableness of his testimony, and his strength of memory.

The Commission's order is set aside and this cause is remanded to the Industrial Claim Appeals Office for its reconsideration of the claimant's request to file an appeal out of time in light of the comments herein contained.

Pierce and Tursi, JJ., concur.

Robert F. Trujillo, Petitioner,

v.

Industrial Commission of the State of Colorado, (Ex-Officio

Unemployment Compensation Commission of Colorado), Colorado

Division of Employment, and Rose Medical Center

Hospital Association, Respondents.

No. 81CA1217.

648 P.2d 1094

Colorado Court of Appeals,

Div. I.

April 22, 1982.

Rehearing Denied May 20, 1982.

Certiorari Denied July 6, 1982.

Legal Aid Society of Metropolitan Denver, Linda J. Olson, Bill Whitacre, Denver, for petitioner.

J. D. MacFarlane, Atty. Gen., David Lavinder, Asst. Atty. Gen., Denver, for respondent Industrial Commission and Colorado Div. of Employment.

Zarlengo, Mott & Zarlengo, Donald E. Cordova, Denver, for respondent Rose Medical Center.

VAN CISE, Judge.

In this unemployment compensation case, Robert F. Trujillo (claimant), seeks review of a final order of the Industrial Commission which found that he did not show good cause for his failure to file a timely appeal from a referee's decision. We set aside the order.

In October 1980, a deputy granted claimant a reduced award because, according to the deputy's findings, claimant had quit work due to dissatisfaction with working conditions and assigned duties. See § 8-73-108(5)(a), C.R.S.1973, as amended in Colo.Sess.Laws

1976, ch. 38 at 344. An appeal hearing before a referee was scheduled for December 2, 1980. The notice of the hearing stated that it had been mailed on November 18. When claimant failed to appear at the hearing, a notice of withdrawal of appeal was sent to claimant on December 3 indicating that, unless claimant established good cause for his failure to appear, the deputy's decision would become final.

Claimant then filed a form stating that he had not received notice of the December 2 hearing until December 3, and asserted that the notice had not been mailed until December 2. In support of his position, claimant submitted a photocopy of an envelope from the Colorado Division of Employment and Training which was postmarked December 2, 1980.

The appeal was dismissed by a referee for failure to file a sworn statement. Claimant then obtained an attorney and filed another appeal to the same effect but with a sworn statement.

A referee considered the appeal and, in a decision rendered March 12, 1981, stated in pertinent part:

"File materials in the folder indicate that interested parties were duly notified of the time, date, and place of hearing.

. . . .

"The referee has reviewed the sworn statement and has carefully considered the facts therein.

"In determining whether these reasons constitute good cause for failing to appear at the scheduled hearing, the Referee has considered the guidelines set forth in Section 12.1.14 of the Regulations for the Determination of Good Cause.

"Based on these guidelines the Referee concludes that the facts set forth in the appellant's sworn statement do not constitute good cause for failure to appear at the previously scheduled hearing."

An appeal from that decision was filed on April 2, six days after the 15 day period for filing an appeal prescribed by § 8-74-106(1)(a), C.R.S.1973 (1981 Cum.Supp.) had expired. See Andrews v. Director Division of Employment, 41 Colo.App. 408, 585 P.2d 933 (1978). Claimant's counsel filed an affidavit stating that claimant had authorized an appeal on March 17 and that, because of the press of work and confusion which had resulted from handling an additional contemporaneous case involving claimant, counsel was at fault in failing to file a timely appeal.

The Commission remanded to the referee for a determination (1) as to whether there was good cause to allow the untimely appeal, see § 8-74-106(1)(b), C.R.S.1973 (1981

Cum.Supp.), and, if so, (2) whether claimant had good cause for his failure to appear at the December 2 hearing.

On remand, a hearing was held. The referee, after making findings similar to counsel's affirmations in the affidavit, concluded, as to (1) above, that good cause for late filing of the appeal had not been shown. So concluding, he did not address (2). On appeal, the Commission affirmed. This petition for review followed.

Claimant now contends that under Industrial Commission Regulation 12.1.14, see 7 Code Colo.Reg. 1101.2 at 40, he did have good cause for the untimely filing of his appeal and that the Commission's determination that good cause had not been shown did not conform to its own regulation. We agree.

That regulation provides:

"In determining whether good cause has been shown for the accepting or permitting an untimely action, the Division and the Commission shall consider all relevant factors including but not limited to whether the party acted in the manner that a reasonably prudent individual would have acted under the same or similar circumstances, whether the party received timely notice of the need to act, whether there was administrative error by the Division, whether there were factors outside the control of the party which prevented a timely action, the efforts made by the party to seek an extension of time by promptly notifying the Division, the party's physical inability to take timely action, the length of time the action was untimely, and whether any other interested party has been prejudiced by the untimely action."

It is true that negligence of counsel generally is not considered "excusable neglect" which would justify the late filing of a notice of appeal under C.A.R. 4(a). See Cox v. Adams, 171 Colo. 37, 464 P.2d 513 (1970); Bosworth Data Services, Inc. v. Gloss, 41 Colo.App. 530, 587 P.2d 1201 (1978). However, such negligence does generally constitute "good cause shown" for setting aside a default under C.R.C.P. 55(c). See Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967); Dudley v. Keller, 33 Colo.App. 320, 521 P.2d 175 (1974). In any event claimant's attorney's neglect was a factor "outside the control of the party which prevented a timely action." (emphasis supplied)

Claimant certainly "acted in the manner that a reasonably prudent individual would have acted" in contacting his attorney five days after the March 12 decision was mailed to him and in assuming that she would comply with the legal requirements for perfecting the appeal. Also, here the length of time involved was minimal, with no showing that the untimely action prejudiced the employer or any other "interested party."

The employment security act is to be construed liberally in favor of the claimant when possible. Denver Symphony Ass'n v. Industrial Commission, 34 Colo.App. 343, 526 P.2d 685 (1974). So construing the act and the regulations adopted in implementation thereof, and in view of the relevant factors discussed above as well as the fact that claimant has not had a hearing on the merits of his claim, we hold that the Commission erred in

concluding that good cause was not shown for "accepting or permitting" the untimely appeal of the referee's March 12 decision.

The order is set aside and the cause is remanded to the Commission to determine whether claimant had good cause for his failure to appear at the December 1980 hearing and, if so, to conduct an appeal hearing on the merits of the claim and enter appropriate orders.

Coyte and Tursi, JJ., concur.

Gilbert W. Tucker, Petitioner,

v.

The Industrial Commission of the State of Colorado;

Colorado Department of Labor, Division of Employment; and

Shortstop, Inc., Respondents.

No. 83CA1412.

708 P.2d 484

Colorado Court of Appeals,

Div. III.

Sept. 12, 1985.

William E. Kenworthy, Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Kathryn J. Aragon, Asst. Atty. Gen., Denver, for respondents Indus. Com'n and Colorado Dept. of Labor, Div. of Employment.

No appearance for respondent Shortstop, Inc.

TURSI, Judge.

In this unemployment compensation case, Gilbert W. Tucker (claimant) seeks review of a final order of the Industrial Commission which denied his petition to be allowed a late filing for benefits on the ground that he had failed to establish good cause. We set aside the order.

Claimant was laid off his job on June 30, 1982. Shortly after being laid off, claimant went to Northglenn Job Service Center, an office of the Department of Labor, to apply for unemployment benefits. Claimant was advised to return and make the proper application after exhausting his unused vacation benefits.

After claimant's initial visit to the Center, but before exhausting his vacation benefits, claimant received a lump sum payment of approximately $37,000 from a retirement fund through his former employer. While visiting the Center to inquire about employment prospects, claimant was advised by some claims takers that benefits would be deferred by

the number of weeks equal to the lump sum payment divided by the weekly benefit amount of $182. Claimant testified that, in reliance on these representations, he failed to file for benefits.

Approximately ten months later, claimant was told by another employee at the center that the prior information was erroneous. Claimant was also instructed to fill out forms for delayed claims. Claimant complied with these instructions and claims, dated May 19, 1983, were filed. These benefit claims were denied on the basis of excessive delay in filing. Denial of the claims was timely appealed, and a hearing before a referee was held. The referee affirmed the initial decision, and the Industrial Commission affirmed the referee.

Claimant filed a petition for judicial review of the Commission's final order. This court, however, remanded the case back to the Industrial Commission pursuant to a motion requesting remand filed by the Commission. Thereafter, the Commission vacated the original findings of fact and final order and remanded the case for a hearing to determine whether claimant had good cause for the late filing of his claims.

A rehearing was held. It was concluded that claimant did not establish good cause for the late filing because:

"A definite decision of disposition of this payment should have been initiated, and not possible erroneous information by a claims taker being relied upon. In addition, the consideration of this retirement lump sum payment, according to Division laws and Regulations, would have in all probability [exempted] any payment of benefits because this payment was a retirement payment settlement."

These conclusions were affirmed by the Industrial Commission. Claimant filed an amended petition for review with this court on December 27, 1984.

The claimant alleges that the Industrial Commission erred by failing to consider reliance upon the advice of the Department of Labor personnel as a legally justifiable excuse and good cause for late filing. We agree that claimant's reliance constitutes good cause as a matter of law.

Industrial Commission regulations provide "for the determination of good cause for excusing failure to act in a timely manner whenever a particular action is required." Industrial Commission Regulation 12.1.2, 7 Code Colo.Reg. 1101-2. In the determination of good cause for failure to act in a timely fashion, Industrial Commission Regulation 12.1.14, 7 Code Colo.Reg. 1101-2, delineates several factors that must be considered if relevant. This regulation provides:

"In determining whether good cause has been shown for the accepting or permitting an untimely action, the Division and the Commission shall consider all relevant factors including but not limited to whether the party acted in the manner that a reasonably prudent individual would have acted under the same or similar circumstances, whether

the party received timely notice of the need to act, whether there was administrative error by the Division, whether there were factors outside the control of the party which prevented a timely action, the efforts made by the party to seek an extension of time by promptly notifying the Division, the party's physical inability to take timely action, the length of time the action was untimely, and whether any other interested party has been prejudiced by the untimely action."

However, the list of factors in this regulation is not exhaustive.

This court has previously held "that the Commission must conform to its own regulations, and must apply to every good cause determination all the relevant factors in Industrial Commission Regulation 12.1.14." Esparza v. Industrial Commission, 702 P.2d 288 (Colo.App.1985) (emphasis in original). In addition, the Commission is required to make specific findings of fact with regard to each enumerated factor which is relevant. Esparza v. Industrial Commission, supra; Zuech v. Industrial Commission, 675 P.2d 18 (Colo.App.1983).

In this case, the claimant relies heavily on the assertion that he acted in reliance upon information given him by Department of Labor employees. While the question whether the advice given the claimant was in fact erroneous remains unanswered, it is undisputed that the claimant failed to file his claims in a timely manner in reliance upon the information received at the Center. The issue in this case is not whether claimant is entitled to any benefits but whether he is entitled to a determination of eligibility on the merits.

Claimant failed to file only because he was advised that his claim would be denied and that filing would be futile. Whether the claimant received good or poor advice should not deprive him of a determination on the merits merely because he relied on that advice. The unique circumstances of this case warrant a finding of good cause as a matter of law. Cf. Converse v. Zinke, 635 P.2d 882 (Colo.1981). Fundamental fairness demands that delay caused by good faith reliance upon the statements of Department of Labor employees shall not bar claimant from filing his claims.

The order of the Industrial Commission is set aside and the cause remanded to the Commission for referral to a referee for a determination on the merits of whether claimant is entitled to benefits.

Berman and Metzger, JJ., concur.

Guadalupe Velo, Petitioner,

v.

Employment Solutions Personnel, The Industrial Claim Appeals Office of

the State of Colorado and The Colorado Division of

Employment and Training, Respondents.

No. 97CA0978

988 P.2d 1139

Colorado Court of Appeals,

Div. I.

January 29, 1998

CORRECTED OPINION

Review of Order from the Industrial Claim Appeals Office of the State of Colorado, DD No. 2083396

ORDER AFFIRMED IN PART AND CAUSE REMANDED WITH DIRECTIONS

Joel R. Hayes, Jr., Greeley, Colorado, for Petitioner.

No Appearance for Respondent Employment Solutions Personnel.

Gale A. Norton, Attorney General, Martha Phillips Allbright, Chief Deputy Attorney General, Richard A. Westfall, Solicitor General, Laurie Rottersman, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office.

TAUBMAN, Judge.

Petitioner, Guadalupe Velo (claimant), seeks review of a final order of the Industrial Claim Appeals Office (Panel) which affirmed a hearing officer's decision disqualifying him from the receipt of unemployment compensation benefits pursuant to §§ 8-73-105.5(5) and 8-73-108(5)(e)(XXII), C.R.S. 1997. We affirm in part and remand to the Panel for further proceedings and entry of a new order.

Section 8-73-105.5, C.R.S. 1997, concerns employment with a "temporary help contracting firm" and imposes certain conditions under which an employee of such a firm may receive unemployment benefits. Such employment is characterized by a "series of

limited-term assignments of an employee to a third party." Completion of an assignment, in itself, does not terminate the employment relationship. See § 8-73-105.5(2), C.R.S. 1997. Rather, the employee of the temporary help contracting firm must contact the firm for further assignments, in compliance with a written notice provided by the employer at the time of hire. See § 8-73-105.5(4), C.R.S. 1997.

If the employee does not contact the employer upon completion of an assignment in compliance with such notice, the employee "shall be held to have voluntarily terminated employment for purposes of determining benefits pursuant to § 8-73-108(5)(e)(XXII), C.R.S. 1997." See § 8-73-105.5(5).

If the employee does contact the firm upon completion of the assignment and does not continue working in another assignment, the employee "shall be considered separated under the provisions of § 8-73-108(4)(a), C.R.S. 1997, thereby entitling the employee to receive benefits." See § 8-73-105.5(6), C.R.S. 1997.

After a hearing, the hearing officer found that Employment Solutions Personnel (ESP) is a temporary help contracting firm and that claimant's employment with ESP was characterized by a series of limited term assignments. Further, the hearing officer found that claimant was provided written notice at the time he was hired that he was required to contact ESP daily for further assignments.

The hearing officer found that claimant's temporary assignment with ESP's client ended because there was insufficient work for him. The hearing officer further found that, despite claimant's knowledge pursuant to the written notice that he was required to contact ESP daily thereafter to indicate that he was available for further assignments, he failed to do so.

The hearing officer determined that claimant was separated from his employment with ESP immediately after the termination of his last temporary assignment because he failed to contact ESP thereafter to indicate whether he was available for further assignments. The hearing officer therefore concluded that the claimant was responsible for his separation and should be disqualified from the receipt of unemployment benefits based on his employment with ESP pursuant to §§ 8-73-105.5(5) and 8-73-108(5)(e)(XXII) (quit for personal reasons which do not otherwise provide for an award of benefits).

The hearing officer further found that, after claimant's separation from ESP, ESP contacted claimant with several job offers, which claimant rejected. The hearing officer determined that the issue whether it was reasonable for claimant to have rejected these job offers after he separated from employment with ESP and filed a claim for unemployment compensation benefits might have an impact on claimant's eligibility for unemployment benefits pursuant to §§ 8-73-108(5)(a) and 8-73-108(5)(b), C.R.S. 1997. Consequently, he remanded claimant's case to the division for fact-finding and a decision as to this issue only.

However, on review, the Panel affirmed claimant's disqualification pursuant to §§ 8-73-105.5(5) and 8-73-108(5)(e)(XXII). Thereafter, claimant sought this review.

I.

Because the hearing officer's remand to determine the reasonableness of claimant's rejection of job offers raised a question as to whether the Panel's decision was a final, appealable order, we requested supplemental briefs from the parties on this issue. Having reviewed those briefs, we now conclude that we have jurisdiction to determine the propriety of the Panel's order concerning claimant's entitlement to benefits.

Under the unique statutory scheme of the Colorado Employment Security Act, entitlement, or non-monetary provisions of the Act, and eligibility, or monetary provisions, are distinct and separate matters that relate to whether a claimant may receive unemployment compensation benefits. Entitlement and eligibility normally are determined in separate proceedings and the issues concerning one may not be intermingled with issues concerning the other. See Denver v. Industrial Claim Appeals Office, 833 P.2d 881 (Colo. App. 1992).

Further, a finding that a claimant is not monetarily eligible to receive benefits is a final disposition of a claim because it completely determines the rights of the parties without further action by the administrative tribunal. Arteaga v. Industrial Claim Appeals Office, 781 P.2d 98 (Colo. App. 1989). The same is true with respect to a finding that a claimant is not entitled to benefits.

Here, whether claimant should be disqualified from the receipt of unemployment benefits pursuant to §§ 8-73-105.5 and 8-73-108 was an entitlement issue. See Arteaga v. Industrial Claim Appeals Office, supra. In contrast, the question of the reasonableness of claimant's refusal of the job offers made by ESP after he separated from employment with ESP and filed his claim for unemployment benefits was an eligibility issue. See Jones v. Industrial Commission, 705 P.2d 530 (Colo. App. 1985); Romero v. Industrial Commission, 616 P.2d 992 (Colo. App. 1980). This eligibility issue is moot, however unless and until there is an administrative determination that claimant is entitled to benefits.

Consequently, there is before us a final order on the issue of the claimant's entitlement to benefits, and we have jurisdiction to address that issue on appeal. Cf. Agren, Blando & Associates, Inc., 746 P.2d 69 (Colo. App. 1987).

II.

Claimant concedes that he did not contact ESP following the completion of his last assignment, but argues that ESP was aware that he was available for further assignments. Based on this reasoning, the claimant contends that the hearing officer erred in concluding he was not entitled to benefits based on his "technical" violation of ESP's policy. Alternatively, claimant contends he is entitled to benefits because he was not "at

fault" for his separation. We disagree with the first contention and conclude that a remand is required to determine whether claimant was "at fault" for his separation.

A.

The purpose of the notice requirement in § 8-73-105.5(4) is to ensure that the employer is made aware that a temporary worker is available for additional assignments, so the employer may offer further assignments and, thus, continue the worker's employment.

Here, the evidence was undisputed that, on the last day of his final assignment, claimant was notified by an ESP representative that his assignment was ending and that, subsequently, ESP offered claimant additional assignments which claimant did not accept.

On the other hand, there is no evidence that claimant informed ESP that he was available for further assignments. Further, the hearing officer found that claimant did not contact ESP in accordance with the written notice that he had received.

We agree with the Panel that, under these circumstances, there was no error in the determination that the disqualifying provisions of §§ 8-73-105.5(5) and 8-73-108(5)(e)(XXII) are applicable and, thus, affirm that portion of the hearing officer's order.

B.

We agree with claimant that, even if a statutory disqualifying provision may be applicable, he still may be entitled to benefits on the basis that he was not "at fault" for his separation. Claimant argues that he is not "at fault" for his separation because, even though he technically violated the agreement provision requiring him to call ESP to advise it of his availability to work, ESP knew that his temporary assignment had ended and therefore was aware that he was available for further assignments. Thus, he reasons that, if the "totality of the circumstances" is considered, he was not "at fault" for his separation.

A general principle underlying the unemployment compensation statutory scheme is that if a claimant is unemployed through no "fault" of his or her own, he or she is entitled to benefits. Zelingers v. Industrial Commission, 679 P.2d 608 (Colo. App. 1984).

As used in the unemployment statutory scheme, "fault" is a term of art. In regard to a claimant's entitlement to benefits, it generally is defined and applied as a factor separate and apart from the qualifying and disqualifying statutory subsections found at § 8-73-108(4) and 8-73-108(5), C.R.S. 1997. Collins v. Industrial Claim Appeals Office, 813 P.2d 804 (Colo. App. 1991).

Thus, even if the findings of a hearing officer support the application of one of the disqualifying sections of the statute, a claimant may still be entitled to benefits if the

totality of the circumstances establishes that the claimant's separation occurred through "no fault" of his or her own. Keil v. Industrial Claim Appeals Office, 847 P.2d 235 (Colo. App. 1993).

"Fault" is not necessarily related to culpability, but only requires a volitional act or the exercise of some control or choice in the circumstances leading to the separation from employment such that the claimant can be said to be responsible for the separation. See Richards v. Winter Park Recreational Ass'n, 919 P.2d 933 (Colo. App. 1996).

Further, "fault" is an ultimate legal conclusion which is to be based on the established findings of evidentiary fact. See Board of Water Commissioners v. Industrial Claim Appeals Office, 881 P.2d 476 (Colo. App. 1994).

Here, we agree with the claimant that he is entitled to a determination whether he was "at fault" for his separation notwithstanding the applicability of the disqualifying provisions of § 8-73-105.5. To determine otherwise would abrogate the overriding legislative policy that unemployment benefits are to be awarded only to those claimants who are unemployed through "no fault" of their own. See § 8-73-108(1)(a), C.R.S. 1997.

Further, we discern no legislative intent to treat unemployment compensation claimants who work for temporary help agencies differently from other unemployment compensation claimants with regard to the issue of fault. See Samaritan Institute v. Prince-Walker, 883 P.2d 3 (Colo. 1994) (in interpreting a statute, court must determine legislative intent); Travelers Indemnity Co. v. Barnes, 191 Colo. 278, 552 P.2d 300 (1976) (statutory scheme must be read and construed in context to give consistent, harmonious, and sensible effect to all its parts).

However, although claimant raised the issue whether he was at "fault" for his separation before the Panel, the Panel did not address his argument. Therefore, the matter must be remanded to the Panel for it to consider this issue and, based on its resolution of the "fault" issue, to enter a new order on whether claimant is entitled to benefits.

We decline to address the claimant's arguments that the employer's contract did not meet the criteria of § 8-73-105.5(4). These arguments were not raised and preserved for our review in the administrative proceedings. See QFD Accessories, Inc. v. Industrial Claim Appeals Office, 873 P.2d 32 (Colo. App. 1993).

The Panel's order is affirmed insofar at it determined that the disqualifying provisions of §§ 8-73-105.5 and 8-73-108(5)(e)(XXII) are applicable to claimant, and the cause is remanded to the Panel for further proceedings consistent with the views expressed herein.

Judge Metzger and Judge Plank concur.

Beverly J. Wade

v.

John Hurley, Director of Colorado Division of Employment; Industrial

Commission of the State of Colorado (Ex-Officio Unemployment

Compensation Commission of Colorado); H.R. and Gretta Barker,

d/b/a Ma's Hash House; and Donald H. Farnham

d/b/a Ma's Hash House

No. 73-108

33 Colo. App. 30, 515 P.2d 491

Colorado Court of Appeals,

Div. I.

September 5, 1973

William E. Benjamin, for petitioner.

John E. Moore, Attorney General, John E. Bush, Deputy, Robert L. Harris, Assistant, for respondents.

PIERCE, Judge.

Claimant was employed as a cook by Ma's Hash House. Upon being separated from her employment, she filed a claim for unemployment compensation benefits with the Industrial Commission. After a hearing, a referee concluded, among other findings, that claimant's unemployment was a result of her quitting because of dissatisfaction with the prevailing standard hours of work common to other workers performing the same or similar work, and thus, under 1965 Perm. Supp., C.R.S. 1963, 82-4-8 (6)(b)(i), she was entitled to no award of benefits. Upon review, the Industrial Commission adopted the referee's findings of fact and conclusions and entered an order affirming her decision. Claimaint appeals, and we reverse.

Her principal contention is that she terminated her employment because the employer violated its employment contract with her and that, therefore, she is entitled to a full award of benefits under the provisions of 1965 Perm. Supp., C.R.S. 1963, 82-4-8(4)(i). She then concludes that the Commission erred in applying 1965 Perm. Supp., C.R.S. 1963, 82-4-8(6)(b)(i), to the facts of this case when the proper section of the statute to be

applied is 1965 Perm. Supp., C.R.S. 1963, 82-4-8(4)(i), or at very least, 1971 Perm. Supp., C.R.S. 1963, 82-4-8(5)(d), which section provides for a 50% award when the responsibility for the separation is shared by the employer and the employee.

Although the testimony was in some conflict regarding the contractual arrangements between the parties, the referee specifically found "[claimant] entered into a verbal agreement with Mr. Barker that she would work as a roll-and-pie cook from 5:30 a.m. until noon on a five-day-per-week basis, but that she would not work Saturdays." The resolution of this factual issue was within the province of the Commission and where there is substantial evidence to support this finding, we will not disturb it on review. Morrison Road Bar, Inc. v. Industrial Commission, 138 Colo. 16, 328 P.2d 1076.

The Commission's findings also indicate that, because the employer had difficulty finding sufficient help, the claimant was soon working almost every Saturday. There are no findings, however, to the effect that the original contract was ever modified by the parties or that claimant had agreed to waive the original provisions of the contract as to working hours.

The facts are not in dispute that, just prior to claimant's separation from her employment, her husband had appeared at the employer's place of business and informed the employer that claimant would not continue to work a six-day week. The employer contacted claimant and requested that she return to work on a six-day-a-week basis, but claimant refused and terminated her employment.

With this factual background, the Commission found:

"The issue in the case is not whether or not the claimant and employer had an agreement that her employment would not exceed five days per week. It is well established that it is an employer's prerogative to set business hours and working schedules, and it is also well known that restaurant employees customarily work on Saturdays. When the employer discovered he needed a cook on a six-day-per-week basis and told the claimant he could no longer continue her on the five-day basis, she had every right to resign if she found this condition unacceptable. It does not follow that she is entitled to an award of benefits for this separation."

These conclusions are erroneous.

While it is true an employer has the prerogative of setting business hours and working schedules in the absence of a specific agreement between employer and employee to the contrary, a contract limiting the working hours to fewer than those which generally prevail for others doing the same or similar work cannot be ignored. See Redmond v. Industrial Commission, 32 Colo. App. 134, 509 P.2d 1277. The "custom" of the trade is no longer relevant since the parties have departed from it of their own accord.

Where, as found here, there is a contract between the parties specifying a five-day work week and where, thereafter, the employer causes the employee to resign by unilaterally

changing the number of days in the work week, the employee is entitled to a full award of benefits under the provisions of 1965 Perm. Supp., C.R.S. 1963, 82-4-8(4)(i).

Order is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Chief Judge Silverstein and Judge Enoch concur.

Janice E. Warburton, Petitioner,

v.

Industrial Commission of the State of Colorado (Ex-Officio Unemployment Compensation Commission of Colorado); Mike L. Baca, Commissioner; Gary B. Rose, Commissioner; John J. McDonald, Commissioner; Colorado Department of Labor; Division of Labor and Employment, Division of Labor; Division of Employment and Training; Ruben Valdez, Director of the Division of Employment and Training of the State of Colorado; National Jewish Hospital at Denver (Employer); and Employers Unity (Employer Representative), Respondents.

No. 83CA1000.

678 P.2d 1076

Colorado Court of Appeals,

Div. II.

March 1, 1984.

Janice E. Warburton, pro se.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Lynn Palma, Asst. Atty. Gen., Denver, for respondents.

BERMAN, Judge.

Claimant, Janice E. Warburton, seeks review of a final order of the Industrial Commission denying her unemployment compensation benefits. We set aside the order.

Claimant was employed as a "coordinator of special therapies" for National Jewish Hospital (employer). Before she left on maternity leave she provided about eight hours of

direct patient services per week and spent the rest of her time on planning and administration, including supervising two therapists. A few months before her return from leave she met with her supervisor who informed her that some changes had occurred in her absence. It was undisputed that claimant's direct service time was to be increased and her administrative duties cut proportionally; one of the therapists under her supervision had been transferred to another department and the other therapist was to participate in coordination and planning.

The employer's representative testified that claimant's administrative duties would be cut by approximately seven hours per week, while claimant stated that the cut would be greater. However, claimant's salary and title were to remain the same. Shortly before claimant was scheduled to return from leave, she submitted a letter of resignation. She stated that she was resigning because she considered the changes to be a demotion.

The deputy awarded claimant full benefits pursuant to Sec. 8-73-108(4)(c), C.R.S. (1982 Cum.Supp.) (unsatisfactory working conditions), finding that the changed duties did not utilize claimant's experience and training. The referee reversed, finding on conflicting evidence that claimant's working conditions utilized her experience and training, were not unsatisfactory, and that the change did not result in working conditions substantially less favorable to claimant. He concluded that claimant quit for personal reasons and denied benefits pursuant to Sec. 8-73-108(8), C.R.S. (1982 Cum.Supp.). The Industrial Commission adopted and affirmed the findings and conclusions of the referee.

Claimant seeks review, contending that the facts support the application of Sec. 8-73-108(4)(d), C.R.S. (1982 Cum.Supp.). We agree.

Section 8-73-108(4)(d) provides for a full award of benefits if a claimant resigns because of a substantial change in working conditions, where those conditions become substantially less favorable to the claimant. A substantial change occurs if a claimant is relieved of supervisory and administrative responsibilities, even if the claimant's salary remains the same. Martinez v. Industrial Commission, 657 P.2d 457 (Colo.App.1982). We find the reasoning of Martinez to be persuasive here.

It is undisputed that claimant's administrative duties were to be cut, and reduced even further by being shared with a former subordinate, and that her supervisory responsibilities were cut in half by the staff reduction in her department. Under these circumstances, despite the fact that her job title and salary were to remain the same, the change in claimant's working conditions constituted a demotion, and she is therefore entitled to a full award of unemployment benefits pursuant to Sec. 8-73-108(4)(d), C.R.S. (1982 Cum.Supp.). See Martinez v. Industrial Commission, supra; see also Industrial Commission v. McIntyre, 162 Colo. 227, 425 P.2d 279 (1967).

The order is set aside and the cause is remanded with directions to award claimant full unemployment benefits.

Kelly and Babcock, JJ., concur.

Shirley Wargon, Petitioner,

v.

The Industrial Claim Appeals Office of the State of

Colorado, and Alta Mode, Inc., Respondents.

No. 89CA1108.

787 P.2d 668

Colorado Court of Appeals,

Div. II.

Jan. 25, 1990.

Eric J. Pringle, Denver, for petitioner.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., and Carol A. Finley, Asst. Atty. Gen., Denver, for respondent Indus. Claim Appeals Office.

Robert A. Calvert, Denver, for respondent Alta Mode, Inc.

DAVIDSON, Judge.

Claimant, Shirley Wargon, seeks review of a final order of the Industrial Claim Appeals Office (Panel) which disqualified her from the receipt of benefits. We set aside the order and remand with directions.

Claimant was employed by respondent Alta Mode, Inc., as a clothing store salesperson from August 1987 through March 29, 1988. She was the only non-owner salesperson. Pursuant to her verbal hiring agreement, claimant's monthly compensation was a base salary of $1500 plus a bonus of $200. Claimant testified she quit a retail clothing sales job where her compensation was based on a commission to accept this job mainly because she wanted the stability and security of a monthly salary.

On March 29, 1988, one of the owners informed claimant that beginning April 1, 1988, her compensation structure would be changed. Instead of receiving a base monthly salary plus bonuses, claimant would be compensated strictly on commission. She would receive a 10 per cent commission on her sales plus her bonus. Claimant resigned the next day citing the change in compensation structure.

Based on evidence presented by employer concerning claimant's sales, the hearing officer found that the new method of compensation would not result in a substantial reduction in claimant's income. He further found that the new method of paying wages was "substantially fair" and that claimant did not act reasonably in refusing to accept it. Consequently, the hearing officer disqualified claimant from the receipt of benefits pursuant to § 8-73-108(5)(e)(I), C.R.S. (1986 Repl. Vol. 3B) (quitting because of dissatisfaction with standard working conditions). The Panel affirmed the order.

On review, claimant contends that the Panel erred in applying § 8-73-108(5)(e)(I) because claimant's separation from employment followed a change in job duties. We agree.

Section 8-73-108(5)(e)(I) provides that an employee is disqualified from receiving benefits if the employee quits because of dissatisfaction with "standard working conditions." However, a finding that a claimant quit because of dissatisfaction with standard working conditions is proper only when there has been no substantial change in claimant's work environment, duties, and conditions. Martinez v. Industrial Commission, 657 P.2d 457 (Colo. App.1982).

Here, there was a change in claimant's working conditions immediately prior to her resignation. The Panel has interpreted the hearing officer's findings as implicit determinations that claimant's new wage method did not constitute a substantial change in claimant's working conditions, or that it at least did not result in conditions substantially less favorable to claimant. From our reading of the order, we conclude that, although the hearing officer's findings addressed the applicability of § 8-73-108(5)(e)(VI), they did not correctly address the applicability of § 8-73-108(4)(d) C.R.S. (1986 Repl. Vol. 3B).

Section 8-73-108(4)(d) provides for a full award of benefits if a claimant resigns because of a substantial change in working conditions, if those conditions become substantially less favorable to the claimant. Accordingly, we must determine first whether a change in method of compensation from salary to commission is a substantial change and, if so, whether that change is substantially less favorable to the claimant.

Whether a change in working conditions constitutes a substantial change and, if so, whether the substantial change is substantially less favorable to the worker must be judged by an objective standard rather than by a claimant's subjective outlook. Consequently, in assessing the evidence, the issue is whether a reasonable employee in claimant's position would find the change in working conditions to be not only substantial, but also substantially less favorable. See Rose Medical Center Hospital v. Industrial Claim Appeals Office, 757 P.2d 1173 (Colo. App.1988); Action Key Punch Service, Inc. v. Industrial Commission, 709 P.2d 970 (Colo. App.1985); Gatewood v. Russell, 29 Colo. App. 11, 478 P.2d 679 (1970).

A change in duties or a demotion may be a change in working conditions that is substantially less favorable, Martinez v. Industrial Commission, supra., as may be a

situation in which a claimant has been relieved of administrative or supervisory responsibilities, Warburton v. Industrial Commission, 678 P.2d 1076 (Colo. App.1984), or has had her salary reduced. See Musgrave v. Eben Ezer Lutheran Institute, 731 P.2d 142 (Colo. App.1986). Furthermore, intangible factors may adversely affect a work environment or working conditions. See Gray Moving & Storage, Inc. v. Industrial Commission, 38 Colo. App. 419, 560 P.2d 482 (1976) (ostracism may evidence a substantial change in working conditions).

Similarly, being paid on a commission rather than on a salary can generate increased risk, responsibility, and stress for a reasonable employee in claimant's position. We therefore hold that a change in the method of compensation from a salary plus bonus to a commission plus bonus constitutes a substantial change in claimant's working conditions as a matter of law.

Furthermore, we conclude that, to a reasonable employee in claimant's position, the planned modification in her compensation would constitute a substantially less favorable change in working conditions.

The hearing officer concluded that the new compensation method would not result in a substantial reduction in claimant's income and, therefore, did not result in an unfavorable change in working conditions. However, the amount of compensation an employee receives is only one factor of many which may be considered in evaluating work environment or conditions, and was not the critical factor in evaluating the impact of the job change on claimant.

Because of the possibly greater security of a salaried job, many employees, including claimant, consider it preferable to be paid in that manner. In fact, claimant left a commissioned job to work for this employer primarily because she wanted the security and stability of a salary. In explaining her dissatisfaction with a commission, claimant referred to the resultant fluctuation and the unpredictability of monthly income, the increased competition among the sales force, and increased job pressure. We therefore conclude that, as a matter of law, to a reasonable person in claimant's position, the change in compensation method from salary to commission constituted a substantially less favorable change in working conditions.

The order is set aside, and the cause is remanded to the Industrial Claim Appeals Office with directions to award claimant full benefits pursuant to § 8-73-108(4)(d), C.R.S. (1986 Repl. Vol. 3B).

Smith and Tursi, JJ., concur.

Gerald S. Yanish, Petitioner,

v.

Industrial Commission of Colorado (Ex-officio Unemployment

Compensation Commission of Colorado), and PCA Corporation of

Kansas, Photo Corp. of America, Respondents.

No. 76--509.

38 Colo.App. 492, 558 P.2d 1007

Colorado Court of Appeals,

Div. I.

Dec. 30, 1976.

Robert L. Harris, Denver, for petitioner.

J. D. MacFarlane, Atty. Gen., Jean E. Dubofsky, Deputy Atty. Gen., Edward G. Donovan, John Kezer, Asst. Attys. Gen., Denver, for respondent Industrial Commission of Colo.

COYTE, Judge.

Claimant seeks review of an order of the Industrial Commission denying unemployment compensation benefits. We set aside the order.

Claimant was twice separated from his employment, first in February 1975, and, after rehiring by the same employer, a second time in August 1975. The referee found that claimant was terminated initially due to his incompatibility with supervisors and fellow employees, and consequently, as to that termination, was entitled to fifty percent of a full award of benefits under § 8--73--108(5)(b), C.R.S.1973.

With respect to the second period of employment, the referee, after a hearing, concluded claimant was responsible for the later termination. Claimant was therefore disqualified from the receipt of benefits for a period of thirteen weeks in accordance with the provisions of § 8--73--108(7), C.R.S.1973.

The Commission adopted the findings of fact and the decision of the referee. Claimant filed a timely petition for review, and, after review, the Commission affirmed its previous decision.

I.

Claimant raises various assignments of error relative to alleged procedural defects in the Commission's proceeding, to the evidentiary value of testimony by the employer, and to the effect of the rehiring. The procedural error is dispositive.

Section 8--74--106(1), C.R.S.1973, authorizes the Commission to prescribe regulations for the conduct of hearings and appeals in unemployment compensation cases. The statute further provides that the presentation of claims and necessary documentation, including reports required from the employer 'shall be in accordance with (said) regulations . . . .'

Pursuant to its statutory authority, the Commission promulgated rules, in effect at the time of the claim here, governing the submission of specified documents. Under those regulations a protest by the employer of benefit payments was required to be made within seven days of the date upon which the Division of Employment mailed its notification form to the employer, and the protest form bore a printed statement to this effect. If an employer failed to comply with the prescribed time limitations, the employer would 'be deemed not to be an interested party' as defined in § 8--70--103(17), C.R.S.1973, and barred from protesting payment of benefits in the particular instance. Division of Employment Regulation No. 4 (Nov.1974).

It is undisputed that claimant's employer, although it received the appropriate notification, did not protest the claim within the pertinent time limitations. The employer's report contained in the record is dated some eight days later than the time stipulated for its return on the face of the form.

The Commission concedes that the employer's protest was not submitted in timely fashion. However, it maintains that inasmuch as the issue was not raised in the proceedings until claimant filed a petition for review before the Commission, claimant has waived the opportunity to object in this review to the procedures followed. The argument is unconvincing.

Powers entrusted to the Commission are specifically delineated in the statute. The Commission has broad authority to affirm, modify, or set aside the decision of a referee on its own motion. It may also direct the taking of additional evidence if necessary. See § 8--74--105, C.R.S.1973. Accordingly, the Commission has ultimate responsibility with respect to matters of fact and law supporting its decision. McGinn v. Industrial Commission, 31 Colo.App. 6, 496 P.2d 1080 (1972).

On this basis, the judicial authority cited by the Commission in support of its waiver argument is distinguishable. This is not a situation where the matter is raised for the first time before a body constituted exclusively for purposes of review. See, e.g., Robert S. Abbott Publishing Co. v. Annunzio, 414 Ill. 559, 112 N.E.2d 101 (1953); Cf. Jacobs v. Office of Unemployment Compensation & Placement, 27 Wash.2d 641, 179 P.2d 707 (1947). Nor is it a case in which an employer is improperly deprived of his opportunity to

protest by the Division's failure to notify him of the claim. Allred v. Squirrell, Colo.App., 543 P.2d 110 (1975). Here the Commission was not only sufficiently appraised of claimant's objection to the employer's protest but was required to correct the alleged defect despite the fact that it was not raised before the referee. Section 8--74--105, C.R.S.1973; McGinn v. Industrial Commission, supra. Thus, claimant did not waive his right to object to the procedural defect.

As the employer's protest did not conform to the procedural requirements established by the Commission pursuant to s 8--74--106(1), C.R.S.1973, the employer was precluded from contesting the payment of benefits. Vieweg v. B. F. Goodrich Co., 170 Colo. 71, 459 P.2d 759 (1969); Miller v. Industrial Commission, 28 Colo.App. 462, 474 P.2d 177 (1970). The evidence presented by the employer must be disregarded, and therefore no evidence exists to support a denial of benefits. Accordingly, the Commission's decision cannot be upheld on review. Beatty v. Automatic Catering, Inc., 165 Colo. 219, 438 P.2d 234 (1968). No disputed factual issue arose here subsequent to expiration of the time for the filing of a protest by the employer, and thus further proceedings on the part of the Commission are unnecessary. Industrial Commission v. Emerson Western Co., 149 Colo. 529, 369 P.2d 791 (1962).

The order is set aside and the cause is remanded with directions to award claimant unemployment benefits determined by his initial claim.

Enoch and Sternberg, JJ., concur.

COLORADO COURT OF APPEALS **2013 COA 124**

DATE FILED: August 15, 2013

Court of Appeals No. 12CA1047
Industrial Claim Appeals Office of the State of Colorado
DD No. 30859-2011

Yotes, Inc.,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Peter Z. Miller,

Respondents.

ORDER SET ASIDE

Division V
Opinion by JUDGE CARPARELLI
Miller and Fox, JJ., concur

Announced August 15, 2013

Elwyn F. Schaefer & Associates, P.C., Elwyn F. Schaefer, Sara A. Green, Denver, Colorado, for Petitioner

John W. Suthers, Attorney General, Alice Q. Hosley, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

No Appearance for Respondent Peter Z. Miller

¶ 1 In this unemployment compensation case, petitioner, Yotes, Inc. (employer), seeks review of a final order of the Industrial Claim Appeals Office (Panel) that reversed a hearing officer's decision and awarded unemployment compensation benefits to Peter Z. Miller (claimant) under section 8-73-108(4), C.R.S. 2012. We set aside the order.

I. Background

¶ 2 Claimant, who worked as a sales associate for employer, had an intimate relationship with a coworker. After the relationship ended, the coworker persisted in initiating unwelcomed communication, and demanded that claimant take a paternity test to determine whether he had fathered her child.

¶ 3 On Saturday, October 8, 2011, claimant wrote a letter asking his supervisor to help stop the coworker from sexually harassing him in the workplace. On Tuesday, October 11, the supervisor called claimant to schedule a meeting to discuss his request, but the soonest they could meet was Friday, October 14. At the Friday meeting, claimant explained his concerns to the supervisor. The supervisor told claimant that he would be traveling out of town

early the following week, but would meet with the coworker when he returned on Thursday, October 20. The supervisor authorized claimant to take a paid leave of absence and excused him from attending meetings at which the coworker would be present until the supervisor completed his investigation of the matter.

¶ 4 Later that day, the coworker called claimant on his cell phone. The next day, Saturday, October 15, claimant resigned. He asserted that employer typically addressed important business transactions within forty-eight hours, that his report of sexual harassment was of equal importance, that employer had not resolved the matter within forty-eight hours, and, therefore, employer was not taking the matter seriously.

¶ 5 The deputy for the Division of Employment and Training awarded claimant benefits based on a determination that working conditions could have been hazardous to claimant's physical or mental well-being, as provided for in section 8-73-108(4)(c), C.R.S. 2012. Employer appealed. The hearing officer found that claimant quit because he believed that employer was not acting quickly enough. However, the hearing officer found that employer was

taking the complaint seriously and claimant did not allow employer reasonable time to conduct an investigation and determine the appropriate action. Based on these and other findings, the hearing officer concluded that the claimant was at fault for the separation and that a disqualification was warranted under section 8-73-108(5)(e)(XXII), C.R.S. 2012. Claimant appealed.

¶ 6 The Panel reversed the hearing officer and awarded benefits to claimant. The Panel first relied on section 8-73-108(4)(o), C.R.S. 2012, which mandates an award of benefits to an employee who is separated from employment if the Division of Employment and Training determines that the employee quit "because of personal harassment *by the employer* not related to the performance of the job" (emphasis added). Saying that the statute does not define "employer," the Panel "decline[d] to limit 'employer' under [section] 8-73-108(4)(o) as [] only referring to individuals in a supervisory or management role or to an employer that condoned or permitted the harassment." Instead, it "interpret[ed] 'employer' to include coworkers," and explained that it was construing section 8-73-108(4)(o) "to further the legislative intent that unemployment

insurance is for the benefit of persons unemployed through no fault of their own in cases where a worker quits due to personal harassment by coworkers." In support of its ruling, the Panel cited section 8-73-108(1)(a), C.R.S. 2012, *Colorado Division of Employment & Training v. Hewlett*, 777 P.2d 704 (Colo. 1989), and *Henderson v. RSI Inc.*, 824 P.2d 91 (Colo. App. 1991).

¶ 7 The Panel also ruled that section 8-73-108(4)(c) permits an award of benefits based on unsatisfactory working conditions.

¶ 8 We now consider employer's appeal of the Panel's decision.

II. Standard of Review

¶ 9 We may set aside the Panel's decision only when (1) the Panel acted without power or in excess of its powers; (2) the decision was procured by fraud; (3) the findings of fact do not support its decision; or (4) the decision is erroneous as a matter of law. *See* § 8-74-107(6), C.R.S. 2012; *Colo. Div. of Emp't & Training v. Parkview Episcopal Hosp.*, 725 P.2d 787, 790 (Colo. 1986).

¶ 10 We do not disturb findings of a hearing officer that are supported by substantial evidence or reasonable inferences drawn from that evidence. *See* § 8-74-107(4), C.R.S. 2012; *Tilley v. Indus.*

Claim Appeals Office, 924 P.2d 1173, 1177 (Colo. App. 1996).

III. Applicable Statutes

¶ 11 Section 8-73-108(5)(e)(XXII) provides that a claimant is not entitled to unemployment benefits if he or she quits "under conditions involving personal reasons, unless the personal reasons were compelling pursuant to other provisions of [section 8-73-108(4)]." Section 8-73-108(4) requires a full award of benefits when an employee is separated for certain reasons and related conditions of employment.

¶ 12 The application of sections 8-73-108(4)(o) and 108(4)(c) is at issue here. Section 8-73-108(4)(o) mandates an award of benefits to an employee who is separated from employment when the Division determines that the employee quit "because of personal harassment *by the employer* not related to the performance of the job" (emphasis added). Section 8-73-108(4)(c) requires an award of benefits when the Division determines that a person has been separated from a job as the result of unsatisfactory or hazardous working conditions.

IV. Personal Harassment by Employer

¶ 13 We conclude the Panel erred when it awarded benefits to

claimant under section 8-73-108(4)(o). Under section 8-73-108(4)(o), when the Division of Employment and Training determines that an employee quit "because of personal harassment *by the employer* not related to the performance of the job," the Division must award benefits to the employee (emphasis added).

A. Coworker Was Not Claimant's Employer

1. Statutory Interpretation

¶ 14 Statutory interpretation is a question of law that we review de novo. *Clyncke v. Waneka*, 157 P.3d 1072, 1076 (Colo. 2007). Our primary task when construing a statute is to give effect to the intent of the General Assembly. *Campbell v. Indus. Claim Appeals Office*, 97 P.3d 204, 207 (Colo. App. 2003). To determine legislative intent, we interpret statutory terms in accordance with their plain and ordinary meaning. *Id.* Accordingly, we must give consistent, harmonious, and sensible effect to all parts of the statute and avoid an interpretation or construction that would render any language meaningless. *Id.*; *Well Augmentation Subdistrict v. City of Aurora*, 221 P.3d 399, 420 (Colo. 2009). In addition, we do not ascribe a meaning that would lead to an illogical or absurd result. *Frazier v.*

People, 90 P.3d 807, 811 (Colo. 2004).

2. Statutory Definition of Employer

¶ 15 Because section 8-73-108, C.R.S. 2012, is part of the Colorado Employment Security Act, Articles 70 through 82 of Title 8, we must consider its meaning in the context of the entire Act. Section 8-70-113, C.R.S. 2012, defines "employer" to be an "employing unit" that meets specified criteria. Claimant's coworker is not an employer under any of the statutory criteria.

3. Statutory Use of Different Terms

¶ 16 The supreme court has held that "'the use of different terms signals an intent on the part of the General Assembly to afford those terms different meanings.'" *Colo. Div. of Emp't & Training v. Accord Human Res., Inc.,* 270 P.3d 985, 989 (Colo. 2012) (quoting *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1010 (Colo. 2008)).

¶ 17 In section 8-73-108, the General Assembly used a variety of terms to refer to different categories of people or organizations, including "employer," "employer's duly authorized representative," "worker," "supervisor," "fellow worker," "coworker," and "customer."

See, e.g., §§ 8-73-108(3)(c), C.R.S. 2012 (coworker); 8-73-108(4)(b)(I), C.R.S. 2012 (employer), 8-73-108(4)(d), C.R.S. 2012 (worker), 8-73-108(5)(e)(II), C.R.S. 2012 (supervisor), 8-73-108(5)(e)(VI), C.R.S. 2012 (employer or an employer's duly authorized representative), 8-73-108(5)(e)(XIV), C.R.S. 2012 (supervisor and fellow worker).

¶ 18 We conclude that the General Assembly's use of different terms to refer to an employer and a coworker signals its intent that these terms have different meanings. *See Accord Human Res.*, 270 P.3d at 989. Moreover, the Panel's conclusion that the term "employer" includes coworkers renders the latter term meaningless.

4. Illogical and Absurd Result

¶ 19 Equating the terms "employer" and "coworker" leads to an illogical and absurd result. For instance, section 8-73-108(4)(b)(I), which allows for an award of benefits when a worker is separated from employment because of health issues, conditions the award in certain circumstances on the worker informing the "employer in writing" of the health issues. Under the Panel's interpretation of the term "employer," notification to a coworker would be sufficient. *See*

Vance v. Ball State Univ., 81 USLW 4553, 133 S.Ct. 2434, 2439 (2013) (concluding that, for purposes of Title VII, an employee is a "supervisor" if he or she is empowered by the employer to take tangible employment actions against the claimant).

5. Conclusion

¶ 20 We conclude that the Panel erred as a matter of law when it defined "employer" to include claimant's coworker. The Panel's definition is inconsistent with the meaning of employer used throughout section 8-73-108 and the statutory definition in section 8-70-113. It renders the word "employer" meaningless and leads to an absurd result. Thus, we conclude that "personal harassment by the employer" does not include the actions of claimant's coworker.

B. Employer's Conduct

¶ 21 We also conclude that, for purposes of section 8-73-108(5)(e)(XXII), there is no evidence of personal harassment by employer. It is undisputed that the coworker was not in a supervisory or management position with employer. In addition, the hearing officer did not find that employer condoned or otherwise failed to take action with regard to the coworker's conduct. Instead,

the hearing officer found that employer took the harassment seriously and acted reasonably in response.

¶ 22 The supreme court's decision in *Hewlett* does not require that claimant here be awarded benefits. In *Hewlett*, the court held that an employee who quits her job because of personal harassment is not disqualified from receiving benefits under section 8-73-108(5)(e)(XXII). However, unlike the circumstances here, the court did not address whether harassment solely by a coworker was sufficient for an award of benefits. Rather, there was evidence that the claimant in *Hewlett* was subject to harassment by both her supervisor and coworkers. Thus, *Hewlett* is distinguishable from this case.

¶ 23 Because there is no finding that employer fostered or condoned the coworker's actions, we conclude that the Panel erred when it concluded that claimant quit "because of personal harassment by the employer not related to the performance of the job" and was entitled to benefits under section 8-73-108(4)(o). *See Survey Solutions, Inc. v. Indus. Claim Appeals Office*, 956 P.2d 1275, 1277 (Colo. App. 1998).

V. Unsatisfactory Working Conditions

¶ 24 We also conclude that the Panel erred as a matter of law when it ruled that claimant was entitled to an award of benefits based on unsatisfactory working conditions under section 8-73-108(4)(c).

A. Section 8-7-108(4)(c)

¶ 25 Under section 8-73-108(4)(c), if the Division of Employment and Training determines that a person has been separated from a job as the result of unsatisfactory or hazardous working conditions, it must award that person full benefits. The Division must apply an objective standard when determining whether working conditions are unsatisfactory or hazardous. *See Rodco Sys., Inc. v. Indus. Claim Appeals Office*, 981 P.2d 699, 701-02 (Colo. App. 1999); *Survey Solutions, Inc.* (applying objective standard in determining entitlement issues under another statutory subsection).

¶ 26 When determining whether working conditions are objectively unsatisfactory, the Division must consider:

- the degree of risk involved to the worker's health, safety, and morals;
- the worker's physical fitness and prior training;

- the worker's experience and prior earnings;
- the distance of the work from the worker's residence; and
- the working conditions of workers engaged in the same or similar work for the same and other employers in the locality.

§ 8-73-108(4)(c). In each of these considerations, it is implicit that the unsatisfactory working conditions existed at the time of separation and were likely to continue to exist.

B. Panel Erred

¶ 27 We conclude that the Panel erred when it concluded that claimant's working conditions were unsatisfactory because "a reasonable person would find the actions of the coworker to be so vexing, troubling, and annoying as to warrant quitting."

¶ 28 The hearing officer found that (1) employer took the complaint seriously and acted reasonably; (2) after October 14, 2011, the only communication from the coworker to claimant occurred outside of the workplace; (3) employer did not have control over events outside of work; (4) employer was not obligated to protect claimant outside of work; and (5) claimant's supervisor authorized him to take a paid

leave of absence and excused him from attending meetings at which the coworker would be present until the supervisor completed his investigation. The hearing officer also found that claimant (1) reasoned that because employer had not fully resolved the matter in forty-eight hours, it was not taking his complaint seriously, and (2) quit because he believed employer did not act quickly enough to stop the coworker from harassing him. The hearing officer ultimately concluded that it was not reasonable for claimant to quit without allowing the investigative process to be completed and that claimant quit for personal reasons. Because the hearing officer's findings are supported by substantial evidence in the record, they are binding on review by the Panel. *See Tilley*, 924 P.2d at 1177.

¶ 29 The Panel concluded that "the record [] clearly supports the finding that the claimant was being personally harassed by a coworker that was not related to his job performance and this was a factor in his decision to quit." Relying on *Hewlett*, the Panel concluded that an award was warranted under section 8-73-108(4)(c)[1], saying it was persuaded that "a reasonable person would find the actions of the coworker to be so vexing, troubling, and

annoying as to warrant quitting." This conclusion was contrary to the hearing officer's finding that it was not reasonable for claimant to have quit without allowing employer to complete its investigation.

¶ 30 We conclude that the Panel erred. When claimant quit, he was on paid leave and was not at risk of encountering the coworker at his place of employment. Thus, the working conditions upon which the Panel relied did not exist at the time claimant decided to quit. In addition, employer told claimant it would investigate the matter and schedule a meeting with the coworker. Claimant quit on a Saturday, before his supervisor would have met with the coworker. In substance, the hearing officer concluded that a reasonable person would have waited until employer's investigation was completed. The Panel's decision is silent as to whether a reasonable person would have quit before employer completed its investigation.

¶ 31 We conclude that, when determining whether working conditions are unsatisfactory, the Division must consider the working conditions that existed when the separation occurred and the extent to which the conditions were likely to continue.

¶ 32 Accordingly, we conclude that the Panel erred.

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[1] The Panel's decision mistakenly referred to section 8-73-108(4)(o).

VI. Applicability of Section 8-73-108(5)(e)(XXII)

¶ 33 Because employer had indefinitely removed claimant from the adverse working conditions and claimant did not wait to learn whether the adverse conditions would be eliminated, we conclude that claimant was not entitled to benefits under sections 8-73-108(4)(c), and, thus, was disqualified from receiving benefits under section 8-73-108(5)(e)(XXII). *See Cole v. Indus. Claim Appeals Office*, 964 P.2d 617, 619 (Colo. App. 1998).

¶ 34 The order is set aside.

JUDGE MILLER and JUDGE FOX concur.

Zelingers, Petitioner,

v.

Industrial Commission of the State of Colorado, (Ex-Officio

Unemployment Compensation Commission of Colorado) and

Sandra A. Thompson, Respondents.

No. 83CA0759.

679 P.2d 608

Colorado Court of Appeals,

Div. II.

March 1, 1984.

Zuckerman & Kleinman, P.C., Leo T. Zuckerman, Michael J. Kleinman, David W. Osterman, Denver, for petitioner.

No appearance for respondents.

KELLY, Judge.

The employer seeks review of a final order of the Industrial Commission awarding full unemployment benefits to Sandra A. Thompson (claimant). We affirm.

The evidence at the hearing before the referee was essentially undisputed. Claimant was employed for almost four months. During that time she was absent approximately seven days because of illness, her child's illness, and to pick up her boyfriend at the airport. Each time she notified her employer that she would be absent prior to the time she was scheduled to report to work. The incident that led to her termination began when she called her employer, and stated that she needed to make an out-of-state trip because of an illness or death in her boyfriend's family. Both the claimant and the employer's representative testified that either her supervisor or an owner of the company told her "if you have to go, go." When her boyfriend called to inform the employer when she would return to work, she was terminated.

The referee found that the employer was responsible for claimant's termination, even if her absenteeism was excessive, because she was not given an opportunity to choose between being absent and continuing her employment. He awarded full unemployment benefits pursuant to Sec. 8-73-108(4), C.R.S. (1983 Cum.Supp.). The Industrial Commission adopted and affirmed the referee's decision.

The employer argues that the record establishes that claimant's absenteeism was excessive, and that fact mandates the maximum reduction of benefits pursuant to Sec. 8-73-108(9)(a)(XX), C.R.S. (1983 Cum.Supp.). The employer also contends that the referee erred as a matter of law in basing an award of benefits on a finding that claimant had not been given an express warning that her absenteeism would lead to termination. We disagree with the employer's contentions because they are based on an overly mechanical construction of the unemployment statute.

The intent of the General Assembly is that each eligible individual is entitled to a full award of benefits if he is unemployed through no fault of his own. Section 8-73-108(1)(a), C.R.S. (1983 Cum.Supp.); Sims v. Industrial Commission, 627 P.2d 1107 (Colo.1981). However, the concept of "fault" under the statute is not necessarily related to culpability, but must be construed as requiring a volitional act. See City & County of Denver v. Industrial Commission, 666 P.2d 160 (Colo.App.1983). Furthermore, even where there are findings to support their application, the disqualifying provisions of Sec. 8-73-108(9), C.R.S. (1983 Cum.Supp.) are not mandatory if the totality of the circumstances establishes that a claimant was unemployed through no fault of his own. See Hospital Shared Services v. Industrial Commission, 677 P.2d 447 (Colo.App.1984).

Here, the evidence established, and the referee found, that claimant was given at least tacit permission to miss work, and had no knowledge that her employment was in jeopardy until she was terminated. Whatever blame may be assigned to claimant for her excessive absenteeism, the employer's failure to inform her of the consequences of another absence deprived her of the opportunity to act volitionally in her separation from employment. In the absence of a volitional act by claimant, there can be no "fault" on her part within the meaning of the unemployment statute. See Escamilla v. Industrial Commission, 670 P.2d 815 (Colo.App.1983).

Order affirmed.

Berman and Babcock, JJ., concur.

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ADVANCE SHEET HEADNOTE
February 27, 2012

2012 CO 15

No. 10SC419, Colorado Division of Employment and Training v. Accord Human Resources, Inc. and Industrial Claim Appeals Office of the State of Colorado – Section 8-70-114(1), C.R.S. (2011) does not give the Colorado Division of Employment and Training authority to collapse separate employer tax accounts into one for purposes of assessing unemployment taxes.

Colorado Division of Employment and Training sought to reverse the court of appeals decision that section 8-70-114(1), C.R.S. (2011) did not authorize the Division to collapse five separate employer accounts, combine their unemployment tax rates and assess back taxes.

The supreme court affirms the holding of the court of appeals and finds that nothing in section 8-70-114(1) gives the Division authority to combine separate employer tax accounts into one account for purposes of assessing unemployment taxes. Section 8-70-114(1) describes circumstances where individuals will be deemed to be employed by a single employing unit for purposes of paying benefits.

Supreme Court of the State of Colorado
101 West Colfax Avenue, Suite 800 • Denver, Colorado 80202

2012 CO 15

Supreme Court Case No. 10SC419
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 09CA1356

Petitioner:

Colorado Division of Employment and Training,

v.

Respondents:

Accord Human Resources, Inc. and Industrial Claim Appeals Office of the State of Colorado.

Order Affirmed
en banc
February 27, 2012

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JUSTICE EID delivered the Opinion of the Court.
JUSTICE HOBBS dissents.
JUSTICE MÁRQUEZ does not participate.

¶1 Petitioner Accord Human Resources, Inc. ("Accord HR") is a professional employer organization that transacts business in Colorado along with four related entities. In 2004, Accord HR transferred a portion of its Colorado employees to another Accord entity with a lower unemployment tax rate and, in doing so, reduced its unemployment tax burden. Subsequently, the Colorado Division of Employment and Training ("Division") determined that, pursuant to section 8-70-114(1), C.R.S. (2011), it had authority to treat the various Accord entities as one entity for purposes of assessing unemployment taxes, thus erasing any tax advantage that could be gained through the employee transfer. Under this rationale, the Division issued a delinquent tax notice to Accord HR.

¶2 Accord HR appealed, and the hearing officer reversed. The hearing officer concluded that each of the five Accord entities was an "employer" entitled to a separate "employer" tax account. The hearing officer further determined that section 8-70-114(1), which provides that "[a]ll individuals performing services within this state for any employing unit that maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit," applied only to the status of individuals for benefits purposes, not to the status of separate employers for tax purposes. The Division appealed the hearing officer's decision to the Industrial Claim Appeals Office ("ICAO"), which reversed. In its Final Order, the ICAO held that section 8-70-114(1) gave the Division the authority to combine the various employer accounts for the purposes of assessing taxes. On appeal, the court of appeals reversed the ICAO's Final Order and reinstated the hearing officer's decision.

¶3 We now affirm the court of appeals. We conclude there is nothing in the language of section 8-70-114(1) that gives the Division authority to collapse separate employer accounts into a single employer account for purposes of assessing unemployment taxes. The statute simply states under what circumstances individuals will be deemed to be employed by a single employing unit for purposes of paying benefits.

I.

¶4 Accord HR is a professional employer organization operating in approximately forty-five states, including Colorado. Four other entities related to Accord HR — Accord Human Resources of New York, Inc.; Accord Human Resources of California, Inc.; Accord Human Resources of California II, Inc.; and Accord Human Resources of Colorado, Inc. ("Accord CO") — also transact business in Colorado.

¶5 The parties do not dispute that each of the Accord entities was an "employer" as defined by section 8-70-113(1)(a)(II), C.R.S. (2011). In 2004, the Division assigned each of the Accord entities a separate employer account and tax rate, and issued separate Notices of Employer Tax Rate to each of the Accord entities. Accord HR was assigned an unemployment tax rate of 3.82 percent and Accord CO was assigned a rate of 2.52 percent. During the first quarter of 2004, Accord HR transferred between 340 and 481 of its employees, approximately 57 percent of Accord HR employees in Colorado, to

Accord CO.[1] Accord CO then paid unemployment taxes on the transferred employees' wages according to the tax rate assigned to Accord CO. As a result of the transfer, Accord HR's unemployment taxes decreased.

¶6 In 2007, the Division issued a Liability Determination (the "Determination") to Accord HR assessing back unemployment taxes and interest. In the Determination, the Division assigned the Accord entities one blended tax rate for all five entities. The Division concluded that section 8-70-114(1) authorized the Division to collapse the five Accord entities' accounts and combine their unemployment tax rates. By combining the account numbers and rates of the five Accord entities, the Division calculated that Accord HR owed in excess of $500,000 in unemployment taxes.

¶7 Accord HR appealed the Determination. On appeal, a hearing officer reversed the Determination and the Division's assessment of delinquent unemployment taxes. The hearing officer held that each of the Accord entities was an "employer" under section 8-70-113(1)(a)(II), and, therefore, required separate employer accounts and tax rates under section 8-76-103(1)(a), C.R.S. (2011). Furthermore, the hearing officer found that, contrary to the Division's claims, section 8-70-114(1) applied only to the status of individuals for benefits purposes, not to the status of separate employers for unemployment tax purposes. Therefore, the hearing officer held that the Division did not have authority to consolidate the separate employer accounts into a single employer account for unemployment tax purposes.

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[1] The record does not contain any findings of fact as to why Accord HR transferred employees to Accord CO.

¶8 The Division appealed the hearing officer's decision to the ICAO. The ICAO reversed the decision of the hearing officer and held that section 8-70-114(1) was not limited to benefits determinations but could be applied to employer accounts for the purposes of assessing a tax. In its Final Order, the ICAO found that because there was a connection in ownership, all of the Accord entities were separate establishments of the same employing unit and, thus, the combination was permissible.

¶9 Accord HR then appealed the ICAO's Final Order. The court of appeals reversed the ICAO's Final Order and reinstated the hearing officer's decision. The court determined that section 8-70-114(1) did not authorize the Division to collapse separate employer tax accounts into a single account and assess taxes retroactively based on elements of common control or ownership. Because each of the individual Accord entities met the definition of employer under section 8-70-113(1)(a)(II), the court held that the Division was required to maintain a separate employer tax account for each such entity. We agree and affirm.

II.

¶10 The Colorado Employment Security Act, sections 8-70-101 to -82-105, C.R.S. (2011) ("CESA"), establishes an unemployment insurance fund ("Fund") financed by employer-paid premiums or taxes. Under CESA, the Division collects taxes from employers for payment into the Fund and pays benefits to eligible, unemployed individuals. CESA bifurcates these duties, with one section of CESA providing procedures for the calculation and collection of taxes paid by employers, and another

section of CESA providing procedures for the determination of benefits paid to former employees. The distinction between the two sections of CESA is an important one.

¶11 Benefits are paid from the Fund to individuals who meet the eligibility criteria. §§ 8-73-101, -102, C.R.S. (2011). The benefits sections should be construed liberally in order to further the remedial and beneficent purposes of lightening the burden of unemployment on those who are involuntarily unemployed. § 8-70-102; Colo. Div. of Emp't & Training v. Hewlett, 777 P.2d 704, 706-07 (Colo. 1989).

¶12 In contrast, only an "employer" is required to pay unemployment taxes into the Fund based on the amount of wages paid to current employees and the amount of claims made by former employees. §§ 8-76-102, -103, C.R.S. (2011). Because the payments made by employers are a tax, the taxing section of CESA will be strictly construed. See Cottrell Clothing Co. v. Teets, 139 Colo. 558, 342 P.2d 1016 (1959); Washington Cnty. Bd. of Equalization v. Petron Dev. Co., 109 P.3d 146, 150 (Colo. 2005). "When construing tax provisions, we do not extend the statute's operation beyond its clear import, or deprive the taxpayer of a legitimate favorable construction of the statutory or regulatory provision at issue." Washington Cnty. Bd. of Equalization, 109 P.3d at 150.

¶13 Section 8-76-103(1)(a) states that the Division "shall maintain a separate account for each employer" and credit that account with that employer's taxes. The Division assigns each account an experience rating based on the amount of benefits paid to former employees of the employer. § 8-76-103. The employer's experience rating and

the overall wages that an employer pays in Colorado are used in a formula to determine an employer-specific tax rate. §§ 8-76-102, -103.

¶14 Because an employer's overall liability to the Fund is, in part, based on the number of unemployment claims filed against it, it follows that an employer may have a lower tax rate if it has very few or no unemployment claims filed against it. In this case, Accord HR, an entity with a higher tax rate, transferred employees to Accord CO, an entity with a lower rate, thus reducing Accord HR's unemployment tax burden. The Division contends that it had authority under section 8-70-114(1) to combine the various employer accounts held by the Accord entities in order to erase the tax advantage Accord HR obtained by transferring the employees. We disagree.

¶15 Section 8-70-114(1) provides that "[a]ll individuals performing services within this state <u>for any employing unit</u> that maintains two or more <u>separate establishments</u> within this state shall be deemed to be employed <u>by a single employing unit</u> for all the purposes of articles 70 to 82 of this title." § 8-70-114(1) (emphasis added). The Division contends that section 8-70-114(1) authorizes it to combine employer tax accounts into a single "employing unit" account for the calculation of taxes. We find the Division misinterprets section 8-70-114(1) based on its language and terms of art defined by the legislature.

¶16 The relevant statutory term for evaluating unemployment tax liability is "employer," not "employing units." As noted above, only "employers" pay into the Fund, and the Division is required to maintain separate accounts where each "employer[']s" unemployment taxes are received. Thus, the fact that an "employing

unit" operating "separate establishments" shall be deemed a single "employing unit" under section 8-70-114(1) does not advance the Division's argument.

¶17 The statute's language demonstrates that the legislature intended to draw a distinction between "employing unit," "employer," and "separate establishment." An "employing unit" is an extremely broad term used to describe virtually any individual or organization that employs anyone in the state. § 8-70-114(1).[2] "Employers" are a subset of "employing units" that meet additional qualifications, such as paying a certain amount of wages. § 8-70-113(1)(a)(II).[3] A "separate establishment" is not defined by the statute, but in context the phrase suggests that an "employing unit" may operate two or more separate establishments but still retain its character as a single "employing unit."

¶18 We have held that "the use of different terms signals an intent on the part of the General Assembly to afford those terms different meanings." Robinson v. Colo. State Lottery Div., 179 P.3d 998, 1010 (Colo. 2008). As noted above, only "employers," not "employing units," are required to pay taxes, and the Division maintains separate accounts for only "employers," not "employing units." Thus, the fact that an

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[2] "Employing unit" is defined as "any individual or type of organization, including any partnership, limited liability partnership, limited liability company, limited liability limited partnership, association, trust, estate, joint stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or legal representative of a deceased person, who employs one or more individuals performing services within this state." § 8-70-114(1).

[3] Specifically, an "employer" is an employing unit that, after December 31, 1998, either paid wages during any calendar quarter totaling one thousand five hundred dollars or more or employed at least one employee for any portion of a day for twenty weeks during the current or preceding calendar year. § 8-70-113(1)(a)(II).

"employing unit" operating "separate establishments" shall be deemed a "single employing unit" does not give the Division authority to combine separate employer accounts into a single employer account. Such a logical leap is not supported by the statute's language.

¶19 Moreover, section 8-70-114(1) speaks only to how individuals are to be treated for benefit purposes, not to how taxes are to be assessed by the Division. Specifically, the statutory language states that "[a]ll individuals" who have worked for employing units with separate establishments "shall be deemed to be employed by a single employing unit for all the purposes of article 70 to 82 of this title." § 8-70-114(1). The language of section 8-70-114(1) thus addresses how employees are to be classified for receiving benefits, not on how employers' taxes are to be assessed. See, e.g., Giacopelli v. Indus. Comm'n, 622 P.2d 111, 112 (Colo. App. 1980) (where claimant had worked for one hotel and then another, remand was appropriate to determine if both establishments were a "single employing unit" and, if so, whether transfer from one to the other was a "less desirable transfer" qualifying claimant for benefits). The Division stresses that section 8-70-114(1)'s classification of individuals as having worked for a single "employing unit" applies "for all purposes." But again, the problem with the Division's argument is that section 8-70-114(1) does not assess taxes with regard to classification of individuals as having worked for single employing units; in other words, tax assessment is not a "purpose" to which section 8-70-114(1) could apply.

¶20 The Division also argues that it is unwise, from a public policy perspective, to permit an employer to shift employees from an entity with a higher tax rate to one with

a lower rate to lower its unemployment tax burden — a practice known as "dumping." The Division notes that, in 2004, Congress passed the SUTA[4] Dumping Prevention Act, mandating that states amend their employment compensation laws to prevent this practice. 42 U.S.C. § 503(k) (2006). Colorado adopted such a law in 2005. See § 8-76-104, C.R.S. (2011). However, this law was not enacted at the time Accord HR transferred a portion of its Colorado employees to Accord CO, and both parties agree that the new statute does not apply to the case here. We decline the Division's invitation to apply the legislature's policy determination prior to its adoption of applicable statutory language, especially given our background principle that tax statutes are to be construed narrowly. Washington Cnty. Bd. of Equalization, 109 P.3d at 150. Further, we make the common sense observation that had the Division already possessed the authority to combine various employer accounts under section 8-70-114(1), there would have been no reason for the legislature to have acted in 2005. See Leonard v. McMorris, 63 P.3d 323, 331 (Colo. 2003) ("We presume the General Assembly knows the pre-existing law when it adopts new legislation or makes amendments to prior acts.").

¶21 Finally, it is significant that the authority provided to the Division in the 2005 statute is far narrower than the authority it claims to possess under section 8-70-114(1). In this case, the Division takes the position that section 8-70-114(1) permits it to combine employer accounts whenever it can be shown that the entities share common ownership

[4] SUTA stands for State Unemployment Tax Act.

and control.[5] By contrast, under the 2005 statute, if there has been a transfer of "trade or business" from one employer to another employer that share common ownership, the general rule is that the unemployment experience rating of the predecessor employer is transferred to the successor employer. § 8-76-104(2)(b) (if "an employer transfers all or a portion of its trade or business to another employer and, at the time of the transfer, there is substantially common ownership, management, or control of the two employers, the unemployment experience attributable to the predecessor employer shall be transferred to the successor employer"). The Division may combine employer accounts only if it is shown that the transfer was accomplished for the purpose of avoiding tax liability:

> If, following a transfer experience, the division determines that the purpose of the transfer of the trade or business was solely or primarily to obtain a reduced liability for contributions, the division shall combine the experience rating accounts of the employers into a single account and shall assign a single rate to the account.

Id. Therefore, under the 2005 statute, if there has been a transfer of trade or business from one "employer" to another "employer" with substantially common ownership, the experience rating of the predecessor employer transfers to the successor employer, unless the transfer was accomplished for the purpose of avoiding unemployment taxes, in which case the Division is authorized to combine employer accounts. If we were to

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[5] Because we find that section 8-70-114(1) does not give the Division authority to consolidate separate employer accounts under a single employer account for purposes of assessing unemployment taxes, we need not determine whether the Division properly applied principles of common ownership and control in deciding to consolidate the accounts.

adopt the Division's interpretation of section 8-70-114(1), then, we would have to find that the legislature granted broad authority to the Division to combine employer accounts under section 8-70-114(1), and then in 2005 impliedly repealed that authority through new legislation that expressly authorized a far more limited power to combine employer accounts. Given our general reluctance to find that statutes have been impliedly repealed, Frank M. Hall, Inc. v. Newsom, 125 P.3d 444, 451 (Colo. 2005), we decline to adopt such an interpretation in this case.

¶22 In sum, we conclude there is nothing in the language of section 8-70-114(1) that gives the Division authority to collapse separate employer accounts into a single employer account for purposes of assessing unemployment taxes. The statute simply describes circumstances where individuals will be deemed to be employed by a single employing unit for paying benefits — and nothing more. Applying this reasoning here, section 8-70-114(1) did not provide the Division with the authority to consolidate the various employer accounts held by the Accord entities[6] for purposes of assessing taxes.

III.

¶23 For the reasons stated above, we affirm the holding of the court of appeals.

JUSTICE HOBBS dissents.
JUSTICE MÁRQUEZ does not participate.

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[6] The Division also argues that it was error for it to assign each Accord entity a separate employer account in the first instance. Because the Division did not raise this issue below, we do not address it here. Beauprez v. Avalos, 42 P.3d 642, 649 (Colo. 2002) (an issue not presented to or raised at the trial court will not be considered on appeal).

JUSTICE HOBBS, dissenting:

¶24 I respectfully dissent. I disagree with the majority's conclusion that the Division lacked authority to consolidate the unemployment tax accounts of the five entities wholly owned by Accord Human Resources, Inc. (Accord HR). In my view, section 8-70-114(1), C.R.S. (2003) authorized the Division to find that the Accord HR entities, all owned by the same holding company, constituted a "single employing unit" for unemployment premium collection purposes. The court of appeals' decision should be reversed and the decision of the Industrial Claim Appeals Office reinstated.

¶25 As I read it, the crux of the majority opinion is that

> [O]nly "employers," not "employing units," are required to pay taxes, and the Division maintains separate accounts only for "employers," not "employing units." Thus, the fact that an "employing unit" operating separate "establishments" shall be deemed a "single employing unit" does not give the Division authority to combine separate employer accounts into a single employer account. Such a logical leap is not supported by the statute's language.
>
> Moreover, section 8-70-114(1) speaks only to how individuals are to be treated for benefit purposes, not to how taxes are to be assessed by the Division.

Maj. op. ¶¶ 18-19. However, section 8-70-114(1), a definitional section within the Colorado Employment Security Act (CESA), <u>requires</u> the Division to deem an "employing unit that maintains two or more separate establishments" in Colorado to be a "single employing unit" for <u>all purposes</u> of CESA. One of the remedial purposes of CESA is to collect and set aside funds from employers in order to provide unemployment benefits for individuals. <u>See</u> § 8-70-102, C.R.S. (2011). Thus, the Division had the authority to consider the Accord entities to be a "single employing

unit" for unemployment premium collection purposes. This is not a logical leap; it is plain statutory language. In my view, neither caselaw, statutory provisions, nor reasonable statutory interpretation supports the majority's conclusion that section 8-70-114(1) applies only to employee benefit determinations and not to unemployment premium collection.

¶26 Under CESA, unemployment "premiums" are payable to the state yearly "by each employer." § 8-76-101(1). The Division maintains "a separate account for each employer," § 8-76-103(1)(a), and the annual premium collected from an employer is tied to a formula which depends, in part, on wages and premiums paid by the employer and benefits paid out from the employer's unemployment tax account, §§ 8-76-101 to -103. In other words, an employer's yearly premium is directly related to the number of its current employees and to unemployment claims by its former employees. The Division collects these premiums to provide funds "for the benefit of persons unemployed through no fault of their own." § 8-70-102 (legislative declaration); see §§ 8-73-101(1), 8-77-101 to -109.

¶27 Each of the five Accord entities operating in Colorado is owned by the same holding company and lists the same Oklahoma address in reports to the state. Each had separate unemployment tax accounts with the Division in 2004. Four of the registered entities share the same board of directors and corporate officers; Accord Human Resources of New York, Inc., is operated by a separate board of directors and corporate officers. All five are run by the same CEO.

¶28 In early 2004, Accord HR significantly reduced its yearly unemployment premiums by transferring almost sixty percent of its total Colorado workforce from Accord HR to Accord HR Colorado, which had a much lower unemployment premium rate because it had recently registered in Colorado and had few unemployment claims from former employees. The payroll transfer from one corporation to another, both registered under the same address, holding company, board of directors, and corporate officers, triggered the Division's audit in August 2004. With this transfer, the parent company, Accord HR, effectively saved millions of dollars in unemployment premiums payable to the state unemployment compensation fund.

¶29 The Division determined that section 8-70-114(1), C.R.S. (2003) provided it the authority to consolidate the five Accord entitites' tax accounts into a single account because the large transfer of employees from the tax rolls of a parent company to a subsidiary indicated that the parent, Accord HR, was operating its five subsidiaries as a single entity within the state. According to the Division, Accord HR met the section 8-70-114(1) criteria as a "single employing unit" maintaining "two or more separate establishments" in the state. I agree with the Division.

¶30 Statutory interpretation is a question of law that we review de novo. Clyncke v. Waneka, 157 P.3d 1072, 1076 (Colo. 2007). When interpreting a statute, it is our primary goal to give effect to legislative intent. Id. at 1077. To determine legislative intent, we look first to the statutory language itself and review the plain and ordinary meaning of the words. Id. If the language is plain and clear, the statute is to be applied as written because it is presumed that the General Assembly meant what it said. Id.

¶31 Colorado's unemployment insurance scheme, CESA, is a remedial statute which is to be liberally construed in order to further its remedial and beneficent purposes. Colo. Div. of Emp't & Training v. Hewlett, 777 P.2d 704, 706-07 (Colo. 1989). Under CESA, "employers" must pay premiums to fund unemployment insurance benefits. See § 8-76-102(1). An individual unemployed through no fault of her own, who meets the eligibility criteria in article 73 of CESA, shall receive unemployment benefits chargeable to the account of her "employer." See § 8-73-108. "Employer" is defined as an "employing unit" that pays a minimum amount of wages per year. § 8-70-113(1). An "employing unit" is defined as any "individual or type of organization," including a corporation, that employs at least one individual in Colorado. § 8-70-114(1). Employees of "any employing unit that maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of articles 70 to 82 of this title." Id.

¶32 I conclude the definitions at issue here are plain. The Division maintains unemployment tax accounts for "employers." An "employer" is an "employing unit" with certain characteristics. Employees of "any employing unit" that operates separate establishments in Colorado shall be considered to be employed by a "single employing unit." Thus, employees of "a single employing unit" must be considered employees of a single "employer" for all CESA purposes. Because unemployment tax assessment and collection is a CESA purpose, the Division has the authority to consider the employees of a single employing unit to be employed by a single employer for unemployment tax collection.

¶33 Here, at the relevant time of the Division's audit, Accord HR was an "employing unit that maintains two or more separate establishments within this state,"[1] such that the Division properly considered employees of the five Accord entities to be employed by Accord HR as a "single employing unit" for all CESA purposes. Because the Division had the authority to consider employees of the five Accord entities employees of a single employing unit, it necessarily had the authority to consider employees of the five Accord entities to be employees of a single "employer." See § 8-70-113(1)

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[1] "Separate establishment" is not specifically defined by the legislature. Black's Law Dictionary defines "establishment" as "[a]n institution or place of business." Black's Law Dictionary 626 (9th ed. 2009). This accords with a plain understanding of the term. The majority opinion states that an "establishment" must be different than an "employer" and an "employing unit," but offers no definition: "A 'separate establishment' is not defined by the statute, but in context the phrase suggests that an 'employing unit' may operate two or more separate establishments but still retain its character as a single 'employing unit." Maj. op. ¶ 17.

I agree with the majority's understanding. One example of "an employing unit that maintains two or more separate establishments" could be two hotels with different names, each owned and operated by the same corporate entity. See, e.g., Giacopelli v. Indus. Comm'n, 622 P.2d 111, 111-12 (Colo. App. 1980) (remanding for factual finding on whether two hotels, with different names, shared a "connection in ownership" such that they should be considered a "single employing unit" under section 8-70-114(1)). Other examples abound of entities that could be considered employers, employing units, and establishments, such as restaurant chains or franchises, retail stores, or banks.

Here, the Accord entities satisfy a common sense definition of "establishment" as a "place of business." Testimony at the Division hearing established that Accord HR Colorado is wholly owned by Accord HR. New employees of Accord HR Colorado are supplied a general employee manual from Accord HR, and Accord HR employee policies apply to employees of each entity. The five entities share an address, a holding company, a CEO, and four out of five share the same board of directors and corporate officers. In my view, the plain language of section 8-70-114(1) evinces a legislative intent to require the Division to consider the Accord entities to be establishments of a "single employing unit" for CESA purposes.

("employer" is an "employing unit" that meets certain characteristics). And this classification clearly applies to all purposes of CESA. § 8-70-114(1).

¶34 Unlike the majority, I do not read the crucial sentence in section 8-70-114(1)[2] as applying only to the classification of employees for individual benefit calculations. See Maj. op. ¶¶ 19-20. "[A]ll the purposes of articles 70 to 82" necessarily includes the purpose of collecting funds to provide unemployment benefits to eligible persons as described by the formulas in article 76 of CESA, sections 8-76-101 and -102. In my view, it would be unreasonable to construe the statute to require the Division to count employees as employed by one employer (or employing unit) for benefit disbursement purposes and to count the same employees as employed by a different employer for tax collection purposes.[3] In other words, if employees of the Accord entities may be classified as employed by single employing unit—Accord HR—for benefit disbursement purposes, then Accord HR's contribution to the unemployment compensation fund, which is based on characteristics of its employees, must also be

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[2] "All individuals performing services within this state for any employing unit that maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of articles 70 to 82 of this title." § 8-70-114(1).

[3] The complicated formulas used to calculate an employer's yearly contributions to the unemployment compensation fund are designed to ensure that any unemployment benefits owed to former employees of the employer are paid with premiums collected from that employer. The formulas take into consideration past unemployment claims from former employees, employees' tenure and experience rating, and wages paid. See § 8-76-103. The scheme aims to balance benefits paid out with taxes collected from an employer, a balancing which become more difficult if an employee may be classified as employed by one employing unit for benefit disbursement purposes and by a different employing unit for premium assessment and collection purposes.

based on Accord HR's classification as a single employing unit with separate "establishments."

¶35 The majority construes section 8-70-114(1) differently, invoking canons of construction to suggest that the legislature never intended the crucial sentence to apply to the Division's authority to assess unemployment premiums from employers. Although it is not completely clear to me, the majority appears to assert that the crucial sentence in the definition of "employing unit" applies to the definition of "employer" only when "employer" is used in the benefits calculation sections of CESA, and not in the premium assessment provisions. Nothing in the text of the statute supports this proposition, and I do not read CESA to be so limited.

¶36 The majority invokes canons of construction to buttress its unsound conclusion. First, the majority notes that we construe tax statutes narrowly, and because unemployment premiums are a tax, the sentence in the employing unit definition should not be construed to give the Division the authority to combine the tax accounts of various employers that may be "separate establishments" of an employing unit. Maj. op. ¶¶ 12, 19-20.

¶37 However, the language at issue here is not in the taxing section of CESA. Article 70, which contains section 8-70-114(1), provides definitions and general provisions applicable to the whole of CESA, while article 76 provides the unemployment premium collection authority of the state. Generally, when the legislature provides a formal definition for a term, that definition controls throughout the entire statute. Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist., 109 P.3d 585, 597-

98 (Colo. 2005). In my view, the definition of "employing unit" in section 8-70-114(1) applies each time "employer" is referenced in the statute, which includes the benefit disbursement sections as well as the premium assessment provisions. In other words, I would not choose different constructions for a term that is specifically defined by the legislature and used throughout CESA.

¶38 Further, although article 76 of CESA requires employers to pay unemployment premiums to the Division, CESA as a whole is a remedial statute, not a taxing statute. The purpose of CESA is not to raise revenue for the state, but to collect revenue in order to compile "unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."[4] § 8-70-102. Thus, I would not interpret narrowly the definitional sections of CESA, a remedial statute. See Hewlett, 777 P.2d at 706-07.

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[4] A 1945 California court applied an identical definition of "single employing unit" to an employer who set up several "establishments" in the state to avoid paying unemployment taxes. Wiltsee v. Cal. Emp't Comm'n, 158 P.2d 612, 613-14 (Cal. Dist. Ct. App. 1945). In construing the definition to apply to employers for unemployment tax assessment purposes, the court noted that the unemployment insurance scheme is much different than a general taxing scheme:

> Here we have a statute which, while it requires a "contribution" that in itself may possibly be regarded as a tax, has a much broader object than the mere raising of revenue. It sets up a scheme for ameliorating the hardships of unemployment, and undertakes, in conjunction with the United States Government, to pay unemployment benefits to those who, without fault of their own, are out of work, . . . and to measure both burden and benefits by the amount of compensation paid to employees when they are working. In view of the purpose of these provisions they should not be whittled down by narrow construction, nor should exceptions not clearly justified by their language be engrafted upon them by judicial interpretation.

Id. at 616 (quoting Cal. Emp't Comm'n v. Black-Foxe Military Inst., 110 P.2d 729, 732 (Cal. App. Dep't Super. Ct. 1941)).

¶39 Second, the majority employs another canon when it asserts that when the legislature acted to amend CESA in 2005, it must have granted the Division new authority it previously did not have. See Maj. op. ¶¶ 20-21 ("[H]ad the Division already possessed the authority to combine various employer accounts under section 8-70-114(1), there would have been no reason for the legislature to have acted in 2005."). This is incorrect. The 2005 amendment to section 8-76-104 was enacted by the General Assembly soon after Congress required states to include specific provisions in state unemployment acts in order to continue receiving federal unemployment funding. See SUTA Dumping Prevention Act of 2004, Pub. L. No. 108-295, 118 Stat. 1090 (codified as amended at 42 U.S.C. § 503(k) (2006)) ("For purposes of [receiving Federal Unemployment Tax funding], the unemployment compensation law of a State must provide . . . ."); ch. 155, title of act, 2005 Colo. Sess. Laws 543, 543 ("An Act concerning modifications to the method of determining the unemployment insurance tax rate of an entity that acquires an employer's business for purposes of complying with the federal 'SUTA Dumping Prevention Act of 2004'."); § 8-76-104(2)(b), C.R.S. (2011) (adopting the language of 42 U.S.C. 503(k)(1)(A)). In my view, the enactment of the 2005 amendment had no bearing on the Division's pre-2005 authority to combine employer accounts when an employer may be engaged in payroll dumping and where the employer meets

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I agree. CESA is meant to "lighten the burden" of unemployment "by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment." § 8-70-102. Thus, I would not apply the canons we apply to taxing statutes to interpret a definition in a remedial statute. See Hewlett, 777 P.2d at 706-07 (CESA, a remedial statute, should be construed liberally.).

the criteria as an employer that maintains "separate establishments" in the state. The CESA amendment was enacted to comply with federal law, not to comment on the authority the Division had previously. I would give little weight to the 2005 amendment in interpreting whether the Division had pre-2005 authority, under the plain language of section 8-70-114(1), to consider Accord HR a single employing unit that maintains separate establishments in the state.

¶40 The majority cites a court of appeals case to support its assertion that section 8-70-114(1) only applies to benefits claims of individuals. However, that case and a court of appeals case cited below, do not support the majority's claim. In Giacopelli, the court of appeals considered whether a former employee of two different hotels, each owned or managed by the same individual, was entitled to an unemployment benefit calculation as though the two hotels were a "single employing unit" under section 8-70-114(1). 622 P.2d at 111-12. The court of appeals remanded because "[t]he evidence indicates a connection in ownership" such that the hotels may have been separate establishments of a single employing unit. Id. at 112 (remanding for factual findings "to determine if there was a single employing unit").

¶41 Dewhurst v. Industrial Claim Appeals Office, cited by the court of appeals' decision below, involved whether an employee who was transferred from a Montana Wal-Mart to a Colorado Wal-Mart was continuously employed by the same "employing unit" for unemployment benefit purposes. 148 P.3d 378, 379-80 (Colo. App. 2006). The court of appeals in that case agreed with the employee and found that "[s]ection 8-70-114(1) merely defines an employing unit for purposes of determining benefits for

those working in Colorado and describes one situation in which a worker will be deemed to have been employed by a single employing unit." Id. at 380.[5] Further, the court noted that section 8-70-114(1) does not "describe[] the sole or exclusive circumstances in which a single employing unit may exist." Id. at 380.

¶42 In my view, Dewhurst and Giacopelli do not limit section 8-70-114(1)'s applicability to only determinations of unemployment benefits for individuals. Those cases narrowly concerned the applicability of that section to former employees' benefit eligibility determinations, not to state maintenance of employer tax accounts or unemployment tax collection. To the extent those decisions suggest the outer limits of section 8-70-114(1)'s applicability to other purposes of CESA, those statements are dicta.

¶43 I would conclude that the phrase "all purposes" in section 8-70-114(1) applies that section to the Division's maintenance of employers' unemployment tax accounts and to unemployment premium assessment and collection purposes. I would also conclude that the hearing officer's factual finding that the Accord entities met the criteria of a single employing unit that maintains separate establishments was supported by evidence in the record. In my view, section 8-70-114(1) gave the Division the authority and the duty to consider the Accord entities to be a single employing unit for the purposes of assessing unemployment premiums as well as benefit disbursement for individuals. Thus, I would reverse the court of appeals and conclude that the Division had the authority to consolidate the unemployment tax accounts of the Accord

[5] That situation is, apparently, where the worker's employer "maintains two or more separate establishments within [Colorado]." § 8-70-114(1); Dewhurst, 148 P.3d at 380.

entities because Accord HR is an employing unit that maintains "separate establishments" in Colorado.

¶44 Accordingly, I respectfully dissent.

COLORADO COURT OF APPEALS **2015COA182**

DATE FILED: December 31, 2015
CASE NUMBER: 2015CA46

Court of Appeals No. 15CA0046
Industrial Claim Appeals Office of the State of Colorado
DD No. 5975-2014

A Child's Touch,

Petitioner and Cross-Appellee,

v.

Industrial Claim Appeals Office of the State of Colorado,

Respondent,

and

Robert L. Morris,

Respondent and Cross-Appellant.

ORDER AFFIRMED

Division IV
Opinion by JUDGE ROMÁN
Ney*, J., concurs
Graham, J., dissents

Announced December 31, 2015

Robert A. Lees & Associates, Robert A. Lees, Michael J. McNally, Jenna J. Sveen Gyorfi, Greenwood Village, Colorado, for Petitioner and Cross-Appellee

No Appearance for Respondent Industrial Claim Appeals Office

King & Greisen, LLP, Paula Greisen, Kimberly J. Jones, Denver, Colorado, for Respondent and Cross-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2015.

¶ 1 In this unemployment compensation benefits case, petitioner, A Child's Touch, seeks review of a final order of the Industrial Claim Appeals Office (Panel) holding that its former employee, claimant Robert L. Morris, was entitled to benefits because he was engaged in covered employment when A Child's Touch terminated his employment in September 2013. We conclude that A Child's Touch does not meet the statutory criteria for exemption from the Colorado Employment Security Act (CESA), §§ 8-70-101 to 8-84-108, C.R.S. 2015, because it is neither "operated, supervised, controlled, or principally supported by a church or convention or association of churches" nor an "elementary or secondary school" within the meaning of section 8-70-140(1)(a), C.R.S. 2015. We therefore affirm the Panel's decision.

I. Background

¶ 2 A Child's Touch is a state-licensed child care center providing infant and toddler day care, preschool, and kindergarten programs for children from six weeks to six years of age, and a summer camp for children ages six to twelve years.

¶ 3 Christian-themed iconography, prayers, and devotions are incorporated into its daily curriculum. Students recite the pledge of

allegiance to both the United States flag and a Christian flag. Religious-themed activities are incorporated, including art projects depicting religious scenes, the reading of Bible stories, and religious-themed counting lessons. A Child's Touch maintains a seasonally-inspired "creation station" at which children can interact with models and images depicting Bible scenes such as Noah's Ark, Christ's Resurrection, and the Christmas Nativity. In addition, Christian holidays are celebrated through activities such as a "Happy Birthday Jesus" party during the Christmas season, the re-enactment of the Easter story, and the baking of "resurrection biscuits." A Child's Touch also promotes its Christian-based education on its outdoor sign and Ten Commandments stone tablet. It joined the Association of Christian Schools International (ACSI) in 2013, and, a year later, in 2014, after claimant's termination, gained ACSI accreditation.

¶ 4 In addition to A Child's Touch being licensed as a child care center by the Department of Human Services, its kindergarten is licensed by the Colorado Department of Education, and children spend most of their days engaged in academic pursuits such as preparation for reading, writing, math, and science.

¶ 5 A Child's Touch was partially controlled by the Maranatha Christian Church, which had the authority to "sell" A Child's Touch. However, that relationship ended when the church ceased operations in 2011.[1]

¶ 6 A Child's Touch is run by a board of directors. Members of the board have included the founder of A Child's Touch, his wife and daughter, and an ordained minister who has not served as pastor of any particular church since before claimant's termination. In 2014, after claimant's termination, A Child's Touch added the pastor of Thrive Church to its board of directors.

¶ 7 Claimant served as a maintenance worker at A Child's Touch from approximately 1997 until his termination in September 2013. In September 2013, claimant took a medical leave for double hip replacement surgery. His position was eliminated during his absence. When he filed for unemployment compensation benefits, A Child's Touch challenged his request on the ground that he was

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[1] Although 1992 and 2008 audits by the Division of Labor determined that A Child's Touch was exempt from unemployment compensation taxation based on its association with Maranatha, the church ceased operations in 2011. Therefore, the previous audit results do not assist our analysis concerning claimant's termination in 2013.

not in covered employment and that it was exempt from unemployment compensation taxes under CESA because it is a religious organization. *See* § 8-70-140(1)(a).

¶ 8 After conducting two hearings and reviewing numerous exhibits, the hearing officer was persuaded that A Child's Touch operated primarily for religious purposes and was principally supported by a church or association of churches. *See* § 8-70-140(1)(a). The hearing officer denied claimant's claim for unemployment compensation benefits.

¶ 9 A divided Panel set aside the hearing officer's decision, holding that, although the evidence established that A Child's Touch operated primarily for religious purposes, the evidence did not support the hearing officer's finding that A Child's Touch is "principally supported" by an association of churches. Because this conclusion would disqualify A Child's Touch from the CESA exemption, the Panel went on to consider whether A Child's Touch qualified for the exemption on an alternative basis, namely as an elementary school that is operated primarily for religious purposes. The majority of the Panel then found that A Child's Touch was not an elementary school within the meaning of section 8-70-140(1)(a)

either, and thus did not qualify for the unemployment compensation tax exemption.

II. Issues on Appeal

¶ 10 A Child's Touch contends that the Panel misinterpreted the evidence and the applicable statute. Specifically, it asserts that (1) it was "principally supported" by an association of churches during the period in question; and (2) the Panel misconstrued section 8-70-140(1)(a) by excluding facilities, such as A Child's Touch, which offer kindergarten but include no higher grades, from fitting within the meaning of "elementary school."

¶ 11 Claimant agrees with the outcome of the Panel's decision, but cross-appeals the Panel's determination that A Child's Touch operates primarily for religious purposes. He contends that because students at A Child's Touch spend the majority of their time pursuing nonreligious, secular academics, A Child's Touch's primary activity is education, not religion.

¶ 12 We conclude that A Child's Touch is neither principally supported by a church or association of churches nor an elementary school within the meaning of section 8-70-140(1)(a). Accordingly, we hold that the Panel correctly determined that A

Child's Touch is not entitled to a religious exemption from unemployment compensation taxes under CESA.

III. Standard of Review

¶ 13 We are bound by the hearing officer's factual findings if they are supported by substantial evidence in the record. *Goodwill Indus. v. Indus. Claim Appeals Office*, 862 P.2d 1042, 1046 (Colo. App. 1993).

¶ 14 However, we are not bound by the hearing officer's or Panel's determinations of ultimate facts. *Samaritan Inst. v. Prince-Walker*, 883 P.2d 3, 9 (Colo. 1994). "Ultimate conclusions of fact . . . are conclusions of law or mixed questions of law and fact that are based on evidentiary facts and determine the rights and liabilities of the parties. . . . [A]n ultimate conclusion of fact is as a general rule phrased in the language of the controlling statute or legal standard." *Federico v. Brannan Sand & Gravel Co.*, 788 P.2d 1268, 1272 (Colo. 1990).

¶ 15 Thus, while we are bound by any findings the hearing officer made concerning A Child's Touch's activities if those findings are substantially supported by evidence in the record, neither we nor the Panel is bound by the hearing officer's ultimate conclusions that

A Child's Touch operates primarily for religious purposes or that A Child's Touch is principally supported by an association of churches. *See Samaritan Inst.*, 883 P.2d at 9.

¶ 16 Moreover, we review the Panel's legal conclusions de novo. *See Bell v. Indus. Claim Appeals Office*, 93 P.3d 584, 586 (Colo. App. 2004). In particular, we "review questions of statutory construction de novo." *Mounkes v. Indus. Claim Appeals Office*, 251 P.3d 485, 487 (Colo. App. 2010).

IV. Section 8-70-140(1)(a)

¶ 17 The statute at issue, section 8-70-140(1)(a), states that for purposes of CESA:

¶ 18 "[E]mployment" does not include services performed:

> (a) In the employ of a church or a convention or association of churches or in the employ of an organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or convention or association of churches or in the employ of an elementary or secondary school that is operated primarily for religious purposes.

¶ 19 Accordingly, to qualify for the CESA exemption, A Child's Touch must be either:

(1) a church or a convention or association of churches,

(2) an organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or convention or association of churches, or

(3) an elementary or secondary school that is operated primarily for religious purposes.

¶ 20 A Child's Touch argues that it qualifies under both the second and third categories. We agree with the Panel and the hearing officer that A Child's Touch is operated primarily for religious purposes[2] within the meaning of section 8-70-140(1)(a), which is a requirement for both the second and third categories. For A Child's Touch to qualify for the CESA exemption, we must also agree with it either (a) that it is principally supported by a church or convention or association of churches,[3] or (b) that it is an elementary school.

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[2] We note with approval the reasoning of the Illinois Court of Appeals in *Unity Christian School of Fulton, Illinois v. Rowell*, 6 N.E.3d 845, 852-53 (Ill. App. Ct. 2014) ("The Department's conclusion was based on a finding that Unity's 'curriculum is primarily secular in nature.' Well, of course it is. Just like the curricula in every other parochial school in the state. But the primary purpose of the school is to teach those secular subjects in a faith-based environment.").

[3] The dissent asserts that our analysis of whether A Child's Touch is "principally supported by . . . [an] association of churches" is

A. Principally Supported by an Association of Churches

¶ 21 A Child's Touch contends that the Panel erroneously concluded that it is not "principally supported by [an] association of churches." It argues that the evidence established that it receives support from several churches, and that this support is sufficient to meet the statutory requirement. *See* § 8-70-140(1)(a). In particular, it cites to testimony that members of churches serve on its board, "offer prayer support, spiritual advice and guidance,

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"beside the point." Of course, this is only true if one concludes, as the dissent does, that the "elementary school" test is met. But if a reviewing court concludes that A Child's Touch is *not* an elementary school under section 8-70-140(1)(a), then it must — that is to say, we must — analyze the rest of section 8-70-140(1)(a) and consider whether A Child's Touch still qualifies for the religious exemption under the analytically separate "principally supported" test. A Child's Touch asserts that the Panel erroneously concluded that claimant's work did not fall under either the second *or* the third statutory exemption from unemployment compensation coverage as services performed:

> [I]n the employ of an organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or convention or association of churches *or* in the employ of an elementary or secondary school that is operated primarily for religious purposes.

§ 8-70-140(1)(a) (emphasis added).

provide referrals, and promote and market the school to their congregations."

¶ 22 Reviewing the record as a whole, we are not convinced that A Child's Touch was principally supported by an association of churches when claimant was discharged in September 2013.

¶ 23 To establish "principal" support, the entity seeking exemption from unemployment compensation taxes must establish that it "'could not exist' without the churches' support, in other words, it is dependent upon that support. Such dependency constitutes 'principal' support for purposes of [the parallel Idaho act]." *Nampa Christian Sch. Found., Inc. v. State*, 719 P.2d 1178, 1184 (Idaho 1986). A Child's Touch did not meet this burden.

¶ 24 The evidence presented showed only minimal association between A Child's Touch and any church during the critical period surrounding claimant's termination. *See* § 8-70-103(2), C.R.S. 2015; § 8-73-102, C.R.S. 2015 (claimant's unemployment compensation benefit is based on wages earned within the year and a half preceding his initial claim).

¶ 25 A Child's Touch did not establish that it required the support of any church to continue operating when it terminated claimant's

employment. To the contrary, the evidence established that Maranatha Christian Church, which had asserted some level of control over A Child's Touch, ceased to exist several years before claimant's termination and was not supporting A Child's Touch at the time of claimant's termination. *See Unity Christian Sch. of Fulton, Ill. v. Rowell*, 6 N.E.3d 845, 852-53 (Ill. App. Ct. 2014) (principal support exemption not established because the fact that the school was run out of the basement of a church when it started ninety-two years earlier failed "to demonstrate how the school is currently supported principally by the churches" and evidence instead showed school was presently a separately incorporated entity in a separate building with a constitution that states it is not affiliated with any ecclesiastical body).

¶ 26 And while A Child's Touch secured ACSI accreditation, that did not happen until *after* claimant was terminated. Moreover, the evidence showed that although the former pastor of the defunct Maranatha church was once on A Child's Touch's board, he was no longer serving as a pastor when A Child's Touch terminated claimant. Further, although the hearing officer noted that A Child's Touch's "current board chairman is a [minister] with" a local

church, the composition of A Child's Touch's board at the time of the hearing was not at issue in May and September of 2014. Rather, the critical period was at the time of claimant's termination in September 2013. Finally, the evidence established that the pastor on A Child's Touch's board at the time of the hearing did not join the board until 2014, long after claimant's departure. In short, a snapshot of the period in which claimant was terminated does not establish that A Child's Touch was principally supported by a church or association of churches. *See Nampa Christian Sch.*, 719 P.2d at 1184.

¶ 27 The other factual finding cited by the hearing officer likewise provides only tenuous support for his conclusion that A Child's Touch was principally supported by an association of churches. The hearing officer found that various churches "promote" A Child's Touch "to their individual members," and that A Child's Touch "relies on families being referred by the various churches in the area to keep operating." But the testimony from which the hearing officer drew this finding did not clearly establish this. The testimony instead confirmed that churches refer some families to A

Child's Touch, but never established that A Child's Touch could not exist without those referrals.

¶ 28 In the absence of evidence demonstrating that its operations at the time of claimant's termination depended on such support, A Child's Touch failed to show that the support of any church or churches was "necessary for [its] continued operation." *Id.* The level of support A Child's Touch described during the period in question resembles the "moral support" *Nampa Christian Schools* rejected as insufficient. *See id.* The key is the quality of support during the period in which claimant was terminated, September 2013. Here, although a church supported A Child's Touch prior to claimant's termination and the current board contains local pastors, we conclude that A Child's Touch was not principally supported during the time period in which claimant was actually terminated.

¶ 29 Therefore, we agree with the majority of the Panel that A Child's Touch failed to establish that it was "principally supported by a church or convention or association of churches." *See* § 8-70-140(1)(a).

¶ 30 Because we have concluded that A Child's Touch is not an exempt organization under the second category described in section 8-70-140(1)(a), we are required to consider whether A Child's Touch nonetheless qualifies for the religious exemption from CESA by falling into the third category: an elementary or secondary school that is operated primarily for religious purposes.

B. Elementary School

¶ 31 We also disagree with A Child's Touch's contention that the Panel erred by failing to find that it is an elementary school within the meaning of CESA. § 8-70-140(1)(a). Specifically, we reject A Child's Touch's assertion that the inclusion of kindergarten in its curriculum necessarily makes it an "elementary school" within the meaning of section 8-70-140(1)(a).

¶ 32 CESA neither defines "elementary school" nor clearly articulates the legislature's intended scope of the term. Without a statutory definition, dictionary definitions can guide us. "When a statute does not define its terms but the words used are terms of common usage, we may refer to dictionary definitions to determine the plain and ordinary meaning of those words." *Gagne v. Gagne*, 2014 COA 127, ¶ 29 (quoting *Bachelor Gulch Operating Co. v. Bd. of*

Cty. Comm'rs, 2013 COA 46, ¶ 25). Additionally, the context in which an undefined term is used "may provide guidance as to legislative intent and the term's proper meaning." *Fogg v. Macaluso*, 892 P.2d 271, 274 (Colo. 1995).

¶ 33 As pertinent here, *Webster's Third New International Dictionary* 735 (2002) defines "elementary school" as "A school in which elementary subjects (as reading, writing, spelling, and arithmetic) are taught to children from about six to about twelve years of age which in the U.S. covers the first six or eight grades." In our view, this definition is not broad enough to include a child care facility which offers kindergarten within the ordinary meaning of "elementary school."

¶ 34 We find persuasive the statutory definition of a "child care center" in the Human Services Code. There, it explains that a kindergarten is a child care center unless the kindergarten is "maintained in connection with a public, private, or parochial elementary school system of at least six grades or operated as a component of a school district's preschool program . . . ." § 26-6-

102(1.5), C.R.S. 2015.[4] A Child's Touch is indisputably not maintained in connection with a public, private, or parochial elementary school system of at least six grades nor operated as a component of a school district's preschool program. This provision, thus, supports the conclusion that the presence of a kindergarten class does not convert a child care facility into an "elementary school" for the purpose of section 8-70-140(1)(a).

¶ 35 Conversely, we are not persuaded by the statutes A Child's Touch relies upon to support its proposed broad definition of "elementary school." It points to Title 22, which defines "school age" as "any age over five and under twenty-one years." § 22-1-115, C.R.S. 2015. Under the School Attendance Law of 1963, Title 22 provides that "every child who has attained the age of six years on or before August 1 of each year and is under the age of seventeen years . . . shall attend public school." § 22-33-104(1)(a), C.R.S.

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[4] While this definition is drawn from the Child Care Licensing Act, which does not apply to "special schools or classes operated primarily for religious instruction," A Child's Touch, although operated primarily for religious purposes, is not operated primarily for religious *instruction*. According to the record, the curriculum was primarily academic and the religious component took up only about ten percent of the day. Additionally, A Child's Touch *is* licensed as a child care center by the Department of Health.

2015. However, neither of these statutes defines "elementary school" and neither specifies that a child care facility which includes a kindergarten constitutes an elementary school.

¶ 36 Other jurisdictions examining the meaning of "elementary school" have concluded that a facility that offers preschool and kindergarten, but no grades beyond kindergarten, does not qualify as an "elementary school." For example, in *Commonwealth v. Burke*, 687 N.E.2d 1279 (Mass. App. Ct. 1997), the Appeals Court of Massachusetts reversed a defendant's conviction for drug offenses within a school zone because the school in question, a preschool, did not qualify as an "elementary school" under the statute. *Id.* at 1282. Citing the definition contained in *Webster's Third New International Dictionary*, the court held that "a kindergarten, together with a preschool, is not an elementary school." *Id.* at 1281.

¶ 37 The District Court of Appeal of Florida reached the same conclusion when it determined that a "kindergarten/preschool" is not an elementary school within the meaning of Florida's penal code. The court therefore affirmed the dismissal of charges against a defendant for purchasing illicit drugs "within 1,000 feet of the real

property comprising a public or private elementary, middle, or secondary school." *State v. Roland*, 577 So. 2d 680, 681 (Fla. Dist. Ct. App. 1991).

¶ 38 The Supreme Court of New Jersey followed this reasoning in vacating the conviction of a defendant charged with distributing drugs on the property of "any elementary or secondary school," reasoning that the ten-student kindergarten class there did not "transform a day care center into an elementary school" for purposes of that statute. *State v. Shelley*, 15 A.3d 818, 820, 824 (N.J. 2011). The court recognized that while some definitions "lead to a conclusion that an elementary school generally includes the first six to eight grades and may include a kindergarten program as an introduction to formal education, . . . none definitively establish[es] whether a kindergarten class, standing unconnected to other elementary grades, constitutes an 'elementary school.'" *Id.* at 820-21. And, further emphasizing the similarities with this case, the court observed that without higher grades, "the essential character of [the facility] is a day care center." *Id.* at 824.

¶ 39 We are persuaded by the reasoning of *Shelley*, *Burke*, and *Roland*. Because section 8-70-140(1)(a) creates an exemption for

services performed "in the employ of an elementary . . . school . . .," it is appropriate in this context to characterize the facility as a whole. *See Fogg*, 892 P.2d at 274. When so analyzing A Child's Touch, it is apparent that it is more akin to a child care center than an elementary school.[5]

¶ 40 We need not elucidate a comprehensive definition of "elementary school" to conclude that A Child's Touch does not fall within the "elementary school" exception of section 8-70-140(1)(a). Thus, unlike the Panel majority, we do not conclude that an elementary school necessarily consists of first through sixth or first through eighth grades, or that kindergarten students are not elementary school students. Instead, it is sufficient in this case to conclude that an entire child care facility is not properly characterized as an "elementary school" for unemployment

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[5] We note that the dissent from the Panel's decision pointed out that most designated "elementary schools" in the five largest Colorado school districts do not include first through sixth or first through eighth grade. However, the dissent on the Panel and the dissent in this opinion drew on statistics that are not contained in the record; consequently, we cannot rely upon the statistics or the analysis flowing therefrom. *See Armstrong v. Banking Bd. of Colo.*, 530 P.2d 1306, 1307 (Colo. App. 1974) (not published pursuant to C.A.R. 35(f)) ("An appellate court is not at liberty to consider matters outside the record presented to it in its determination of any cause.").

compensation tax purposes simply because it happens to provide a kindergarten program for its oldest charges.

¶ 41 We thus hold that a child care facility such as A Child's Touch, which offers day care, preschool, and kindergarten, but does not teach any higher grades, is not an "elementary school" for purposes of a religious exemption from unemployment compensation taxes under section 8-70-140(1)(a).

V. Conclusion

¶ 42 We therefore conclude that the majority of the Panel correctly held that A Child's Touch did not meet the criteria for a religious exemption under section 8-70-140(1)(a).

¶ 43 Accordingly, the Panel's order is affirmed, and the case is remanded to the Division of Unemployment Insurance to determine claimant's entitlement to and eligibility for unemployment compensation benefits.

JUDGE NEY concurs.

JUDGE GRAHAM dissents.

JUDGE GRAHAM, dissenting.

¶ 44 I respectfully dissent from the majority's reasoning on three grounds. First, the majority concludes that A Child's Touch (ACT) was not principally supported by a church, convention, or association of churches. A school does not have to be principally supported by an association of churches under the clear wording of the applicable statute, which plainly distinguishes between schools and other organizations operated primarily for religious purposes. Second, even if "principal support" was a prerequisite to ACT being excused from covered employment, the hearing officer's findings of fact clearly show that there was principal support from churches. Third, seizing upon an argument never advanced by the claimant below, the majority concludes that ACT is not an elementary school. I conclude that ACT operates an elementary school because it is a part of the Colorado kindergarten through high school education system as established by the Colorado Educator Licensing Act of 1991.

I. Background

¶ 45 ACT is a licensed kindergarten, a privately owned 501(c)(3) corporation, and a member of the Association of Christian Schools

International. It is licensed by the State of Colorado. It has been designated as a religious school, after two separate audits by the Colorado Division of Unemployment Insurance and declared to be exempt from unemployment compensation insurance liability. ACT relies on referrals from a network of churches for students, and the hearing officer found that without those referrals ACT would not be able to continue operating. Contrary to the majority's conclusion that the record does not support the hearing officer's finding, there is substantial evidence in the record supporting that finding. Both Mr. and Mrs. Grillo, principal owners of ACT, testified that ACT relied upon other churches for referrals and symbiotic support. Counsel asked Ms. Grillo specifically, "Could A Child's Touch survive without the assistance of other churches?" She replied, "ACT could not survive . . . ." She went on to explain that ACT relied upon other churches for referrals. The hearing officer's finding is amply supported by testimony in the record.[1]

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[1] The testimony of Mr. Grillo corroborated that of his wife. He explained that the referral of families by a network of churches "equates to dollars and cents . . . in our financial statements."

¶ 46 The parties do not dispute, as the Panel's majority concluded and the majority here points out, that the school is operated primarily for religious purposes.

II. The School Need Only Be Operated for a Religious Purpose

¶ 47 I conclude that the majority misinterpreted the applicable statutory law because it conflated a school operated primarily for religious purposes with other organizations that are operated for religious purposes *and* operated, supervised, controlled, or principally supported by a church. The statute in question, section 8-70-140(1)(a), C.R.S. 2015, incorporates the language of 26 U.S.C. § 3309(b)(1) (2012) (dealing with exemptions from the Internal Revenue Code) in fashioning an exemption from employment. The Colorado statute carves out an exception from the definition of employment where a person is employed by a

> church or a convention or association of churches or . . . an organization that is operated primarily for religious purposes and . . . is operated, supervised, controlled, or principally supported by a church or convention *or* [is employed by] *an elementary or secondary school that is operated primarily for religious purposes.*

§ 8-70-140(1)(a).

¶ 48 I interpret that statute by first looking to the plain words of the statute and ascribing to them their plain and unambiguous meanings. *People v. Yascavage*, 101 P.3d 1090, 1093 (Colo. 2004). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). "A statutory interpretation leading to an illogical or absurd result will not be followed." *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004).

¶ 49 The statute clearly creates two classes of exemption. First, an exemption is afforded to an organization that is operated, supervised, controlled, "or principally supported by a church or convention of churches." § 8-70-140(1)(a). Second, an exemption is afforded to "an elementary or secondary school that is operated primarily for religious purposes." *Id.* For those schools falling within the second exemption, there is no additional requirement that they be operated, supervised, controlled, or principally supported by a church or convention of churches.

¶ 50 Because there is no dispute here that ACT was operated primarily for religious purposes, it plainly qualifies for an exemption

so long as it is also deemed to be an elementary school. Thus, the majority's concern over whether ACT met the principally supported test is simply beside the point.

III. Nonetheless, ACT Was Principally Supported

¶ 51 Although I reject any notion that ACT was required to be principally supported by a church or convention of churches in order to qualify for its exemption, the fact is that the hearing officer found it was principally supported.

¶ 52 We must follow and apply the hearing officer's factual findings if they are supported by substantial evidence in the record. *Goodwill Indus. v. Indus. Claim Appeals Office*, 862 P.2d 1042, 1046 (Colo. App. 1993). The hearing officer here found that ACT was accredited by the Association of Christian Schools International for its kindergarten program. ACT is a member of that Association. Importantly, "ACT has been promoted by various churches in their area to their individual family members." And the school "relies on families being referred by the various churches in the area to keep operating." These findings of fact are unrebutted and, in my view, establish without question that ACT is principally supported by churches. I acknowledge that neither the majority nor any party

has supplied us with a definition of the words "principally supported," but I reject any notion that they convey a requirement of financial support. I note that the majority does not assume a financial requirement either. It is enough for me that the hearing officer found sufficient support from community referrals and accreditation by the Association of Christian Schools International.

¶ 53 I am not convinced nor am I bound by the majority Panel's conclusion that there was "nothing in this evidence in support of A Child's Touch or that there is a combination of churches providing support, financial or moral." That conclusion simply ignores the record and because I review the Panel majority's conclusion de novo, I reject its conclusion as being contrary to substantial evidence. *Bell v. Indus. Claim Appeals Office*, 93 P.3d 584, 586 (Colo. App. 2004).

¶ 54 Furthermore, the Panel majority's decision below did not assess whether ACT lacked principal support during any designated period at or near the time of claimant's discharge. Yet the majority here rests its analysis on a conclusion, without factual support, that at the particular time claimant was discharged, ACT lacked principal support. There is nothing in the record to support this

conclusion. On the contrary, ACT was an exempted religious school at all times pertinent, including that snapshot of time when claimant was discharged. Thus, the majority's conclusion that it was "not convinced that A Child's Touch was principally supported by an association of churches when claimant was discharged" is not based on any evidence in the record and is contrary to the hearing officer's express findings.

¶ 55 The referrals by churches, found by the hearing officer to be necessary for the school's existence, were not assigned to any particular period. And, the majority's concern over ACT's affiliation with Maranatha Christian Church has no bearing on the referrals by the network of churches. Also, contrary to the suggestion in the majority's first footnote, the change in affiliation with Maranatha Christian Church does not affect the significance of the ACT's audit. It continues to operate as a 501(c)(3) tax-exempt organization and it satisfies all particulars of the Department of Labor exemption.

IV. ACT Is an Elementary School

¶ 56 Grasping an issue that was not raised before the hearing officer, the Panel majority added as an afterthought its opinion that it was "unaware of any legal authority defining 'elementary school'

in the context of § 8-70-140(1)(a) or similar statutes in other states." Recognizing that the hearing officer did not rely on ACT being an elementary school in order to satisfy the third condition in section 8-70-140(1)(a), the Panel majority nevertheless singled out the testimony of one witness who stated that ACT is properly considered to be an elementary school because it was required to meet the Department of Education's requirements for kindergartens. The claimant never argued that ACT does not qualify for exemption because it is not an elementary school. But the Panel cited that as a reason why ACT's school should be denied an exemption. The Panel majority concluded that an elementary school was limited to grades one through six. The majority here follows that view, but I reject it.

¶ 57 As a licensed kindergarten, ACT instructs children in preparation for the elementary pursuits of reading, writing, math, and science. The General Assembly has declared that there are unmet needs in mathematics, science, and technology and has adopted a strategic plan for all prekindergarten through high school education. *See* § 22-81-102, C.R.S. 2015. A general review of our public education system reveals that all early education in Colorado

is considered to be either prekindergarten through grade twelve or kindergarten through grade twelve.

¶ 58 Examiner Kroll points out in his dissent to the Panel's order:

> Not many educators, students or parents in Colorado would be familiar with the definition of an elementary school as being limited to a school providing instruction in the 'first six to eight years of formal education.' In the largest five school districts in the state (Jeffco Public Schools, Denver Public Schools, Douglas County School Dist., Cherry Creek School Dist., and Adams 12 School Dist.) there are 297 schools designated as 'elementary' that fail to meet [the Panel majority's adopted definition].

¶ 59 Citing several definitions, Examiner Kroll describes all schools in the context of primary and secondary education, with primary education being generally for children ages five through twelve.[2]

> The various pieces of legislation enacted by the General Assembly pertinent to education do not often have occasion to distinguish between strictly 'elementary,' 'secondary' or other categories of school. As a result, the term 'in the employ of an elementary or secondary

[2] The majority criticizes my citing to Examiner Kroll's dissent, stating that he drew upon statistics that were not in the record. However, it is apparent to me that he took administrative notice of statistics that were within the Panel's and Department of Labor's purview under the relaxed standards of administrative review. Consequently, I see no harm in recognizing the efficacy of his observations.

> school' as used by Congress is not explicitly defined in the state statutes. However, two pieces of education legislation do appear significant in revealing the legislature's understanding of the category of elementary and secondary schools. Section 22-1-115 C.R.S. defines 'school age' as 'any age over five and under twenty one years.' Section 22-1-114 requires that any person operating a private school may be required to provide the local school board information pertaining to any student 'of school age' in attendance at their school.

¶ 60 He further points out that the Compulsory School Attendance statute, section 22-33-104, C.R.S. 2015, requires that children who have turned age six prior to August 1, and are under the age of seventeen, are required to attend public schools. And, that statute refers to categories of pupils as elementary and secondary. Elementary school pupils include kindergarten pupils. *See* § 22-33-104(1)(a)(II) (kindergartens are one of the elementary schools for which an exception to the hours of attendance is made).

¶ 61 Although there is no specific Colorado legislation that defines "elementary schools," I believe that most parents in Colorado, as well as the Department of Education and the General Assembly, would consider Colorado's primary and secondary education system to include "kindergarten through grade twelve." I therefore resist

the majority's attempt to cite cases from other state jurisdictions for the proposition that a Colorado kindergarten is something other than an elementary school. *State v. Roland*, 577 So. 2d 680, 681 (Fla. Dist. Ct. App. 1991); *Commonwealth v. Burke*, 687 N.E.2d 1279 (Mass. App. Ct, 1997); and *State v. Shelley*, 15 A.3d 818 (N.J. 2011), are not persuasive because they deal with foreign educational systems that are unique to their respective states and have no precedential value or relevance to Colorado's system.

¶ 62 The majority relies upon section 26-6-102(1.5), C.R.S. 2015, of the Human Services Code in concluding that ACT was not an elementary school. But that code deals with child care centers — not schools — and has no relevance to the issues raised by claimant in his appeal. That code was not argued below nor was it considered by the majority of the Panel. Section 26-6-103(1)(a), C.R.S. 2015, of that code plainly states that the code does not apply to "schools . . . operated primarily for religious instruction . . . ."

¶ 63 For all of these reasons, I respectfully dissent and would overturn the Panel majority's final order reversing the hearing officer's decision.

COLORADO COURT OF APPEALS **2013 COA 175**

DATE FILED: December 19, 2013
CASE NUMBER: 2012CA2326

Court of Appeals No. 12CA2326
Industrial Claim Appeals Office of the State of Colorado
DD No. 5463-2011

Foundation for Human Enrichment,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; and Division of Unemployment Insurance,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE ROMÁN
Dailey and J. Jones, JJ., concur

Announced December 19, 2013

Lapin Lapin, P.C., Theresa L. Corrada, Denver, Colorado, for Petitioner

John W. Suthers, Attorney General, Mary Karen Maldonado, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

No Appearance for Respondent Division of Unemployment Insurance

¶ 1 In this unemployment compensation tax liability case, petitioner, Foundation for Human Enrichment (the Foundation), seeks review of a final order of the Industrial Claim Appeals Office (Panel). The issue on appeal is whether coordinator services performed by twenty-one individuals, who lived and worked out of state, for workshops offered by the Foundation, constituted covered "employment" for tax purposes under the Colorado Employment Security Act (CESA), sections 8-70-101 to 8-82-105, C.R.S. 2013. The Panel concluded that the out-of-state coordinators were covered employees under the CESA and that the Foundation was responsible for paying unemployment compensation taxes for these individuals.

¶ 2 We conclude that respondent, the Division of Unemployment Insurance (Division), lacked statutory authority to impose tax liability against the Foundation with regard to the out-of-state coordinators. Consequently, we set aside the Panel's order and remand with instructions to reinstate the hearing officer's original decision determining that the out-of-state coordinators were not covered employees under the CESA for tax purposes.

I. Factual and Procedural Background

A. Tax Audit

¶ 3 The Foundation is a nonprofit organization based in Boulder, Colorado, that does outreach to victims of violence, war, and natural disasters. The out-of-state coordinators performed various administrative and clerical services for the Foundation in helping to organize workshops offered by the Foundation in out-of-state locations.

¶ 4 The Division conducted an audit of the Foundation and issued a notice of liability, finding that twenty-three workers, classified as coordinators, were in covered employment for purposes of the CESA. The Foundation appealed that decision.

B. Hearing Officer's Original Decision

¶ 5 Following a hearing, the hearing officer upheld the Division's ruling as to two workers who worked in Colorado. However, the hearing officer determined that twenty-one workers who lived and provided all their services to the Foundation out of state were not in covered employment for purposes of the CESA.

C. Panel's Initial Order

¶ 6 The Division appealed the hearing officer's ruling as to the twenty-one out-of-state coordinators to the Panel. The Panel determined that the out-of-state coordinators were in covered employment under the definition of employment in section 8-70-116, C.R.S. 2013, and set aside the hearing officer's decision concluding otherwise. The Panel remanded for findings under section 8-70-115(1)(b), C.R.S. 2013, regarding whether the out-of-state coordinators were free from the Foundation's control and direction and whether they were customarily engaged in an independent business.

D. Hearing Officer's Decision on Remand

¶ 7 On remand, the hearing officer found that the out-of-state coordinators were not customarily engaged in independent businesses providing event planning services. Thus, the hearing officer concluded, the coordinators were not independent contractors and they were in covered employment for purposes of the CESA.

E. Panel's Final Order

¶ 8 The Foundation appealed that decision to the Panel. The Panel issued a final order affirming the hearing officer's decision.

¶ 9 In that order, the Panel upheld its prior determination that the out-of-state coordinators were in covered employment pursuant to section 8-70-116 because the coordinators both provided services and resided out of state. The Panel also rejected the Foundation's argument that section 8-70-117, C.R.S. 2013, was applicable because none of the conditions set forth in that section had been satisfied.

¶ 10 The Panel agreed with the hearing officer's determination that the out-of-state coordinators were not independent contractors under section 8-70-115, C.R.S. 2013, because they were not customarily engaged in independent businesses. The Panel also determined, although not specifically addressed by the hearing officer, that the undisputed evidence would support the conclusion that the out-of-state coordinators were subject to control and direction by the Foundation.

¶ 11 The Foundation then brought this appeal.

II. Analysis

¶ 12 The Foundation contends that the Panel erred in determining that the out-of-state coordinators were in covered employment for purposes of the CESA. We conclude that the Panel's order must be set aside because the out-of-state coordinators' services to the Foundation were not "employment" under the CESA.

A. Standard of Review

¶ 13 We may set aside the Panel's decision only if (1) the Panel acted without, or in excess of, its powers; (2) the decision was procured by fraud; (3) the findings of fact do not support the decision; or (4) the decision is erroneous as a matter of law. *See* § 8-74-107(6), C.R.S. 2013; *Colo. Div. of Emp't & Training v. Parkview Episcopal Hosp.*, 725 P.2d 787, 790 (Colo. 1986). Our review of an agency's interpretation of a statute is de novo. *Benuishis v. Indus. Claim Appeals Office*, 195 P.3d 1142, 1145 (Colo. App. 2008).

¶ 14 In construing a statute, we ascertain and effectuate the General Assembly's intent by applying the plain meaning of the statutory language, giving consistent effect to all parts of a statute, and construing each provision in harmony with the overall

statutory design. *In re Miranda*, 2012 CO 69, ¶9. Additionally, statutes "pertaining to the same subject matter are to be construed in pari materia to ascertain legislative intent and to avoid inconsistencies and absurdities." *Walgreen Co. v. Charnes*, 819 P.2d 1039, 1043 (Colo. 1991).

B. The Out-Of-State Coordinators' Services Were Not "Employment" Under the CESA

1. "Employment" Under the CESA

¶ 15 Under the CESA, an "employer" must pay unemployment compensation premiums or taxes based on the amount of "wages for employment" paid to current employees and the amount of claims made by former employees. *See* §§ 8-76-101 to -103, C.R.S. 2013; *Colo. Div. of Emp't & Training v. Accord Human Res., Inc.*, 2012 CO 15, ¶ 12. "Employment," in turn, is defined in the CESA through a number of statutory provisions. *See* § 8-70-103(11), C.R.S. 2013 (listing these provisions).

¶ 16 The CESA contains two statutes that address whether an individual's services are covered employment and the Division's respective authority to impose unemployment compensation taxes. *See* §§ 8-70-116, -117; *see also* § 8-76-101 (discussing when

premiums shall accrue and become payable).

2. Sections 8-70-116 and 8-70-117

¶ 17 Section 8-70-116, which is entitled "Employment — location of services," is geographically expansive and defines employment to include services "wherever performed within the United States" provided (a) "[t]he service is not covered under the unemployment compensation law of any other state" and (b) "the service is directed or controlled" from Colorado. § 8-70-116(1)(a)-(b), C.R.S. 2013.

¶ 18 Section 8-70-117, which is entitled "Employment — base of operations," provides that a worker is in covered employment if one of four conditions exists: (1) the entire service of an individual is performed within this state; (2) the entire service of an individual is performed both within and without this state if the service is localized in this state; (3) the service is not localized in any state but some of the service is performed in this state and the base of operations or, if there is no base of operations, the place from which the service is directed or controlled, is in this state; (4) the base of operations or place from which the service is directed or controlled is not in any state in which some part of the service is performed

but that the individual's residence is in this state. Section 8-70-117 then provides: "For purposes of this section, service shall be deemed to be localized within a state if the service is performed entirely within the state or if the service is performed both within and without the state but the service performed without the state is incidental to the individual's service within the state . . . ."

3. Historical Basis for Section 8-70-117

¶ 19 The test set forth in section 8-70-117 is based on a uniform definition of "employment" that was developed in the 1930s and eventually adopted by nearly every state. *See* Beverly Reyes, Note, *Telecommuters and Their Virtual Existence in the Unemployment World*, 33 Hofstra L. Rev. 785, 790 (2004) (hereinafter *Telecommuters*) (stating that forty-six states and the District of Columbia have adopted the uniform definition); *Laub v. Indus. Claim Appeals Office*, 983 P.2d 815, 817-18 (Colo. App. 1999) (noting that the uniform definition of employment was drafted in the 1930s); *see also St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 775 n.3 (1981) ("All 50 States have employment security laws implementing the federal mandatory minimum standards of

coverage."). This definition was intended to eliminate uncertainty with regard to which state's unemployment compensation laws would apply to the payment of benefits and assessment of taxes when a worker performed services for a single employer in a number of states. *See Laub*, 983 P.2d at 817-18; *Iverson Constr., Inc. v. Dep't of Emp't Servs.*, 449 N.W.2d 356, 359 (Iowa 1989).

¶ 20 The uniform definition is based on two principles. *See In re Mallia*, 86 N.E.2d 577, 580 (N.Y. 1949); *Iverson*, 449 N.W.2d at 359. First, all employment of an individual should be allocated to one state and not divided among the several states in which the individual might perform services, and that one state should be solely responsible for paying benefits to the individual. *Mallia*, 86 N.E.2d at 580. Second, the state to which the individual's employment is allocated should be the one in which it is most likely that the individual will become unemployed and seek work. *Id.*

¶ 21 In determining which state will be allocated an individual's employment, the elements in the uniform definition have been interpreted by other jurisdictions as setting forth a four-part test which is to be applied in the following order: (1) the state where the

claimant's provision of services is "localized;" (2) the state where the claimant's "base of operations" is located; (3) the state from which the claimant's services is directed or controlled; (4) the state where the claimant is a resident. *Iverson*, 449 N.W.2d at 359; *see also Telecommuters*, 33 Hofstra L. Rev. at 791.

4. Panel's Interpretation of Sections 8-70-116 and 8-70-117

¶ 22 The Panel interpreted sections 8-70-116 and 8-70-117 as alternate jurisdictional statutes and held that there was no requirement that the conditions in both statutes had to be met for jurisdiction to be established. The Panel concluded that section 8-70-117 was inapplicable to service provided entirely out of state. Examining section 8-70-116, the Panel disagreed with the Foundation's argument that a coordinator's services were covered by the unemployment compensation laws of the state where the coordinator resided. The Panel noted that there was no indication that any other state had assumed jurisdiction over the services performed by the coordinators, demanded payment of taxes on those services, maintained an experience rating regarding the Foundation, or made a determination regarding a coordinator's

employment. Thus, the Panel concluded that the out-of-state coordinators were in covered employment under section 8-70-116.

5. The Out-Of-State Coordinators' Services Were Covered by the Unemployment Laws of Another State

¶ 23 We agree with the Panel that section 8-70-117 is inapplicable to situations where the worker's services are performed entirely out of state. Section 8-70-117, by its own terms, applies only when the worker performs all his services in this state, performs a portion of his services in this state, or resides in this state. None of those circumstances is present here. Thus, as did the Panel, we must consider the applicability of section 8-70-116.

¶ 24 Section 8-70-116 includes as "employment" services of an employee "wherever performed within the United States" provided that the service is "not covered under the unemployment compensation law of any other state" and that the service is "directed or controlled" from this state. As structured, section 8-70-116 may apply in circumstances where section 8-70-117 does not, although that is probably exceedingly rare given the adoption of employment security laws by all fifty states. *See St. Martin*, 451 U.S. at 775 n.3. And, contrary to the Foundation's assertion, we

need not consider the criteria in section 8-70-117 when analyzing section 8-70-116. Section 8-70-116 does not expressly incorporate any of those criteria. Further, section 8-70-117, by prefacing certain definitional language relating to the criteria with the phrase "[f]or purposes of this section," indicates that application of the criteria is limited to that section. Thus, we agree with the Panel that sections 8-70-116 and 117 provide independent bases for determining whether a worker is in covered employment for purposes of the CESA.

¶ 25 In evaluating whether the twenty-one coordinators are subject to section 8-70-116, we first consider whether they are covered by the unemployment compensation laws of another state. Our review of the administrative record establishes that the coordinators lived in eleven different states: (1) Arizona (Light); (2) California (Boblen, Chrisman, Gindi, Hart, Krekler, Luly, Smith, and Schuler); (3) Connecticut (Peyrot); (4) Maryland (Duncan); (5) Minnesota (Lee and Ostrander); (6) New Mexico (Zanghi); (7) New York (Bourbeau); (8) North Carolina (Langley); (9) Oregon (Love and Meretksy); (10) Texas (Morrel and Williams); and (11) Vermont (Zilboorg).

¶ 26 All eleven of those states have enacted some form of the uniform definition of employment that contains language similar to section 8-70-117. *See* Ariz. Rev. Stat. Ann. § 23-615(A)(1) (2013); Cal. Unemp. Ins. Code § 602 (West 2013); Conn. Gen. Stat. Ann. § 31-222(a)(2) (West 2013); Md. Code Ann., Lab. & Empl. § 8-202(c), (d) (West 2013); Minn. Stat. Ann. § 268.035, subd. 12 (West 2013); N.M. Stat. Ann. § 51-1-42(F)(2) (2013); N.Y. Lab. Law § 511(2)-(5) (McKinney 2013); N.C. Gen. Stat. Ann. § 96-9.5 (West 2013); Or. Rev. Stat. Ann. § 657.035 (West 2013); Tex. Lab. Code Ann. § 201.043 (West 2013); Vt. Stat. Ann. Tit. 21, § 1301(6)(A)(ii)-(iv) (West 2013).

¶ 27 Thus, determination of whether services provided by an individual are "not covered under the unemployment compensation law of any other state" necessarily involves consideration of the uniform definition of employment. *See Iverson*, 449 N.W.2d at 359; *see also Telecommuters*, 33 Hofstra L. Rev. at 791.

6. The Out-Of-State Coordinators' Services Were "Localized" in their Respective States

¶ 28 Other jurisdictions, when applying the criteria in the uniform definition, have used the sequential four-part test set forth

previously. *See Telecommuters*, 33 Hofstra L. Rev. at 791; *see also Iverson*, 449 N.W.2d at 359. The first factor of this test involves consideration of the state where the claimant's provision of services is "localized." *See Telecommuters*, 33 Hofstra L. Rev. at 791. If the provision of services is "localized" in one state, then there is no need to consider the other three factors. *Id*; *see also* § 8-70-117 (providing that "service shall be deemed to be localized within a state if the service is performed entirely within the state").

¶ 29 One court, which applied the uniform definition to similar facts, held that an individual was not in covered employment where the entire service of the individual was performed outside the state. *In re Allen*, 794 N.E.2d 18, 22 (N.Y. 2003). In this case, an employee of a company located in New York telecommuted to work from Florida. *Id.* at 22. The court held that the employee, who worked exclusively in Florida, was not in covered employment in New York for unemployment compensation purposes because her work was "localized" in Florida. *Id.* at 22; *see also Story v. Reed, Roberts Assocs., Inc.*, 284 N.Y.S.2d 556, 557 (N.Y. App. Div. 1967) (services provided by a claimant who worked for a New York

employer but performed services in Florida were "localized" in Florida and the claimant was not entitled to unemployment compensation benefits under New York law); *Logan-Cache Knitting Mills v. Indus. Comm'n*, 102 P.2d 495, 497 (Utah 1940) (holding that the claimant's service was not "localized" in the state because there was no evidence that any service was performed in the state).

¶ 30 Similarly, another court held that when employees performed all their work within the state, the employment was "localized" in the state, and it constituted covered employment for unemployment compensation purposes. *See Commonwealth ex rel. Div. of Unemployment Ins. v. Goheen*, 372 S.W.2d 782, 784 (Ky. 1963) (noting that the location of the employer's place of business is not material in determining whether the services performed for it are covered because, if the services rendered by an employee are localized in the state, there is no need for considering this factor or, indeed, the other criteria for coverage); *see also Vale v. Gaylords Nat'l Corp.* 316 A.2d 56, (N.J Super. Ct. App. Div. 1974) (noting that where service is performed in more than one state, it is not "localized" in any one state); *Mallia*, 86 N.E.2d at 580 (stating that

the "localization" test is determinative when an employee's entire service is localized in one state).

¶ 31 We also note that the Panel has made a similar argument with regard to whether employment is "localized" in this state. *See Laub*, 983 P.2d at 817-18 (in a case involving the application of section 8-70-118, C.R.S. 2012, which concerns a requirement that a nonprofit organization must employ at least four individuals, the Panel argued that the individuals' services must be performed, at least in part, in Colorado to be "localized" in the state and to constitute covered employment for unemployment compensation purposes).

¶ 32 Therefore, in light of the hearing officer's finding that the out-of-state coordinators lived and provided all their services out of state, we conclude that the coordinators' services were "localized" in the out-of-state jurisdictions. Accordingly, based on the definition of "employment" enacted in each state, the coordinators' services would have been covered under the unemployment compensation laws of the state where they worked and resided. *See Mallia*, 86 N.E.2d at 580; *see also Allen*, 794 N.E.2d at 22 (physical presence

determined where interstate telecommuter was "localized" for unemployment compensation benefits purposes). And, because the issue of whether the coordinators are covered by the unemployment compensation laws of another state is a legal one, we reject the Panel's argument that the lack of evidence on this issue requires a determination that the coordinators are in covered employment for purposes of section 8-70-116.

¶ 33 We also reject the Panel's argument that the absence of any action by any state to assume jurisdiction, demand taxes, maintain an experience rating, or make a determination regarding a coordinator's employment precluded a determination that these coordinators were covered by the unemployment compensation laws of another state. Section 8-70-116(1)(a) requires only that the services be "covered" under another state's unemployment compensation laws. It contains no additional requirement that the other state has to take administrative action to collect taxes or premiums, and we will not read that requirement into the statute. *See Boulder Cnty. Bd. of Comm'rs v. HealthSouth Corp.*, 246 P.3d 948, 954 (Colo. 2011) (declining to "read into a statute language

that does not exist”).

III. Conclusion

¶ 34 Therefore, we conclude that the Panel erred in determining that services provided by the out-of-state coordinators constituted covered employment in Colorado. Consequently, we also conclude that neither section 8-70-116 nor section 8-70-117 authorized the Division to impose taxes against the Foundation based on the out-of-state coordinator’s provision of services to the Foundation exclusively from out of state. In light of this conclusion, we need not address the Foundation’s remaining contentions on appeal.

¶ 35 The order is set aside, and the case is remanded to the Panel with instructions to enter an order reinstating the hearing officer’s original decision that the out-of-state coordinators were not in covered employment in Colorado and that the Division improperly assessed taxes against the Foundation for these individuals.

JUDGE DAILEY and JUDGE J. JONES concur.

COLORADO COURT OF APPEALS **2012 COA 23**

Court of Appeals No. 11CA0835
Industrial Claim Appeals Office of the State of Colorado
DD No. 353-70-2010

Cynthia C. Harbert,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Evergreen Christian Outreach,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE RICHMAN
Román and Miller, JJ., concur

Announced February 2, 2012

Cynthia C. Harbert, Pro Se

No Appearance for Respondents

¶1 In this unemployment compensation benefits case, petitioner, Cynthia C. Harbert (claimant), seeks review of a final order of the Industrial Claim Appeals Office (Panel) affirming the hearing officer's decision that claimant was not entitled to benefits because she was not engaged in covered employment when she was terminated. The hearing officer determined, and the Panel agreed, that claimant's employer, Evergreen Christian Outreach (EChO), was an organization operated primarily for religious purposes, and was operated, supervised, controlled, or principally supported by an association of churches pursuant to section 8-70-140(1)(a), C.R.S. 2011, thus exempting employer from the Colorado Employment Security Act (Act).

¶2 We conclude that EChO is not exempt under section 8-70-140(1)(a), and thus we set aside the Panel's order and remand.

I. Background

¶3 From March 2007 until October 2010, claimant worked in a resale store operated by EChO. According to its mission statement, EChO was founded by a group of churches in Evergreen, Colorado, "to provide assistance to residents of the Evergreen mountain

communities who are unemployed, under-employed, dealing with a long term illness, or experiencing other forms of personal crisis." EChO implements "its mission by providing, food, clothing and other items that meet the most urgent needs of those it serves," and occasionally providing "shelter, automotive/fuel, childcare, medical/prescription, or other temporary needs." The resale store where claimant worked provides a major source of funding for EChO's outreach programs. Through its programs, EChO "offers opportunities for discipling and mentoring, thereby reaching out to the emotional, intellectual and spiritual needs of Clients."

¶4 EChO's facilities are located on the grounds of an Episcopal church in Evergreen, except that the resale store, where claimant worked, is located in a private commercial space in a shopping center in Evergreen.

¶5 Claimant separated from her employment with EChO and applied for unemployment benefits. A deputy denied her claim, however, concluding that EChO is a religious organization and that claimant's employment therefore was "not covered." After considering the witnesses' testimony and reviewing EChO's by-laws,

policies, volunteer handbook, and brochure, the hearing officer was also persuaded that although the services provided by EChO were "not religious per se," claimant's employment was nevertheless exempt from the Act, because her work was performed for an organization that is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by an association of churches. § 8-70-140(1)(a). The Panel affirmed and this appeal followed.

II. Issues on Appeal

¶6 Claimant contends that the hearing officer and Panel erred in concluding that EChO is an exempt organization. She argues that EChO is not a "recognized religious body," that the hearing officer confused "the boundaries of the distinction" between EChO's altruistic motivations and true religious function, and that the hearing officer improperly disregarded the testimony of EChO's former executive director who stated that EChO became "less and less of a religiously grounded group." She also maintains that she was never informed that she could be denied unemployment compensation benefits because EChO was not covered by the Act.

We agree that the Panel misapplied the law in this case.

III. Standard of Review

¶7 We are bound by the hearing officer's findings of evidentiary facts if they are supported by substantial evidence in the record. *Goodwill Indus. v. Indus. Claim Appeals Office*, 862 P.2d 1042, 1046 (Colo. App. 1993) ("If the decision is supported by substantial evidence and the inferences which may be drawn therefrom, the hearing officer's decision will not be disturbed on review by this court.").

¶8 However, we are not so bound by the hearing officer's or Panel's determinations of ultimate facts.

> Ultimate conclusions of fact . . . are conclusions of law or mixed questions of law and fact that are based on evidentiary facts and determine the rights and liabilities of the parties. . . . [A]n ultimate conclusion of fact is as a general rule phrased in the language of the controlling statute or legal standard.

Federico v. Brannan Sand & Gravel Co., 788 P.2d 1268, 1272 (Colo. 1990) (citation omitted).

¶9 Thus, while we are bound by the hearing officer's findings of evidentiary facts concerning EChO's activities, we are not bound by

the Panel's ultimate conclusion as to whether EChO operates primarily for religious purposes. On appeal, we are free to draw our own conclusions from relevant documents and evidence in the record, and we review de novo the Panel's ultimate legal conclusion. *See Bell v. Indus. Claim Appeals Office*, 93 P.3d 584, 586 (Colo. App. 2004). And we may set aside a decision of the Panel if it is erroneous as a matter of law. § 8-74-107(6)(d), C.R.S. 2011.

IV. Analysis

¶10 The Panel based its denial of claimant's request for benefits on section 8-70-140(1)(a), which states that, for purposes of the Act, "employment" does not include services performed

> [i]n the employ of a church or a convention or association of churches or in the employ of an organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or convention or association of churches or in the employ of an elementary or secondary school that is operated primarily for religious purposes.

¶11 As the Panel observed, EChO is neither "a church [n]or a convention or association of churches," nor "an elementary or secondary school that is operated primarily for religious purposes."

Thus, our analysis focuses on the second of the three types of organizations exempted from coverage by section 8-70-140(1)(a). Under that provision, an organization is exempt if it "is operated primarily for religious purposes *and* . . . is operated, supervised, controlled, or principally supported by a church or convention or association of churches." § 8-70-140(1)(a) (emphasis added).

¶12 Claimant maintains that EChO is a nonprofit organization whose primary function is to operate "a community food bank and to provide limited or temporary assistance for those in need in the Evergreen community." She argues that although EChO's employees, volunteers, and board members may maintain relationships with its founding churches or other faith-based organizations, EChO's work is primarily secular in nature and should constitute covered employment. In other words, she maintains that EChO does not meet the first prong of the exemption created by section 8-70-140(1)(a) because it is not "operated primarily for religious purposes."

A. *Samaritan Institute* Test

¶13 In *Samaritan Institute v. Prince Walker*, 883 P.2d 3 (Colo. 1994),

our supreme court considered when an organization is "operated primarily for religious purposes," and concluded that because the word "operated" connotes activity, "the type of activity actually engaged in, rather than the motivation and impetus for the activity, is dispositive." *Id.* at 7. "An organization that provides essentially secular services falls outside of the scope of section 8-74-140(1)(a)." *Id.* at 8.

¶14 In *Samaritan Institute*, the supreme court was asked to determine whether an institute that served as "the national administrative office" for a national network of Samaritan counseling centers, by providing "administrative resources, accreditation, and new center development" to the centers, was exempt from the Act's definition of employer. *Id.* at 5. Although the centers provided counseling within a religious context, the institute itself did not provide counseling services, and its funding was "primarily generated from fees charged to its centers." *Id.* Although the institute was "affiliated with a large number of religious organizations," a referee found that it was "independently incorporated" and "operated as a non-profit corporation which

provides [services to the centers] pursuant to a contractual agreement of affiliation." *Id.* at 5-6. Accordingly, the supreme court concluded that the institute was not operated primarily for religious purposes and therefore was not qualified for the exemption created by section 8-70-140(1)(a).

¶15 In reaching this conclusion, the supreme court emphasized that "[t]he activities of an organization, and not the motivation behind those activities, determine whether an exemption is warranted." *Samaritan Inst.*, 883 P.2d at 7. To explain this distinction, the supreme court relied on the decision in *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 784 (1981), which interpreted 26 U.S.C. § 3309(b)(1), the federal counterpart to section 8-70-140(1)(a).

¶16 The United States Supreme Court noted that some activities clearly fall within the scope of the statutory exclusion, while others require an ad hoc determination based upon the specific facts. Thus, the Supreme Court said:

> [T]he services of a janitor of a church would be excluded [i.e., exempted], but services of a janitor for a separately incorporated college, although it may be church related, would be

> covered. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.

St. Martin Evangelical Lutheran Church, 451 U.S. at 781 (quoting H.R. Rep. No. 91-612, at 44 (1969)).

¶17 Thus, *Samaritan Institute* emphasized that "[t]he nature of the activity performed provides assistance in ascertaining whether an organization is 'operated primarily for religious purposes.'" *Samaritan Inst.*, 883 P.2d at 8.

B. Panel's and Hearing Officer's Rulings

¶18 The hearing officer in the instant case concluded that EChO was operated primarily for religious purposes, focusing on several factors, including:

(1) Echo was founded by twenty-one Evergreen, Colorado churches.

(2) Its by-laws stated that its purpose was "to proclaim the saving work of Jesus Christ . . . specifically by following His

commands to 'feed the hungry, give drink to the thirsty, welcome the stranger, clothe the naked, care for the sick and imprisoned' . . . and 'to love one another as He has loved us.'"

(3) The "participating churches" contributed "financial support, volunteers, tangible goods and on-going prayers."

(4) EChO's governing board of directors was composed of church representatives.

(5) EChO paid below-market rent to the Episcopal church at which it is located.

(6) A large image of Jesus and crosses decorated EChO's walls, and Bibles were available on the shelves of its food bank.

(7) Each client was given a "brochure or booklet" which included a Bible verse and a summary of the services EChO provided, and advised clients, "You are recognized by everyone at [EChO] to be a gift, unique, a work of God's hand, and a blessing." The booklets were also available in the resale shop.

(8) Volunteers serving EChO were told of EChO's motto to "[p]reach Jesus at all times, and if necessary use words."

¶19 Focusing on the fact that clients visiting EChO must enter church property, are confronted with "religious icons," may obtain a Bible, and are provided with booklets that "first proselytize," the hearing officer concluded that EChO "is operated as a ministry for religious purposes primarily."

¶20 Nonetheless, the hearing officer also found that the services EChO provides to its clients "are not religious per se." Moreover, the hearing officer acknowledged that those who shop and work in the resale shop "do have a secular experience except for the booklets which are available there." In addition, the current executive director of EChO testified that the clients are not asked if they belong to a church or what their religious preference is. Regardless of a person's religion, EChO will provide food, clothing or financial assistance. She further testified that there is no proselytizing of the clients; "they're not given a sermon or anything."

C. Application of *Samaritan Institute* Test

¶21 As we review the hearing officer's analysis, we note that it did not evaluate EChO's actual activities. Although the hearing officer noted that EChO's booklets contained proselytizing language, the

only *activities* described were EChO's distribution of clothing, shoes, housewares, and food, and its provision of limited funds for basic necessities such as child care, housing, utilities, and gasoline, in addition to its operation of the resale shop. Contrary to the hearing officer's and the Panel's analysis, these activities -- not the religious motivation behind them or the organization's founding principles -- "determine whether an exemption is warranted." *Samaritan Inst.*, 883 P.2d at 7. As the hearing officer observed, EChO's primary function, the provision of services such as food and clothing, is "not religious per se."

¶22 Moreover, like the counseling organization in *Samaritan Institute*, EChO is a separate legal entity from the churches that founded it. While the churches that "operated, supervised, controlled, or principally supported," § 8-70-140(1)(a), EChO operated primarily as religious organizations, EChO is not incorporated by any one church. It maintains separate finances and does not advocate one Christian religion over another. Although it receives funds from the churches, a substantial part of its finances came from the revenues of the resale shop.

¶23 The United States Supreme Court cited to the lack of differentiation between a school and a church in ruling that the school was exempt from unemployment compensation taxes under 26 U.S.C. § 3309(b)(1)(A) (2011). *St. Martin Evangelical Lutheran Church*, 451 U.S. at 784. There, a church-operated elementary school was "not a separate legal entity from the church, [and was] controlled by a Board of Education elected from the local congregation. The congregation entirely finance[d] the school's operation." *Id.* at 778. The United States Supreme Court held that because the school had "no separate legal existence from the church," it fell within the exemption for "a church or convention or association of churches" set forth in 26 U.S.C. § 3309(b)(1)(A) and, because it was regarded as a church, its employees were not entitled to unemployment compensation benefits. *Id.* at 784. The Supreme Court drew a distinction between employees of a "church or convention or association of churches, on the one hand, and employees of 'separately incorporated' organizations, on the other," noting that its holding "concerns only schools that have no legal identity separate from a church." *Id.* at 782 & n.12.

¶24 In contrast, a separate legal entity that is not operated "primarily for religious purposes" is not subject to the exemption, despite affiliations it may have with religious organizations. Rather, as in *Samaritan Institute*, where courts have found that an organization is an entirely separate legal entity engaging in activities that are not religious per se, they have generally distinguished *St. Martin Evangelical Lutheran Church* and held the exemption from unemployment compensation taxes inapplicable. *See*, *e.g.*, *Bethania Ass'n v. Jackson*, 635 N.E.2d 671, 676 (Ill. App. Ct. 1994) (holding that cemetery owned and operated by association of churches was not entitled to unemployment compensation tax exemption because services it provided "were the same as those of secular cemeteries" and therefore its primary purpose was not religious); *accord Concordia Ass'n v. Ward*, 532 N.E.2d 411, 414 (Ill. App. Ct. 1988).

¶25 Similarly, the Arkansas Supreme Court denied exempt status to a hospital operated by the Catholic church, holding that although the hospital's "sole *motivation* may be religious in nature," because it is "*operated* primarily for the purpose of providing health care," it did not operate primarily for a religious purpose and did not fall

within the exemption. *Terwilliger v. St. Vincent Infirmary Med. Ctr.*, 804 S.W.2d 696, 699 (Ark. 1991) (emphasis in original). Parochial schools operated independently of churches may also be subject to unemployment compensation taxes if they are unable to demonstrate that their primary purpose is religious in nature. *See Mid Vermont Christian Sch. v. Dep't of Emp't & Training,* 885 A.2d 1210, 1212-13 (Vt. 2005) (school not operated primarily for religious purposes; "although the school's Bible instruction, inculcation of Christian values and glorification of God were integral parts of the educational mission, the primary purpose is to provide a thorough education, combining traditional and modern subjects"); *Baltimore Lutheran High Sch. Ass'n v. Emp't Sec. Admin.*, 490 A.2d 701, 709 (Md. 1985) (finding no error in board's determination that school was not operated primarily for religious purposes);; *but see Cmty. Lutheran Sch. v. Iowa Dep't of Job Serv.*, 326 N.W.2d 286, 291-92 (Iowa 1982) (holding that separately incorporated parochial school which was created to "to rear children in the Christian faith 'in all their schooling,'" was exempt because it operated primarily for religious purposes).

¶26 Most analogous to EChO is a charitable organization that the Illinois Appellate Court evaluated to determine its primary purpose. There, the Illinois court analyzed whether a center founded and operated by the Episcopal church "to provide counseling, casework and supportive services, and scholarship aid for American Indians, primarily those resident in Chicago," operated primarily for religious purposes. *St. Augustine's Ctr. for Am. Indians, Inc. v. Dep't of Labor*, 449 N.E.2d 246, 246 (Ill. App. Ct. 1983). Like EChO, the St. Augustine Center was a separate legal entity with a board of directors populated by members of the supporting church. *See id.* The Illinois court held that the center was not exempt from unemployment compensation taxation:

> While the record in the instant case indicates that plaintiff offers religious services, we agree with the conclusion that the "primary" purpose of the Center is to offer social services and the religious purpose is only secondary. As one court noted, the use of the word "primarily" necessarily contemplates an additional attribute and means "of first importance" as opposed to "secondarily."

¶27 . . . The fact that religious services and guidance are provided by the plaintiff does not preclude a determination that the Center's

primary goal is to provide secular assistance to American Indians in the Chicago area.

¶28 *Id.* at 249 (citation and footnote omitted).

¶29 Likewise here, the primary purpose or primary activity carried out by EChO is the provision of assistance services to those in need, regardless of their religious affiliation or beliefs. Although EChO does not hide its religious *motivation* for carrying out its charitable work – on the contrary, its religious leanings are publicized in its literature, location, and displayed iconography – it is *operated* primarily to perform charitable work to disadvantaged individuals residing in Evergreen. *See Terwilliger*, 804 S.W.2d at 699. Such work, while often tied to religious organizations, is no different from the charitable work performed by countless secular entities.

¶30 In reaching its determination that EChO "operated primarily for religious purposes," the Panel relied solely on its and the hearing officer's observation that "the services provided by EChO were provided as EChO's ministry." The Panel's and the hearing officer's analysis thus focused on EChO's religious motivation while disregarding its actual activities. Consequently, the Panel and the

hearing officer did not follow the appropriate analysis to determine whether EChO operated primarily for religious purposes. *See Samaritan Inst.*, 883 P.2d at 7-8.

¶31 Because EChO's work and activities are secular in nature, despite its religious motivations for carrying out its work that form its secondary purpose, we cannot say that its *primary* purpose is religious. We therefore conclude that the Panel misapplied the law when it affirmed the hearing officer's determination that EChO was exempt from the Act under section 8-70-140(1)(a), and we hold that EChO is not exempt under that statute. *See* § 8-74-107(6)(d); *Bell*, 93 P.3d at 587

V. Entitlement to and Eligibility for Benefits

¶32 We note that both the Panel's and hearing officer's decisions focused exclusively on whether EChO was an exempt organization under the statute, and neither addressed whether claimant was otherwise eligible for unemployment benefits or entitled to them. Consequently, we do not reach these issues here.

VI. Conclusion

¶33 The order is set aside and the case remanded for further

proceedings in accordance with the views of this opinion.

JUDGE ROMÁN and JUDGE MILLER concur.

COLORADO COURT OF APPEALS

Court of Appeals No.: 07CA2284
Industrial Claim Appeals Office of the State of Colorado
DD No. 11284-2007

Long View Systems Corporation USA,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Gino Lucero,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by: JUDGE TERRY
Hawthorne and Rovira*, JJ., concur

Announced: October 30, 2008

Sherman & Howard L.L.C., Heather Vickles, Brooke Colaizzi, Denver, Colorado, for Petitioner

John W. Suthers, Attorney General, Laurie Rottersman, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

No Appearance for Respondent Gino Lucero

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2008.

In this unemployment compensation case, petitioner, Long View Systems Corporation USA (Long View), seeks review of an order of the Industrial Claim Appeals Office (Panel) affirming a hearing officer's decision that services performed for Long View by Gino Lucero (Lucero) and other similarly situated individuals constituted "employment" under the Colorado Employment Security Act, sections 8-70-101 to -143, C.R.S. 2008. We set aside the Panel's order and remand for additional findings.

Lucero signed a "Consulting Services Agreement" with Long View, in which he agreed to provide computer and information systems operating and consulting services. The agreement provided that Lucero's work would commence on January 2, 2007, "and may end as late as March 31, 2007." Lucero was assigned by Long View to work for one of its clients, Anadarko Petroleum (Anadarko). Long View paid Lucero $18 per hour for his work, and Lucero averaged forty hours of work per week.

Following Lucero's completion in April 2007 of work under the consulting agreement, he filed a claim for unemployment benefits. In July 2007, a deputy issued a decision concluding that under

section 8-70-115, C.R.S. 2008, Lucero and other similarly situated workers were engaged in "employment" with Long View. Accordingly, Long View was responsible for reporting wages paid to all workers in Lucero's class and for paying unemployment insurance taxes on those workers.

Long View appealed the deputy's decision. Following a hearing, the hearing officer found that "[b]ased on a totality of the facts . . . direction and control existed in [Lucero's] performance of services." The hearing officer also found there was "no evidence that [Lucero] did work for other companies during [the time he worked for Long View]." Accordingly, the hearing officer affirmed the deputy's decision that, under the statutory scheme, Lucero was employed by Long View.

Long View then sought administrative review of the hearing officer's decision. The Panel first concluded, contrary to Long View's contention, that the consulting agreement did not create a rebuttable presumption of an independent contractor relationship. The Panel further concluded that the hearing officer's findings were not contrary to the weight of the evidence, and that, although the

evidence of Lucero's alleged independence was conflicting and subject to contrary inferences, there was "no error in the conclusion that [Lucero] was not an independent contractor and that he was in covered employment."

I.

Long View contends the Panel erred in affirming the hearing officer's decision that Lucero was engaged in "employment" under the statutory scheme. We agree, and therefore set aside the Panel's decision and remand for additional findings.

A. Applicable Law

Under section 8-70-115(1)(b), C.R.S. 2008, services performed by an individual for another are deemed to be "employment" unless the putative employer can demonstrate both that (1) the individual is free from control and direction in the performance of the service, both under the contract and in fact, and (2) the individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. *Speedy Messenger & Delivery Serv. v. Indus. Claim Appeals Office*, 129 P.3d 1094, 1096 (Colo. App. 2005).

The statute places the burden of proof on the putative employer to demonstrate that both conditions exist. *See id.*; *see also Home Health Care Prof'ls v. Colo. Dep't of Labor & Employment*, 937 P.2d 851, 853 (Colo. App. 1996). The determination as to whether a putative employer has met this burden is a question of fact, and we will not disturb the Panel's determination on appeal if it is supported by substantial evidence. *See Allen Co. v. Indus. Comm'n*, 762 P.2d 677, 680 (Colo. 1988); *Locke v. Longacre*, 772 P.2d 685, 686 (Colo. App. 1989).

B. Consulting Agreement

Long View contends the consulting agreement created a rebuttable presumption of an independent contractor relationship. We disagree.

Under section 8-70-115(1)(c), C.R.S. 2008, a putative employer may "evidence" the "control and direction" and "independent trade" conditions of subsection (1)(b) by producing a written document, signed by both parties, that satisfies the applicable enumerated factors demonstrating those conditions. *See Speedy Messenger*, 129 P.3d at 1096; *see also* § 8-70-115(1)(d), C.R.S. 2008 (document

may satisfy the requirements of subsection (1)(c) if it demonstrates, by a preponderance of the evidence, the existence of the factors that are appropriate to the parties' situation). Under section 8-70-115(1)(c), a written document, signed by both the putative employer and putative employee, will evidence that the latter is engaged in an independent trade, occupation, profession, or business and is free from control in the performance of the service if the document does not:

> (I) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for the said person for a finite period of time specified in the document;
> (II) Establish a quality standard for the individual; except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;
> (III) Pay a salary or hourly rate but rather a fixed or contract rate;
> (IV) Terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce a result that meets the specifications of the contract;
> (V) Provide more than minimal training for the individual;
> (VI) Provide tools or benefits to the individual; except that materials and equipment may be supplied;
> (VII) Dictate the time of performance; except that a completion schedule and a range of mutually agreeable work hours may be established;
> (VIII) Pay the individual personally but rather makes checks payable to the trade or business name of the individual; and
> (IX) Combine his business operations in any way with the

> individual's business, but instead maintains such operations as separate and distinct.

§ 8-70-115(1)(c)(I)-(IX), C.R.S. 2008; *see also Speedy Messenger*, 129 P.3d at 1097 (setting forth factors that satisfy requirements of § 8-70-115(1)(c)).

We perceive no error in the Panel's conclusion that the consulting agreement Lucero signed did not create a rebuttable presumption under the statute. As the Panel noted, the agreement did not satisfy the factor set forth in section 8-70-115(1)(c)(III) because Long View paid Lucero an hourly rate rather than a fixed or contract rate. Also, the agreement did not satisfy the factor set forth in section 8-70-115(1)(c)(VIII) because Long View paid Lucero personally rather than paying him through a trade or business name.

Long View argues that the Panel should have disregarded these two factors because they were "not appropriate to the parties' situation," and contends that (1) it "discussed and negotiated the hourly rate" with Lucero, and (2) "[a] business name is largely a formality." However, we disagree that these assertions, even if true,

rendered the two factors inappropriate to the parties' situation in considering whether the writing created the statutory rebuttable presumption.

In its reply brief, Long View also asserts that it is "common practice" in the information technology industry to pay contractors at an hourly rate and that "many contractors work in their [personal] name only." However, it did not make these assertions, or present any evidence supporting them, at the hearing. Accordingly, we will not consider them on appeal. *See Goodwill Indus. v. Indus. Claim Appeals Office*, 862 P.2d 1042, 1047 (Colo. App. 1993).

Although we agree with Long View's assertion that a writing need not necessarily satisfy all nine factors enumerated in subsection (1)(c) to create the rebuttable presumption, it must satisfy those factors that are applicable or potentially applicable. *See Speedy Messenger*, 129 P.3d at 1096 (putative employer "may produce a written document that satisfies all the applicable factors set forth in [section] 8-70-115(1)(c)"). Contrary to Long View's contention, a factor is not rendered inappropriate or inapplicable to

the circumstances simply because an agreement fails to satisfy the factor, or because the factor is alleged to be a mere "formality."

Because the consulting agreement did not satisfy two appropriate factors under section 8-70-115(1)(c), we perceive no error in the Panel's conclusion that the agreement did not establish a rebuttable presumption of an independent contractor relationship under section 8-70-115(2). *See Speedy Messenger*, 129 P.3d at 1097.

C. "Independent Trade" and "Control and Direction"

Long View also contends the record and the hearing officer's evidentiary findings do not support the ultimate findings regarding the issues of "independent trade" and "control and direction." We agree, and therefore conclude that the matter must be remanded for additional findings.

1. Independent Trade

The hearing officer made no express determination whether Long View had shown, under section 8-70-115(1)(b), that Lucero was customarily engaged in an independent trade, occupation, profession, or business related to the services performed under the

consulting agreement. However, to the extent the hearing officer implicitly determined Long View failed to satisfy this condition, we conclude that the limited evidentiary findings failed to support such a determination and that additional findings are necessary.

The statutory requirement that the worker be "customarily engaged" in an independent trade or business is designed to assure that a worker, whose income is almost wholly dependent upon continued employment by a single employer, is protected from the vagaries of involuntary unemployment, irrespective of the worker's status as a "servant" or as an "independent contractor" under the common law. *See Speedy Messenger*, 129 P.3d at 1096; *see also Home Health Care Prof'ls*, 937 P.2d at 853*; Carpet Exch. of Denver, Inc. v. Indus. Claim Appeals Office*, 859 P.2d 278, 282 (Colo. App. 1993).

Here, the hearing officer's only finding addressing the "independent trade" issue was that there was no evidence Lucero had worked for other companies during the three-month period he worked under the consulting agreement.

We acknowledge decisions holding that, to be engaged in an

independent trade, occupation, profession, or business, workers must actually and customarily provide similar services to others at the same time they work for the putative employer. *See Speedy Messenger*, 129 P.3d at 1098; *Barge v. Indus. Claim Appeals Office*, 905 P.2d 25, 27 (Colo. App. 1995); *Carpet Exch. of Denver,* 859 P.2d at 282. However, none of these decisions involved circumstances such as those presented here, where a worker entered into an agreement to work for a relatively short period of time.

We agree with the *Speedy Messenger* division that, to satisfy the independent trade condition, a worker must be engaged in a separate trade or business venture, other than provision of services for the putative employer. *Speedy Messenger*, 129 P.3d at 1098. However, in cases involving short-term contracts for services, we are not persuaded that a lack of contemporaneous work for others is dispositive of whether a worker maintained an independent trade or business. *See* 8-70-115(1)(c)(I) (fact that "individual may choose to work exclusively for [the person for whom services are performed] for a finite period of time specified in [a written] document" does not evidence "control and direction" and does not impede finding that

individual is engaged in "independent trade, occupation, profession, or business"); *see also Dep't of Labor v. Fox*, 697 A.2d 478, 485-86 (Md. 1997) (listing contemporaneous service provided to more than one unrelated employer as only one of eight statutory factors used in determining whether individual was customarily engaged in an independent business or occupation).

Thus, we conclude the lack of evidence that Lucero also performed similar services for others during the three-month period of the consulting agreement was insufficient to support a determination that Lucero was not customarily engaged in an independent trade, occupation, profession, or business. *Cf. Locke,* 772 P.2d at 687 (affirming determination that, during period claimant was performing services under three-year contract for putative employer, she was not engaged in independent trade or business where evidence showed that contract with putative employer practically prohibited claimant's conduct of any independent profession or business).

Because the hearing officer failed to make any other evidentiary findings regarding the "independent trade" issue, we

remand to the Panel, with instructions to remand to the hearing officer, for additional findings on this issue. In making those findings, the hearing officer should consider whether Lucero (1) engaged in a trade, occupation, profession, or business that existed separate and apart from any relationship with a particular employer and that would survive the termination of that relationship; and (2) by reason of his skill, engaged in his own economic enterprise such that he bore the risk of his own unemployment. *See Midland Atlas Co. v. South Dakota Dep't of Labor*, 538 N.W.2d 232, 235-36 (S.D. 1995).

In addition to the factors listed in section 8-70-115(1)(c), other relevant factors include whether Lucero maintained a business card, business listing, business address, or business telephone number. *See Speedy Messenger*, 129 P.3d at 1098; *Barge*, 905 P.2d at 27. Additional pertinent factors may include whether Lucero (1) had a financial investment such that he could be vulnerable to suffering a financial loss in connection with performance of the service, (2) had his own equipment needed to perform the service, (3) determined the price of the service to be performed, (4) employed

others to perform the service, and (5) carried his own liability or workers' compensation insurance. *See Fox*, 697 A.2d at 485-86.

The hearing officer has discretion to take additional evidence on these issues in order to make the required supplemental findings.

2. Control and Direction

Long View contends the hearing officer's evidentiary findings do not support the determination that Long View had the right to direct and control Lucero's work. We agree.

a. Whether Long View Controlled Lucero's Work

As a preliminary matter, we conclude that, in the absence of a showing that Anadarko was Long View's agent, evidence that Anadarko controlled Lucero's work is not dispositive of whether Long View controlled his work.

The hearing officer specifically found that (1) Anadarko oversaw Lucero's work, (2) the tools used by Lucero were provided by Anadarko, and (3) the hours or time frames Lucero was required to work were agreed to by Lucero and Anadarko. These findings, which are supported by the record, indicate that it was Anadarko,

and not Long View, that directed or controlled Lucero's work. The findings are also consistent with language in the consulting agreement, which specifically provided that "Long View shall not oversee the actual work or instruct [Lucero] as to how the work must be performed." Additionally, the hearing officer found that Lucero was not required to work exclusively for Long View, and it was undisputed that Long View did not provide any training to Lucero.

Although the consulting agreement contained a limited non-competition provision, that provision did not affect the manner in which Lucero performed his work during the term of the agreement, and we are not persuaded that it conclusively demonstrated Lucero's status. *See Colo. Supply Co. v. Stewart*, 797 P.2d 1303, 1305 (Colo. App. 1990) (concluding that section 8-2-113, C.R.S. 2008, addressing non-compete agreements, applies to independent contractors); *see also Electrolux Corp. v. Commonwealth*, 705 A.2d 1357, 1361 (Pa. Commw. Ct. 1998) (mere existence of non-compete clause did not outweigh other factors showing lack of control).

Thus, although the hearing officer determined that "direction

and control existed in [Lucero's] performance of services," the overwhelming evidence, as reflected in the hearing officer's own findings of evidentiary fact, established that such direction and control came primarily from Anadarko rather than Long View.

Moreover, insofar as the hearing officer sought to impute or attribute Anadarko's direction and control over Lucero to Long View based upon some form of agency relationship between the two entities, we find no evidence in the record to support the existence of such a relationship. Consequently, we perceive no basis for attributing Anadarko's direction and control over Lucero to Long View. *See Freedom Labor Contractors of Florida, Inc. v. State*, 779 So. 2d 663, 665 (Fla. Dist. Ct. App. 2001) (given lack of record evidence to support agency relationship between putative employer and its customers, presumed control by customer over mode or details of claimant's work would not be imputed to putative employer).

b. Whether Control by Anadarko Precludes Application of Section 8-70-115(1)(b)

Section 8-70-115(1)(b) provides a mechanism for a putative employer to demonstrate that it is not, in fact, an employer. As

relevant here, it states:

> Notwithstanding any other provision of this subsection (1) . . . service performed by an individual for another shall be deemed to be employment . . . unless and until it is shown to the satisfaction of the division that such individual is free from control and direction in the performance of the service, both under his contract for the performance of service and in fact; and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.

We have already concluded that additional findings must be made regarding whether Lucero was customarily engaged in an independent trade, occupation, profession, or business related to the services performed under the consulting agreement. Because it may arise on remand, we address the further question that would necessarily arise if he were found to be so engaged: whether Long View has met its burden under section 8-70-115(1)(b) of proving that Lucero was not an employee.

We requested supplemental briefing to allow the parties to address the following question:

> Assuming a putative employer has satisfied its burden under section 8-70-115(1)(b) . . . of proving that the claimant is customarily engaged in an independent trade, occupation, profession, or business related to the services performed, does the putative employer satisfy its further burden under that section to prove that the claimant is free from control and

> direction in the performance of the service, by proving that the putative employer did not control or direct the performance of the service, even if a third party does provide such control or direction?

We conclude that the plain language of that section does not support a conclusion that control and direction over a putative employee by someone other than the putative employer renders the situation one of employment, unless the person providing control and direction is shown to be an agent of the putative employer.

Thus, given the absence of evidence that Anadarko – which was found to provide control and direction to Lucero – was Long View's agent in so doing, the mere fact that it did so would not require a finding that Lucero was an employee.

We are not persuaded otherwise by the Division of Employment and Training's citation to section 8-73-105.5, C.R.S. 2008. That statute addresses temporary help contracting firms. The Division argues that the statute establishes that Long View subjected Lucero to direction and control, and he was therefore Long View's employee. However, the Division did not raise this statute before the hearing officer or the Panel, and did not present evidence that Long View was a temporary help contracting firm.

Even if it had, however, the potential applicability of section 8-73-105.5 to Long View is not conclusive as to whether Lucero was an employee, and would not, by itself, preclude Long View from proving a defense under section 8-70-115(1)(b).

We therefore remand for the Panel to direct the hearing officer to make findings as to the applicability of section 8-70-115(1)(b), in accordance with this opinion. The hearing officer has discretion whether to take additional evidence pertinent to this determination.

II.

In light of our decision, we need not address Long View's contention that the hearing officer's decision was based solely upon unreliable hearsay evidence in violation of the rule set forth in *Industrial Claims Appeals Office v. Flower Stop Marketing Corp.*, 782 P.2d 13, 18 (Colo. 1989).

The order is set aside, and the case is remanded to the Panel with instructions to remand to the hearing officer for additional findings, as specified herein.

JUDGE HAWTHORNE and JUSTICE ROVIRA concur.

COLORADO COURT OF APPEALS **2015COA149**

DATE FILED: October 8, 2015
CASE NUMBER: 2015CA453

Court of Appeals No. 15CA0453
Industrial Claim Appeals Office of the State of Colorado
DD No. 5902-2014

Division of Unemployment Insurance Employer Services-Integrity/Employer Audits,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Marbles Kids, Inc.,

Respondents.

ORDER AFFIRMED

Division II
Opinion by JUDGE DAILEY
Booras and Navarro, JJ., concur

Announced October 8, 2015

Cynthia H. Coffman, Attorney General, Krista Maher, Assistant Attorney General, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Stutheit & Garland, P.C., Brian K. Stutheit, Littleton, Colorado, for Respondent Marbles Kids, Inc.

¶ 1 The sole issue presented in this appeal is whether, for purposes of assessing unemployment insurance tax premiums under the Colorado Employment Security Act (CESA), certain individuals who performed acting and modeling services (artists) were employees of a talent agency that helped them obtain acting and modeling jobs. The Industrial Claim Appeals Office (Panel) issued an order concluding that no such employment relationship existed, and thus, that no premiums were owed. Because we agree with the Panel's analysis, we affirm its order.

I. Factual Background

¶ 2 Respondent, Marbles Kids, Inc., which includes a related entity called Lincoln Talent (Marbles), is a talent agency that represents individuals seeking acting and modeling work. The vast majority of the artists are children.

¶ 3 Marbles is contacted by clients seeking actors or models for assignments. The client notifies Marbles of specific features it is searching for in an acting or modeling role, and Marbles forwards the client a list of artists from its database who fit those features. The client then selects the artists it wishes to audition, and Marbles contacts those artists to inform them of the upcoming audition.

The artists are free to turn down auditions.

¶ 4 The artists, or in the case of child artists, their parents, sign contracts providing that Marbles will receive a percentage commission on any assignments booked through Marbles. Artists are required to bring vouchers to job sites to be paid for their work. The clients pay Marbles, and Marbles then deducts its commission and pays the artist the remaining amount.

¶ 5 Artists, at their own expense, are required to provide Marbles with "tools of the trade" such as photographs, portfolios, voiceover recordings, and demo tapes. For a separate fee, Marbles also provides training workshops to the artists.

II. Procedural History

¶ 6 Petitioner, the Division of Unemployment Insurance, Employer Services-Integrity/Employer Audits (Division), issued a liability determination that the artists were in covered employment with Marbles, and that Marbles was therefore required to pay unemployment insurance tax premiums on amounts paid to the artists.

¶ 7 Marbles appealed. Following an evidentiary hearing, the hearing officer determined that (1) Marbles exercised direction and

control over how the artists obtained work; (2) the artists were not engaged in independent businesses; and (3) the artists performed their acting and modeling services for, or on behalf of, Marbles. Based on those determinations, the hearing officer concluded that an employment relationship existed and that Marbles was responsible for paying the tax premiums.

¶ 8 On review, the Panel did not disturb the hearing officer's evidentiary findings. However, it concluded that those findings, and the record as a whole, established that the artists were not performing services for Marbles, but rather for Marbles' clients who actually conducted the auditions and selected and hired the artists for the various jobs. Consequently, the Panel concluded that the artists were not Marbles' employees and that Marbles was not required to pay the tax premiums.

III. Discussion

¶ 9 The Division contends the Panel erred in concluding that no employment relationship existed. It argues that, contrary to the Panel's ruling, the artists were performing acting and modeling services for Marbles. We disagree.

¶ 10 Section 8-70-115(1)(b), C.R.S. 2015, defines employment

under CESA. As a threshold matter, it requires a showing that a "service [has been] performed by an individual for another." *Id.* CESA does not define the term "service." However, for purposes of the statutory scheme, "service" has been defined as "'an act done for the benefit or at the command of another.'" *Magin v. Div. of Emp't*, 899 P.2d 369, 370 (Colo. App. 1995) (quoting *Weld Cnty. Kirby Co. v. Indus. Comm'n*, 676 P.2d 1253, 1256 (Colo. App. 1983)).

¶ 11 The Division contends that the artists perform their acting and modeling services "at the command" of Marbles. We are not persuaded. To the contrary, the hearing officer found, and the record establishes, that the artists are free to reject auditions or assignments from Marbles' clients. And while Marbles decides which artists' names it will forward to the client, that decision is based on the client's descriptions, and it is the client who ultimately decides whether an artist will be hired to perform work and who that artist will be. Under these circumstances, we conclude that the artists do not perform services "at the command" of Marbles.

¶ 12 The Division also contends that the artists perform the services "for the benefit of" Marbles. Although this presents a closer

question, we again disagree with the Division.

¶ 13 The Division notes that Marbles "benefits" from the artists' work and that Marbles' "main source of income consists of the fees collected" from the artists. It also notes that the artists' performances can either enhance or weaken client impressions of Marbles.

¶ 14 We acknowledge that Marbles generally derives a benefit from the artists' efforts when they perform acting or modeling jobs for Marbles' clients. However, the existence of that benefit does not mean that the artists were performing services "for the benefit of" Marbles so as to constitute employment.

¶ 15 In our view, the word "for" and the phrase "for the benefit of" connote a purposeful or intended benefit and not an inadvertent one. Indeed, "for" is defined as a function word to indicate "purpose," "an intended goal," or "the object or recipient" of an activity. *Merriam-Webster's Collegiate Dictionary* 488 (11th ed. 2004). "In ordinary usage, if something is done 'for the benefit of' x, it is done for the purpose of benefitting x. If something is not done for the purpose of benefitting x but has that unintended effect, it cannot be said that it was done 'for the benefit of' x." *Reich v.*

Compton, 57 F.3d 270, 279 (3d Cir. 1995).

¶ 16 At the hearing, the parties presented no evidence that the artists perform their acting or modeling work for the purpose of benefitting Marbles. None of the artists or parents who testified indicated that the artists provide services to or "for" Marbles. One artist specifically testified that she did not provide services to Marbles. Another testified that, in her view, Marbles worked for her. A parent of two artists testified that "Marbles is an agent working for my children." And Marbles' owner testified that the artists do not give Marbles services of any kind and that she works for the artists.

¶ 17 The relationship contemplates that Marbles does not hire the artists as employees but rather arranges for them to provide services for third parties. This relationship is spelled out in the "agency agreement" in which each artist authorizes Marbles to be his or her "sole agent and manager" in Colorado. As the Panel noted,

> the service being performed [by the artists] is indeed for another, but that other entity is the client, not Marble[s]. The record shows it is the client that conducts the audition and makes its hiring decision based on what it sees

> in that process. The client then undertakes to give the actor the direction and control required to complete the production, commercial, or modeling assignment. The client is also the beneficiary of the [artists'] services. The service is being performed by the [artist] for the client. The artist is not performing a service for Marble[s].

¶ 18 The General Assembly has created limited exceptions to the general requirement that for an entity to be deemed an employer, a worker must have provided services specifically for that entity. These exceptions involve temporary help contracting firms and employee leasing companies. *See* § 8-70-114(2), C.R.S. 2015; § 8-73-105.5, C.R.S. 2015. However, to fall within these statutory exceptions, a specific contract must exist between the employee leasing company or temporary help contracting firm on the one hand and the work-site employer or third party on the other. *See* § 8-70-114(2)(a)(II), (V), (VI); § 8-73-105.5(2). Because there is no evidence in this case that such a contract existed between Marbles and its various clients, these exceptions do not apply. *See* § 8-70-114(2)(d) (providing that if an employee leasing company does not meet the relevant statutory requirements, the work-site employer is deemed to be the employing unit).

¶ 19 In support of its argument that the artists performed services for Marbles, the Division relies on *Gross v. Employment Department*, 240 P.3d 1130 (Or. Ct. App. 2010). In that case, a computer repair referral business (Rent-A-Nerd) was deemed an "employer" of various computer repair technicians affiliated with the business. *Id.* at 1140. Because Rent-A-Nerd largely dictated how the technicians provided services to customers and also benefitted from those services, the court in *Gross* was persuaded that the technicians were providing services "for" Rent-A-Nerd by providing services on its "behalf" or at its "command." *Id.* at 1137-39.

¶ 20 Although there are certain factual similarities between this case and *Gross*, there are also several critical differences. First, in *Gross*, Rent-A-Nerd selected the actual technician who would perform the repair service for a client. *Id.* at 1132. In contrast, here, Marbles merely sends the client a list of artists, and the client then holds auditions and decides whom, if anyone, to hire. Second, Rent-A-Nerd set a "common fee structure for the technicians," *id.* at 1139, whereas in this case it was undisputed that either the client set the fee an artist would receive, or the fee was subject to negotiation between the client and artist with Marbles negotiating

on the artist's behalf.

¶ 21 Further, in *Gross*, technicians not wishing to accept an assignment were required to promptly call Rent-A-Nerd so it could find another technician. *Id.* at 1132. The technicians were also required to call Rent-A-Nerd every morning to report their availability and any existing work they had scheduled. *Id.* The court noted that Rent-A-Nerd "remained involved in the relationship between the technician and the customer throughout its duration." *Id.* at 1139. In contrast, here, once Marbles sends the client a list of artist names and informs the artists of scheduled auditions, it is generally no longer involved (other than to possibly receive and distribute payment if a Marbles artist is eventually hired). It is the client, not Marbles, who exclusively dictates or commands how the acting or modeling services are performed.

¶ 22 Given these key differences and based on our previous discussion, we conclude that *Gross* is inapposite.

IV. Conclusion

¶ 23 Because the artists did not perform acting or modeling services for Marbles, Marbles was not an employer of the artists and they were not Marbles' employees. Consequently, Marbles was not

required to pay unemployment insurance tax premiums on the amounts it paid the artists after deducting its agent commissions.

¶ 24 The Panel's order is affirmed.

JUDGE BOORAS and JUDGE NAVARRO concur.

COLORADO COURT OF APPEALS **2013 COA 142**

DATE FILED: October 24, 2013
CASE NUMBER: 2013CA341

Court of Appeals No. 13CA0341
Industrial Claim Appeals Office of the State of Colorado
DD No. 14668-2012

Ouray Sportswear, LLC,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Division of Unemployment Insurance UI Tax Administration,

Respondents.

ORDER SET ASIDE

Division III
Opinion by JUDGE DAILEY
Román and J. Jones, JJ., concur

Announced October 24, 2013

Allen & Vellone, P.C., Patrick D. Vellone, Mark A. Larson, Denver, Colorado, for Petitioner

No Appearance for Respondents

¶ 1 Petitioner, Ouray Sportswear, LLC (employer), seeks review of a final order of the Industrial Claim Appeals Office (Panel). The Panel affirmed a hearing officer's decision that employer is a "successor" entity for unemployment taxation purposes under section 8-76-104(1)(a), C.R.S. 2013, because it purchased substantially all of the assets of two businesses. We conclude that the Panel's holding that employer is a successor entity directly conflicts with a prior bankruptcy court order approving the asset purchase. Consequently, we set aside the Panel's order.

I. Background

¶ 2 In April 2007, Ski Country Imports, Inc., and Ouray Sportswear Wyoming, Inc. (collectively, debtor), filed for bankruptcy. As part of the bankruptcy proceeding, employer, through a related entity called Jalex Holdings, LLC (Jalex), purchased substantially all of debtor's assets. The purchase included certain liabilities, none of which related to debtor's unemployment insurance obligations. Debtor did not provide notice of the bankruptcy filing to the Colorado Department of Labor and Employment (Department) but did notify the Colorado Department of Revenue, the Office of the

Attorney General, and the Colorado Division of Securities. Debtor represented to Jalex that it had addressed unemployment insurance accounts in the bankruptcy proceeding.

¶ 3 In May 2007, the United States Bankruptcy Court for the District of Colorado issued an order approving Jalex's purchase of debtor's assets. The order expressly provided that in accordance with 11 U.S.C. § 363(f) (2006), the purchase was free and clear of any and all liens, claims, charges, and encumbrances. The order also specified that Jalex would not be deemed a successor to debtor for any of debtor's liabilities except as specified in the order or the asset purchase agreement. Jalex relied on debtor's representation and the bankruptcy court's order and believed that it purchased debtor's assets without any lien by the Department. Following the asset purchase, Jalex created employer as a new business association.

¶ 4 More than four years later, in December 2011, the Department sought to collect from employer $38,342.74, which represented debtor's unpaid 2007 unemployment insurance premiums plus interest. In June 2012, a deputy for the Department issued a

liability determination concluding that debtor's entire unemployment insurance account (which included the unpaid premiums) would transfer to employer because employer was a successor entity to debtor under section 8-76-104(1)(a).

¶ 5 Employer appealed the deputy's ruling. Following a hearing, the hearing officer affirmed the deputy's conclusion that section 8-76-104(1)(a) applied and that employer was, therefore, the successor to debtor's unemployment insurance account. However, the hearing officer expressly declined to decide whether "federal bankruptcy law tak[es] precedence over state unemployment insurance law," concluding that the issue was not before her. The hearing officer further deemed to be "not before" her (1) whether the bankruptcy court could discharge monies owed to the Department; (2) whether the bankruptcy court did so in this instance; and (3) whether the Department could collect on the amount it was seeking from employer. However, the hearing officer then noted that the issue whether the Department could collect from employer had "been adjudicated in federal bankruptcy court" and she urged the parties "to address this matter, if further address is in fact

necessary, in bankruptcy court."

¶ 6 On review, the Panel concluded that the hearing officer correctly determined employer to be a successor entity under section 8-76-104(1)(a). It rejected employer's contention that the hearing officer's decision was preempted because it conflicted with the bankruptcy court's order. The Panel noted that the bankruptcy court order stated only that Jalex was not a successor to debtor's liabilities and that the hearing officer had correctly declined to hold employer liable for unpaid amounts. However, the Panel found no error in treating employer as a successor to debtor for the remaining purposes set forth in section 8-76-104(l)(a), including "succession to . . . [debtor]'s payroll experience, the account, and the payment of benefits from that account."

¶ 7 Employer now appeals the Panel's order.

II. Analysis

A. Standard of Review

¶ 8 We may set aside the Panel's decision if it is erroneous as a matter of law. *See* § 8-74-107(6)(d), C.R.S. 2013. We review an agency's legal conclusions de novo. *See Davison v. Indus. Claim*

Appeals Office, 84 P.3d 1023, 1029 (Colo. 2004). If the controlling facts are undisputed, the legal effect of those facts constitutes a question of law. *Turbyne v. People*, 151 P.3d 563, 572 (Colo. 2007).

B. Employer's Successor Entity Status

¶ 9 Employer contends that the Panel erred in affirming the hearing officer's determination that it is a successor entity under section 8-76-104(1)(a). Employer contends that the bankruptcy court's order effectively precludes the Department and the Panel from treating it as a statutory successor entity. We agree.

¶ 10 Section 8-76-104(1)(a) provides, in pertinent part, that if an entity becomes a statutory employer "because it acquires . . . substantially all of the assets of one or more employers," the entity "shall succeed to the entire experience rating record of the predecessor employer." The Department assigns each employer account an experience rating based on the amount of benefits paid to its former employees, and the experience rating and the overall wages the employer pays in Colorado are used to determine the employer's tax rate. *See Colo. Div. of Emp't & Training v. Accord Human Res., Inc.*, 270 P.3d 985, 988 (Colo. 2012); *see also* §§ 8-76-

102, 8-76-103, C.R.S. 2013. Section 8-76-104(1)(a) further provides that "the entire separate account, including the actual premiums, benefits, and payroll experience of the predecessor employer, shall pass to the successor for the purpose of determining the premium rate for the successor." *See Manpower, Inc. v. Indus. Comm'n*, 677 P.2d 346, 347-48 (Colo. App. 1983) (analyzing prior similar version of statute).

¶ 11 We have not located a Colorado appellate decision, however, that addresses whether section 8-76-104(1)(a) applies if, as here, a purported successor entity acquires substantially all of a predecessor's assets through a free and clear bankruptcy sale order.

¶ 12 Section 363(f) of the Bankruptcy Code authorizes a bankruptcy trustee to sell property "free and clear of any interest in such property" provided any one of five listed conditions is met. 11 U.S.C. § 363(f)(1)-(5).

¶ 13 Although there is some conflicting authority, the more recent trend is to read the phrase "interest in such property" broadly to include not just liens against the property being sold, but also claims that arose from ownership of the property. *See In re Chrysler*

LLC, 576 F.3d 108, 123-26 (2d Cir. 2009) (product liability claims), *vacated as moot sub nom. Ind. State Police Pension Trust v. Chrysler LLC*, 558 U.S. 1087 (2009); *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-90 (3d Cir. 2003) (airline workers' employment discrimination claims and flight attendants' rights under travel voucher program); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 581-82, 585 (4th Cir. 1996) (debtors' obligation to pay premiums under federal statutes imposing liability on "operators," "related persons," and "successors in interest"); *In re PBBPC, Inc.*, 484 B.R. 860, 867-70 (B.A.P. 1st Cir. 2013) *(PBBPC II)* (unemployment agency's right to tax asset purchaser based on asset seller's experience rating); 3 Alan M. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 363.06(1) (16th ed. 2013) ("[T]he trend seems to be in favor of a broader definition that encompasses other obligations that may flow from ownership of the property.").

¶ 14 If a free and clear sale under federal bankruptcy law conflicts with state law, federal law prevails. *See In re PBBPC, Inc.*, 467 B.R. 1, 10 (Bankr. D. Mass. 2012) *(PBBPC I)* (if 11 U.S.C. § 363(f) applies, it preempts any state law to the contrary), *aff'd*, *PBBPC II*, 484 B.R.

860; *In re P.K.R. Convalescent Ctrs., Inc.*, 189 B.R. 90, 94 (Bankr. E.D. Va. 1995) (because free and clear provision of 11 U.S.C. § 363(f) conflicted with, and thus preempted, Virginia statute authorizing depreciation recapture claim, state claim was extinguished); *MPI Acquisition, LLC v. Northcutt*, 14 So. 3d 126, 130 (Ala. 2009) (bankruptcy court order declaring purchase of corporate assets to be free and clear of liability for claims arising out of products manufactured by debtor preempted application of Alabama successor liability law); *see also Bee-Gee, Inc. v. Ariz. Dep't of Econ. Sec.*, 690 P.2d 129, 132 (Ariz. Ct. App. 1984) (noting that bankruptcy court has power to order sales free of all claims, liens, and encumbrances, and that federal law in this area must control over conflicting state law provisions).

¶ 15 Here, the bankruptcy court determined that the requirements of 11 U.S.C. § 363(f) had been satisfied and ordered that the purchase of debtor's assets was free and clear of liens, claims, and encumbrances "in accordance with section 363(f) of the Bankruptcy Code." The court ordered that the transfer of assets was

> free and clear of any and all liens, claims, interest, charges, and encumbrances . . . of

> whatever kind, type, nature, or description, including, without limitation, any lien, security interest, pledge, hypothecation, encumbrance or other charge, interest or claim . . . in, against or with respect to any of the [a]ssets . . . whether direct or indirect, absolute or contingent, choate or inchoate, fixed or contingent, matured or unmatured, liquidated or unliquidated, arising by agreement, statute or otherwise and whether arising prior to, on or after the [p]etition [d]ate.

¶ 16 The bankruptcy court's order further provides that the purchaser "will not be deemed to have assumed any 'claims'" against debtor and that under "no circumstances" would the purchaser "be deemed a successor of or to . . . [debtor] for any liability of . . . [debtor] (whether direct or indirect, liquidated or unliquidated, choate or inchoate or contingent or fixed) whatsoever except as set forth in this [order or the asset purchase agreement]."

¶ 17 The Panel's subsequent holding that employer is a successor entity under section 8-76-104(l)(a), even if only for purposes of "succession to . . . [debtor]'s payroll experience, the account, and the payment of benefits from that account," directly conflicts with the bankruptcy court order's broad language providing that the sale was free and clear of all claims and that the purchaser would not

have any type of successor liability.

¶ 18 Under similar circumstances involving free and clear asset sales under 11 U.S.C. § 363(f), a majority of courts addressing the issue has concluded that state agencies cannot use state successor liability statutes to impose the debtor's unemployment insurance experience rating on the asset purchaser. *See PBBPC II*, 484 B.R. at 869-70 (concluding that "any interest" language of 11 U.S.C. § 363(f) is sufficiently elastic to include the debtor's experience rating and thereby preclude successor liability as to that rating); *In re USA United Fleet Inc.*, 496 B.R. 79, 89 (Bankr. E.D.N.Y. 2013) (interest held by state labor agency to transfer debtors' unemployment experience rating to asset purchaser was subject to free and clear provisions of 11 U.S.C. § 363(f)); *In re Tougher Indus., Inc.*, 2013 WL 1276501, at *6-8 (Bankr. N.D.N.Y. Nos. 06-12960 & 07-10022, Mar. 27, 2013) (memorandum decision) (sale of debtors' assets was free and clear of debtors' experience ratings because those ratings were an interest in property); *but see In re Wolverine Radio Co.*, 930 F.2d 1132, 1146 (6th Cir. 1991) (debtor's experience rating was not an "interest" within meaning of 11 U.S.C. § 363(f), and therefore

debtor's rating survived sale).

¶ 19 We conclude that the Panel's order holding that employer is a successor entity to debtor under section 8-76-104(l)(a) conflicts with, and is therefore preempted by, the bankruptcy court's prior order issued pursuant to 11 U.S.C. § 363(f). Consequently the Panel's order cannot stand. *See PBBPC I*, 467 B.R. at 10; *In re P.K.R. Convalescent Ctrs., Inc.*, 189 B.R. at 94; *MPI Acquisition, LLC*, 14 So. 3d at 130; *cf. Bee-Gee, Inc.*, 690 P.2d at 132-33 (state agency's claim against successor corporation for bankruptcy debtor's unpaid unemployment insurance contributions was not preempted where bankruptcy court order provided that sale was free and clear of only "liens" and did not contain broader language covering statutory claims such as asserted by agency).

¶ 20 Given our conclusion, we need not address employer's alternative contentions that the Panel's order should be set aside based on principles of comity or issue preclusion. We also do not address whether the Department may be able to obtain relief in the bankruptcy court based on any alleged lack of notice of debtor's bankruptcy filing.

¶ 21 The Panel's order concluding that employer is a successor entity under section 8-76-104(1)(a) is set aside.

JUDGE ROMÁN and JUDGE J. JONES concur.

Opinions of the Colorado Supreme Court are available to the public and can be accessed through the Court's homepage at http://www.courts.state.co.us Opinions are also posted on the Colorado Bar Association homepage at www.cobar.org

ADVANCE SHEET HEADNOTE
May 12, 2014

2014 CO 30

No. 12SC501, Industrial Claim Appeals Office v. Softrock Geological Services, Inc. – Colorado Employment Security Act – Employment Law.

The supreme court holds that for the purpose of determining if an individual is an independent contractor under the Colorado Employment Security Act, whether an individual is "customarily engaged in an independent trade, occupation, profession, or business related to the service performed" is a question of fact that can only be resolved by applying a totality of the circumstances test that evaluates the dynamics of the relationship between the putative employee and the employer; there is no dispositive single factor or set of factors.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2014 CO 30

Supreme Court Case No. 12SC501
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 11CA2331

Petitioner:
Industrial Claim Appeals Office,
v.
Respondents:
Softrock Geological Services, Inc.; and Colorado Division of Employment and Training, n/k/a Colorado Division of Unemployment Insurance.

Judgment Affirmed
en banc
May 12, 2014

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JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶1 In this appeal, we consider whether an individual is an independent contractor as opposed to an employee for unemployment tax liability purposes. Under the Colorado Employment Security Act ("CESA"), §§ 8-70-101 to 8-82-105, C.R.S. (2013), employers must pay unemployment taxes on wages paid to employees but not on compensation paid to independent contractors. Section 8-70-115(1)(b), C.R.S. (2013), provides that an individual is only classified as an independent contractor if the employer can prove that the individual is "free from control and direction in the performance of the service, . . . and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." In this case, there is no dispute that the employer did not exercise control over the individual, so the only issue is what test should be used to determine whether the individual is "customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

¶2 We agree with the court of appeals that whether an individual is "customarily engaged in an independent trade, occupation, profession, or business related to the service performed" is a question of fact that can only be resolved by analyzing several factors; whether the individual worked for another is not dispositive of whether the individual was engaged in an independent business. Softrock Geological Servs., Inc. v. Indus. Claim Appeals Office, 2012 COA 97, ¶¶ 9, 23–26. We disagree, however, with the court of appeals' conclusion that whether an individual is engaged in an independent trade or business can be determined by applying a nine-factor test developed based on the list of nine factors that a document must contain to create a

presumption of an independent contractor relationship under section 8-70-115(1)(c). See id. at ¶ 24. Instead, we hold that the determination must be based on a totality of the circumstances test that evaluates the dynamics of the relationship between the putative employee and the employer; while the factors listed in section 8-70-115(1)(c) may be relevant to this determination, the section does not provide an exhaustive list of factors that may be considered. As such, we affirm the judgment of the court of appeals and remand the case to that court to return the case to the Industrial Claim Appeals Office for proceedings consistent with this opinion.

I. Facts and Proceedings Below

¶3 Waterman Ormsby is a geologist who contracted to work on a project basis for Softrock Geological Services, Inc. ("Softrock"), a company that provides geologic services for the oil and gas industry. Relevant to this case, Ormsby worked for Softrock from 2007 through 2010 under various contracts. Softrock did not provide Ormsby with training or tools during this time; rather, Ormsby was expected to, and did, use his own vehicle, tools, and equipment (except for certain specialized equipment that he rented from Softrock) to complete the jobs. Ormsby also had his own business cards, maintained his own liability insurance, and did not represent himself as a Softrock employee.

¶4 Throughout the entire period that Ormsby contracted with Softrock, Softrock classified Ormsby as an independent contractor, not as a Softrock employee. In March 2011, the Division of Employment and Training audited Softrock and issued a notice of liability on the grounds that Softrock should have treated Ormsby as an employee for

the purposes of CESA, meaning that Softrock should have paid unemployment tax premiums on Ormsby's wages.[1]

¶5 Softrock appealed the Division's decision to the Industrial Claim Appeals Office ("ICAO"), and a hearing officer reversed the Division's decision. The hearing officer concluded that Ormsby was an independent contractor and not an employee because Softrock did not control Ormsby and Ormsby was engaged in an independent trade or business while he worked for Softrock. The hearing officer reached this conclusion despite the fact that Ormsby had not provided services to another company during the relevant time-period. According to the hearing officer, not providing services for another in the field is not dispositive proof of the nonexistence of an independent trade or business. The hearing officer explained that Ormsby did not work for other companies because he was unaware that other opportunities existed in the area; however, had he known of other opportunities, he would have pursued them.

¶6 A hearing panel at the ICAO subsequently reversed the hearing officer's determination that Ormsby was not a Softrock employee. The ICAO panel concluded that Ormsby was an employee during the period in question because he only provided services to Softrock, and therefore, he did not have an independent trade or business.

¶7 Softrock sought review in the court of appeals and the court appeals vacated the ICAO panel's order. Softrock Geological Servs., ¶ 1. The court of appeals concluded

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[1] Under CESA, a business must pay state unemployment taxes on wages paid to employees but not on compensation paid to independent contractors. See § 8-76-102.5, C.R.S. (2013); Colo. Div. of Emp't & Training v. Accord Human Res., Inc., 2012 CO 15, ¶ 13.

that the ICAO panel incorrectly relied on a single factor -- whether Ormsby was providing similar services for anyone else -- to determine that Ormsby was an employee and not an independent contractor. Id. at ¶ 26. Rather, the court of appeals found that the ICAO panel should have determined whether Ormsby was an independent contractor by considering the nine factors in section 8-70-115(1)(c). Id. As a result, the court of appeals remanded the case to the ICAO panel to apply the nine-factor test. Id.

¶8 We granted certiorari to consider what the test is for determining whether an individual is engaged in an independent business.[2] While we agree with the court of appeals that there is no single-factor test and that the nine factors laid out in section 8-70-115(1)(c) should be considered, we decline to adopt the court of appeals' test because we find that the fact-finder must consider the dynamics of the relationship between the employer and the putative employee and should not be limited to only considering nine factors.

II. Standard of Review

¶9 The employer has the burden of proving that the putative employee is an independent contractor under section 8-70-115. Long View Sys. Corp. USA v. Indus. Claim Appeals Office, 197 P.3d 295, 298 (Colo. App. 2008). Whether the employer has

[2] Specifically, we granted certiorari to consider the following issue:

> Whether the court of appeals erred by openly departing from longstanding court of appeals precedent and holding that a worker's failure to provide similar services to others at the same time he is working for a putative employer does not automatically dispose of a claim that the worker is an independent contractor rather than an employee.

met this burden is a question of fact. Id. We will not disturb the ICAO panel's determination as long as the ICAO panel properly applied the law and the findings of fact support its conclusion. § 8-74-107(6)(c) to (d), C.R.S. (2013); Allen Co. v. Indus. Comm'n, 762 P.2d 677, 680 (Colo. 1988) (holding that the ICAO's decision "should not be disturbed if it is supported by substantial evidence"). However, whether the ICAO panel applied the appropriate test is a question of law that we review de novo. Davison v. Indus. Claim Appeals Office, 84 P.3d 1023, 1029 (Colo. 2004).

III. Analysis

¶10 In this appeal, we address the question of what it means -- for the purpose of being considered an independent contractor under CESA -- for an individual to be customarily engaged in an independent business. To answer this question, we begin by reviewing the overarching statutory framework for determining whether an employer may classify an individual as an independent contractor rather than an employee for CESA unemployment tax liability purposes. We then consider the specific issue raised by this case, namely how the General Assembly intended for the courts and agencies to determine if an individual is customarily engaged in an independent trade or business. We conclude that the General Assembly intended for courts and agencies to make this determination based on an evaluation of the totality of the circumstances relevant to understanding the dynamics of the relationship between the individual and the employer.

¶11 CESA establishes an unemployment insurance fund that is financed by employer-paid premiums. Under CESA, an employer must pay premiums into the

fund based on wages paid to current employees and the amount of claims made by former employees. §§ 8-76-101, -102.5, C.R.S. (2013); Colo. Div. of Emp't & Training v. Accord Human Res., Inc., 2012 CO 15, ¶ 13. Services performed by one person for another "shall be deemed to be employment" for tax liability purposes unless the employer can prove that the putative employee is actually an independent contractor. § 8-70-115(1)(b). Under the statute, the employer can prove that the putative employee is actually an independent contractor by satisfying two conditions. Id.; Long View Sys., 197 P.3d at 298. First, the employer must demonstrate that the individual is free from the employer's "control and direction." § 8-70-115(1)(b). Second, the employer must prove that the individual is "customarily engaged in an independent trade, occupation, profession, or business related to the service performed." Id.

¶12 The first prong of this test is not at issue in this case, as the hearing officer and the ICAO panel both concluded that Ormsby was free from Softrock's control. As a result, we focus our analysis solely on the meaning of the second prong and consider when an individual is customarily engaged in an independent trade or business. Although the court of appeals has analyzed this section of the statute on several occasions, we have yet to consider it and are not bound by the court of appeals' decisions. See Grossman v. Sherman, 198 Colo. 359, 361, 599 P.2d 909, 911 (1979).

¶13 Initially, we note that CESA does not explicitly provide a test for determining if an individual is customarily engaged in an independent business.[3] Therefore, we are

[3] Section 8-70-115(1)(c), the section of CESA that the court of appeals relied on, provides nine factors for determining whether a document establishes a presumption that the

left to develop a test that is consistent with the intent of the General Assembly. Davison, 84 P.3d at 1029. To effectuate the legislative intent, we consider the statutory scheme as a whole and seek to create a test that works harmoniously with the other provisions of the scheme. See Marquez v. People, 2013 CO 58, ¶ 8.

¶14 Section 8-70-102, C.R.S. (2013), explains that the purpose of CESA is to help protect employees from the negative consequences of involuntary unemployment. Thus, we must interpret section 8-70-115 in a manner that is consistent with this statutory goal. In accordance with this requirement, and reading section 8-70-115 as a whole, we find that the statute requires an inquiry into the nature of the relationship between the individual and the employer when determining whether an individual is engaged in an independent trade or business.

¶15 Section 8-70-115(1)(c) explains that to prove that an individual is an independent contractor, the employer can either provide evidence satisfying the two-prong test set out in section 8-70-115(1)(b) or submit a written document signed by both the employer and the putative employee that meets nine conditions. The nine conditions in section 8-70-115(1)(c) establish limits on the relationship between the employer and the putative employee. Specifically, under section 8-70-115(1)(c), the document must establish that the employer will not do any of the following:

> I. Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for the said person for a finite period of time specified in the document;

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putative employee is an independent contractor; the section does not provide a general test for determining whether an individual is an independent contractor.

II. Establish a quality standard for the individual; except that [the employer] can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;

III. Pay a salary or hourly rate but rather a fixed or contract rate;

IV. Terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

V. Provide more than minimal training for the individual;

VI. Provide tools or benefits to the individual; except that materials and equipment may be supplied;

VII. Dictate the time of performance; except that a completion schedule and a range of mutually agreeable work hours may be established;

VIII. Pay the individual personally but rather makes checks payable to the trade or business name of the individual; and

IX. Combine [the employer's] business operations in any way with the individual's business, but instead maintains such operations as separate and distinct.

While these criteria are the requirements for a written document and are not a statutory test for determining if a worker is customarily engaged in an independent business, we find them to be indicative of what the General Assembly thought are important distinctions between employees and independent contractors. As such, we conclude that they should be considered when determining whether an individual is engaged in an independent business for the purposes of unemployment insurance tax liability.

¶16 As has been pointed out in other cases, however, we find that other factors may also be relevant. In Long View Systems, the court of appeals suggested that when evaluating a claim that the putative employee maintained an independent trade or business, the Division and the ICAO could consider whether the putative employee: maintained an independent business card, listing, address, or telephone; had a financial

investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance. 197 P.3d at 300 (citing Dep't of Labor, Licensing, & Regulation v. Fox, 697 A.2d 478, 485–86 (Md. 1997)).

¶17 Given the wide array of factors that could be relevant, we conclude that rather than requiring a rigid check-box type inspection, a more accurate test to determine if an individual is customarily engaged in an independent business involves an inquiry into the nature of the working relationship. The ICAO and the Division may consider the nine factors in section 8-70-115(1)(c) as well as any other information relevant to the nature of the work and the relationship between the employer and the individual. Accordingly, we decline to adopt the court of appeals' test that exclusively considers only the nine factors enumerated in section 8-70-115(1)(c).

¶18 Similarly, we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship.[4] While this single-factor test certainly protects an employee against the "vagaries of involuntary unemployment," see SZL, Inc. v. Indus. Claim Appeals Office, 254 P.3d 1180, 1183 (Colo. App. 2011), it cannot be what the

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[4] This argument is based on several court of appeals decisions. See, e.g., Carpet Exch. of Denver, Inc. v. Indus. Claim Appeals Office, 859 P.2d 278, 282 (Colo. App. 1993) ("To be customarily engaged in an independent business, a worker must actually and customarily provide similar services to others at the same time he or she works for the putative employer."); Barge v. Indus. Claim Appeals Office, 905 P.2d 25, 27 (Colo. App. 1995) (same); Speedy Messenger & Delivery Serv. v. Indus. Claim Appeals Office, 129 P.3d 1094, 1098 (Colo. App. 2005) (same).

General Assembly intended because it is possible to accomplish this goal without simultaneously subjecting an employer unfairly to the decisions of the putative employee and an unpredictable hindsight review. Indeed, under the single-factor test, the determinative issue is whether the putative employee chose to work for another in the field, regardless of, among other things, the intent of the parties, the number of weekly hours the putative employee actually worked for the employer, or whether the putative employee even sought other work in the field.

IV. Conclusion

¶19 We hold that whether an individual is customarily engaged in an independent business is a question that can only be resolved by applying a totality of the circumstances test that evaluates the dynamics of the relationship between the putative employee and the employer; there is no dispositive single factor or set of factors. Hence, we affirm the judgment of the court of appeals and remand the case to that court to return the case to the ICAO for proceedings consistent with this opinion.

COLORADO COURT OF APPEALS **2014 COA 63**

DATE FILED: May 8, 2014
CASE NUMBER: 2013CA1514

Court of Appeals No. 13CA1514
Industrial Claim Appeals Office of the State of Colorado
DD No. 20689-2012

Visible Voices, Inc.,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Division of Unemployment Insurance,

Respondents.

ORDER AFFIRMED IN PART, SET ASIDE IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE J. JONES
Fox and Navarro, JJ., concur

Announced May 8, 2014

Ogborn Mihm, LLP, Anna N. Martinez, Thomas D. Neville, Denver, Colorado, for Petitioner

No Appearance for Respondent Division of Unemployment Insurance

¶ 1 In this unemployment compensation tax liability case, petitioner, Visible Voices, Inc. (Visible), seeks review of a final order of the Industrial Claim Appeals Office (Panel). The Panel reversed, in part, a hearing officer's decision that services performed for Visible by thirteen individuals (the workers) did not constitute covered "employment" under the Colorado Employment Security Act (CESA) because the workers performed those services as independent contractors. The Panel determined that only two of the workers performed the services as independent contractors and that the remaining eleven workers were Visible's statutory employees.

¶ 2 We affirm the portion of the Panel's order holding that the two workers were independent contractors. However, we set aside the remaining portion of the Panel's order and remand with directions to reinstate the hearing officer's decision that the remaining eleven workers also provided their services to Visible as independent contractors. In so doing, we reject the Panel's reliance on a single factor — whether the eleven workers regularly provided similar services to others while they were providing services to Visible — to determine whether those workers were engaged in an independent

trade or business. We conclude instead that all relevant circumstances must be considered in making this determination.

I. Background

¶ 3 Visible provides "Computer Assisted Realtime Translation"

¶ 4 (CART) services under contracts with various clients, including state agencies and courts. It supplies its clients with "CART providers, or captionists, who perform live word-for-word speech-to-text translation for the deaf and hearing impaired." Visible entered into agreements with the workers in which they agreed to provide CART services to Visible's clients as independent contractors.

¶ 5 The Division of Employment and Training (Division) issued a liability determination concluding that the workers' services for Visible amounted to covered employment and that Visible was, therefore, required to pay applicable unemployment compensation taxes on those services.

¶ 6 Visible appealed the deputy's decision. Following an evidentiary hearing, the hearing officer determined that the workers were independent contractors because they performed the services free from Visible's control and direction, and were customarily

engaged in an independent trade, occupation, profession, or business related to the CART services they performed.

¶ 7 The Division appealed the hearing officer's decision. The Panel upheld the hearing officer's determination that the workers were free from Visible's control and direction. However, the Panel remanded for further findings concerning whether the workers were customarily engaged in an independent trade or business providing CART-related services.

¶ 8 On remand, the original hearing officer was unavailable and a different hearing officer reviewed the evidence and entered a new decision. The hearing officer also determined that the workers were not Visible's employees because they were free from Visible's control and direction and were customarily engaged in independent businesses related to providing CART services.

¶ 9 The Division again appealed. The Panel adhered to its previous ruling that Visible did not control and direct the workers. However, contrary to the second hearing officer's decision, the Panel determined that eleven of the thirteen workers were not customarily engaged in independent businesses related to the CART services. In

making that determination, the Panel relied largely on a lack of evidence that those workers had regularly provided CART services to others besides Visible while working for Visible. It concluded that those eleven workers were in covered employment. Visible seeks review of the Panel's order.

II. Discussion

A. General Legal Standards

¶ 10 Under section 8-70-115(1)(b), C.R.S. 2013, services performed by an individual for another "shall be deemed" covered employment for unemployment tax liability purposes, unless the putative employer demonstrates both that (1) the individual "is free from control and direction in the performance of the service," and (2) the individual "is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

¶ 11 The statute places the burden of proof on the putative employer to demonstrate that both conditions exist to rebut the presumption of an employment relationship between the parties. *SZL, Inc. v. Indus. Claim Appeals Office*, 254 P.3d 1180, 1183 (Colo.

App. 2011); *Long View Sys. Corp. USA v. Indus. Claim Appeals Office*, 197 P.3d 295, 298 (Colo. App. 2008). Whether a putative employer has met this burden is a question of fact, and we will not disturb the agency's factual findings if they are supported by substantial evidence. *See Allen Co. v. Indus. Comm'n*, 762 P.2d 677, 680 (Colo. 1988); *Long View*, 197 P.3d at 298. However, whether the Panel applied the correct legal standard or legal test raises a question of law that we review de novo. *See In re A.M.*, 251 P.3d 1119, 1121 (Colo. App. 2010) (whether a trial court applied the correct legal standard presents a question of law the appellate court reviews de novo); *see also Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004) (appellate court reviews agency's conclusions of law de novo).

¶ 12 To establish that a worker is customarily engaged in an independent trade or business related to the services performed, a putative employer must show that the worker is engaged in a separate business venture, other than the provision of services for the putative employer. *See Long View*, 197 P.3d at 300.

B. Provision of Services to Others

¶ 13 Visible contends that in considering whether the workers were engaged in an independent trade, occupation, profession, or business, the Panel erred by treating as dispositive the factor whether the workers provided similar CART services to others while providing services to Visible. Visible contends that the Panel should have applied a multi-factor approach as described in *Softrock Geological Services, Inc. v. Industrial Claim Appeals Office*, 2012 COA 97, ¶ 10 (*cert. granted* Mar. 25, 2013).

¶ 14 Prior to the *Softrock* decision, a line of cases from divisions of this court had held that to be engaged in an independent trade, occupation, profession, or business within the meaning of section 8-70-115(1)(b), a worker must have actually and customarily provided similar services to others while working for the putative employer. *See Speedy Messenger & Delivery Serv. v. Indus. Claim Appeals Office*, 129 P.3d 1094, 1098 (Colo. App. 2005); *Barge v. Indus. Claim Appeals Office*, 905 P.2d 25, 27 (Colo. App. 1995); *Carpet Exch. of Denver, Inc. v. Indus. Claim Appeals Office*, 859 P.2d 278, 282 (Colo. App. 1993).

¶ 15 Departing from these cases, the *Softrock* division concluded it

was incorrect to treat this "services to others" consideration as dispositive. Instead, it concluded that whether a worker is engaged in an independent and separate business venture other than providing services to the putative employer "involves a multi-factor test," and that a worker's provision of similar services to others is "at most only one consideration." *Softrock*, ¶¶ 10, 16.

¶ 16 Thereafter, in *Western Logistics, Inc. v. Industrial Claim Appeals Office*, 2012 COA 186 (*cert. granted* Mar. 25, 2013), another division of this court declined to follow *Softrock*'s multi-factor approach. Instead, the division adhered to prior decisions holding that "in circumstances other than short-term work, to satisfy the 'independent business' requirement, a worker must have actually and customarily provided similar services to others while working for the putative employer." *Id.* at ¶ 24.

¶ 17 We conclude that a multi-factor approach is the proper framework for determining whether a worker is customarily engaged in an independent trade, occupation, profession, or business under section 8-70-115(1)(b). As the *Softrock* division noted, treating the "services to others" consideration as dispositive of this issue is

inconsistent with the statutory scheme because (1) no such single-factor test appears in the statutory language; (2) treating this consideration, or any other, as dispositive is difficult to reconcile with section 8-70-115(1)(c), which lists multiple factors for determining whether a worker is engaged in an independent trade or business; and (3) one of the factors listed in section 8-70-115(1)(c) actually provides that a worker may choose to work exclusively for a putative employer for a finite time period specified in a written contract. *Softrock*, ¶ 16; *see* § 8-70-115(1)(c)(I).

¶ 18 The *Softrock* division further noted that treating the "services to others" consideration as dispositive is flawed because it subjects putative employers to potential liability based on circumstances the putative employer cannot control and of which it may be unaware. *See Softrock*, ¶ 25.

¶ 19 The *Western Logistics* division criticized *Softrock*'s reliance on the factors in section 8-70-115(1)(c) because, in its view, that subsection, in conjunction with sections 8-70-115(1)(d) and 8-70-115(2), addresses "a different issue — whether a written document signed by a putative employer and a worker creates a rebuttable

presumption of an independent contractor relationship." *Western Logistics*, ¶ 21. We are not persuaded by this criticism.

¶ 20 Subsections (1)(b) and (1)(c) of the statute do not address different issues; they address the same issue — proving an independent contractor relationship. Subsection (1)(b) establishes the presumption of an employment relationship and the legal standard for overcoming that presumption, while subsection (1)(c) describes how a putative employer may, through an agreement *or otherwise*, "evidence" the standard described in subsection (1)(b).

¶ 21 Contrary to the *Western Logistics* division's conclusion, subsection (1)(c) does not merely address "whether a written document signed by a putative employer and a worker creates a rebuttable presumption of an independent contractor relationship." *Western Logistics*, ¶ 21. It, in conjunction with subsection (2), addresses generally how a putative employer may prove an independent contractor relationship, provides not one but two means of doing so, and expressly makes a variety of factors relevant to the inquiry.

¶ 22 The first way a putative employer may prove an independent

contractor relationship is by evidence of a written agreement including provisions (I)-(IX) noted in subsection (1)(c). Such a written agreement creates a rebuttable presumption of an independent contractor relationship. § 8-70-115(2). It logically follows that a worker can rebut the presumption by proving that, despite what the written agreement says, the factors identified in provisions (I)-(IX) do not exist. Thus, the factors identified in provisions (I)-(IX) are relevant to the inquiry whether an independent contractor relationship exists. Nothing in the statute suggests that one relevant factor — whether the worker provided contemporaneous services to others — trumps all other factors.

¶ 23 A putative employer may prove an independent contractor relationship in the absence of a written agreement containing provisions (I)-(IX) by showing "by a preponderance of the evidence that the conditions set forth in" subsection (1)(b) have been satisfied. § 8-70-115(1)(c). The statute does not limit what factors are relevant to the inquiry. If the factors identified in provisions (I)-(IX) of subsection (1)(c) are relevant to determining the effect of a written agreement between the parties, it follows that those factors

are relevant in the context of a putative employer's effort to prove an independent contractor relationship in the absence of such a written agreement.

¶ 24 Consequently, we agree with *Softrock* that the factors listed in provisions (I)-(IX) of subsection (1)(c) may be relevant in determining whether a worker "is customarily engaged in an independent trade, occupation, profession, or business related to the service performed" under subsection (1)(b). *See Moffett v. Life Care Ctrs. of Am.*, 219 P.3d 1068, 1072 (Colo. 2009) (when statutory provisions concern same subject matter or are part of common design, courts must read them together to give full effect to each).

¶ 25 However, to the extent *Softrock* holds that only the factors identified in subsection (1)(c)(I)-(IX) are relevant to the inquiry, we decline to follow it. *See Valentine v. Mountain States Mut. Cas. Co.*, 252 P.3d 1182, 1195 (Colo. App. 2011) (one division of the court of appeals is not bound by the decision of another division). Instead, we conclude that any relevant circumstance may be considered.

¶ 26 The statute identifies factors that may be relevant in many cases, but clearly, in some cases some of those factors may not be

relevant. And just as clearly, other factors may be relevant to the determination in a given case whether a worker is engaged in an independent trade, occupation, profession, or business. Indeed, divisions of this court have recognized a number of such factors. *See Long View*, 197 P.3d at 300 (identifying as relevant whether the worker (1) maintained a business card, business listing, business address, or business telephone number; (2) made a financial investment such that he or she could be vulnerable to financial loss in connection with performance of the service; (3) had his or her own equipment needed to perform the service; (4) determined the price of the service performed; (5) employed others to perform the service; and (6) carried liability or workers' compensation insurance); *Speedy Messenger*, 129 P.3d at 1098 (noting that two workers performing the services at issue did not advertise or have business cards); *Barge*, 905 P.2d at 27 (noting that workers did not maintain business addresses or telephone numbers).

¶ 27 Here, in its initial remand order, the Panel acknowledged *Softrock* but stated that it found *Western Logistics* "more persuasive." Additionally, in its final order, the Panel effectively

ignored *Softrock*'s multi-factor test by focusing almost exclusively on whether the workers performed CART services for others besides Visible.

¶ 28 We recognize that the Panel was faced with conflicting authority from different divisions of this court. However, we again emphasize our conclusions that (1) applying a multi-factor test — which accounts for all relevant circumstances — is the proper means to analyze whether a worker was customarily engaged in an independent trade, occupation, profession, or business; and (2) relying exclusively on whether a worker simultaneously provided similar services to others is inconsistent with the statutory scheme.

C. Evidentiary Support for Hearing Officer's Decision

¶ 29 Applying the multi-factor test in this case, we conclude that the record supports the hearing officer's determination that the eleven workers in question were customarily engaged in independent businesses related to the services provided to Visible.

¶ 30 The hearing officer applied a multi-factor approach, making a series of record-supported evidentiary findings that, in turn, support his ultimate finding that the workers were engaged in

separate and independent business ventures providing CART services. Those findings included the following:

- Each of the workers was a sole proprietor providing CART services on a freelance basis.
- The workers were free to accept or decline assignments from Visible at their discretion.
- The workers could negotiate their compensation rate.
- The workers submitted invoices to Visible after completing an assignment.
- The workers were neither expected nor required to provide services only to Visible, and Visible encouraged them to accept available work from others. *See* § 8-70-115(1)(c)(I).
- Many of the workers provided similar services to others besides Visible.
- There were periods of up to four consecutive months in which Visible offered no assignments to any of the workers.
- The workers supplied and maintained their own equipment. *See* § 8-70-115(1)(c)(VI).
- Visible provided no training to the workers. *See* § 8-70-

115(1)(c)(V).

¶ 31 Additionally, Visible's owner testified, without contradiction, that she did not combine Visible's business operations with any of the workers' businesses. *See* § 8-70-115(1)(c)(IX).

¶ 32 Although the hearing officer found that Visible paid the workers by the hour, he further found that "it would not be feasible to pay [them based] on a fixed . . . contract rate because it would be impossible to predict exactly how long a given court session or other occasion might last." Similarly, although many of the workers were paid using their individual names rather than trade or business names, the hearing officer found that this did "not persuasively demonstrate that the workers were not independently engaged in a related, independent trade or business" because the "standard in the industry is that individual providers work on a freelance basis, most commonly as sole proprietors."

¶ 33 The Panel concluded that "the hearing officer gave undue weight to the fact that V[isible] did not preclude the workers from working for others" and "[i]n effect . . . found the workers were independent contractors regardless of whether they had an

independent business." The record does not support this characterization of the hearing officer's decision. To the contrary, the hearing officer made numerous findings supporting his determination that the workers were, in fact, engaged in independent businesses providing CART services.

¶ 34 Though the record does not contain evidence establishing that all of the workers provided similar services to others besides Visible during the applicable audit period, unlike the Panel, for the reasons discussed above, we are not persuaded that this one circumstance is controlling. *See Softrock*, ¶¶ 10, 16.

¶ 35 Because substantial evidence supports the hearing officer's ultimate determination that Visible met its burden of showing that the workers were free from control and direction and were customarily engaged in an independent business related to their provision of CART services, we will not disturb that determination on review. *See Allen Co.*, 762 P.2d at 681; *see also Long View*, 197 P.3d at 298.

III. Conclusion

¶ 36 The portion of the Panel's order determining that two of the

thirteen workers were independent contractors and not in covered employment with Visible is affirmed. The remainder of the Panel's order is set aside, and the case is remanded with instructions to reinstate the hearing officer's decision determining that the remaining eleven workers were also not in covered employment with Visible.

JUDGE FOX and JUDGE NAVARRO concur.

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ADVANCE SHEET HEADNOTE
May 12, 2014

2014 CO 31

No. 12SC911, Western Logistics, Inc. v. Industrial Claim Appeals Office – Colorado Employment Security Act – Employment Law.

The supreme court holds that for the purpose of determining if an individual is an independent contractor under the Colorado Employment Security Act, whether an individual is "customarily engaged in an independent trade, occupation, profession, or business related to the service performed" is a question of fact that can only be resolved by applying a totality of the circumstances test, as laid out in Industrial Claim Appeals Office v. Softrock Geological Services, Inc., 2014 CO 30.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2014 CO 31

Supreme Court Case No. 12SC911
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 11CA2461

Petitioner:
Western Logistics, Inc. d/b/a Diligent Delivery Systems,
v.
Respondents:
Industrial Claim Appeals Office of the State of Colorado; and Division of Employment and Training, Employer Services – Integrity/Employer Audits.

Judgment Reversed
en banc
May 12, 2014

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JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶1 In this case, we consider when, under the Colorado Employment Security Act ("CESA"), §§ 8-70-101 to 8-82-105, C.R.S. (2013), an individual is an independent contractor as opposed to an employee. Under section 8-70-115(1)(b), C.R.S. (2013), an individual may be classified as an independent contractor if the employer can prove that the individual is "free from control and direction in the performance of the service, . . . and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

¶2 Petitioner, Western Logistics, Inc., d/b/a Diligent Delivery Systems ("Diligent"), challenges the court of appeals' decision affirming an Industrial Claim Appeals Office ("ICAO") panel's decision that certain individuals were employees rather than independent contractors under section 8-70-115. W. Logistics, Inc. v. Indus. Claim Appeals Office, 2012 COA 186. The court of appeals affirmed the ICAO panel's decision on the grounds that the individuals were not simultaneously providing services for others in the field. Id. at ¶¶ 14–19. The court of appeals also determined that the individuals were not free from Diligent's control and direction. Id. at ¶¶ 30–34.

¶3 We disagree with the court of appeals. Whether an individual worked for another is not dispositive of whether the individual was engaged in an independent business. Indus. Claim Appeals Office v. Softrock Geological Servs., Inc., 2014 CO 30, ¶ 18. Rather, as we held in Softrock, determining whether an individual is an employee requires an expansive inquiry into the dynamics of the relationship between the putative employee and the employer. Id. at ¶ 2. Because we believe the independent trade or business issue and the control and direction issue may be related, we do not

reach the control and direction issue. Thus, we reverse the judgment of the court of appeals and remand the case to that court with directions to vacate the portion of its decision that addresses the control and direction issue and to return the case to the ICAO for additional proceedings consistent with this opinion.

I. Facts and Proceedings Below

¶4 Diligent is engaged in the auto-parts delivery business. The company handles all of the delivery logistics for its clients, meaning that it provides a delivery truck and driver for its clients' jobs. Diligent orchestrates the deliveries by using a network of dispatchers who assign drivers from a pool to the various jobs.

¶5 Diligent's pool of drivers is made up of individuals who supply their own truck, tools, and insurance. The company classifies these individuals as independent contractors for tax purposes and requires each individual to sign an agreement designating the individual as an "independent contractor."[1]

¶6 In 2009, the Department of Labor and Employment, Division of Insurance audited Diligent for the years 2008 and 2009. The Division determined that Diligent should have classified 220 of its drivers as employees for the purposes of CESA. As a result, the Division required Diligent to pay unemployment tax premiums on the wages paid to these drivers.

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[1] Section 18-70-115(1)(c) says that a written document signed by both parties that meets nine requirements can be used to create a rebuttable presumption that an individual is an independent contractor for the purposes of CESA. Whether the agreements in this case comply with the statute is not an issue presently before us.

¶7 Diligent appealed the liability determination to the ICAO. A hearing officer found that although the drivers had signed Diligent's independent contractor agreement, the contracts were "not true in fact" and the evidence showed that the drivers were employees, not independent contractors. The hearing officer determined that Diligent did not meet its burden to show that the drivers were independent contractors because it failed to prove both that the drivers were engaged in an independent trade or business and that it did not exercise control over the drivers.[2]

¶8 On review, an ICAO panel found that Diligent's agreements with the drivers did not create a rebuttable presumption of an independent contractor relationship because the agreements did not comport with the statutory requirements set forth in section 8-70-115(1)(c). The ICAO panel then affirmed the hearing officer's decision, primarily relying on the fact that the drivers did not provide contemporaneous services for others while working for Diligent. The ICAO panel did not address the issue of whether the drivers were subject to Diligent's control and direction.

¶9 On appeal, the court of appeals affirmed the ICAO panel's determination that Diligent failed to show that the drivers were customarily engaged in an independent business. W. Logistics, ¶ 9. The court of appeals also concluded that Diligent did not prove that the drivers were free from its control and direction. Id. at ¶ 30.

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[2] The hearing officer based its decision that 220 of Diligent's drivers were employees on testimony from 8 drivers and exhibits from an additional 15 drivers. In its argument to the court of appeals, Diligent argued that it was an error for the hearing officer to base its decision on "representative" testimony. It is not necessary for us to address this argument based on our handling of the other issues in this case.

¶10 We granted certiorari to review the court of appeals' determination that Diligent failed to prove that the 220 drivers were actually independent contractors under section 8-70-115.[3]

II. Standard of Review

¶11 The employer has the burden of proving that the putative employee is an independent contractor under section 8-70-115. Long View Sys. Corp. USA v. Indus. Claim Appeals Office, 197 P.3d 295, 298 (Colo. App. 2008). Whether the employer has met this burden is a question of fact. Id. We will not disturb the ICAO panel's determination as long as the ICAO panel properly applied the law and the findings of fact support its conclusion. § 8-74-107(6)(c) to (d), C.R.S. (2013); Allen Co. v. Indus. Comm'n, 762 P.2d 677, 680 (Colo. 1988) (holding that the ICAO's decision "should not be disturbed if it is supported by substantial evidence"). However, whether the ICAO panel applied the appropriate test is a question of law that we review de novo. Davison v. Indus. Claim Appeals Office, 84 P.3d 1023, 1029 (Colo. 2004).

III. Analysis

¶12 CESA establishes an unemployment insurance fund that is financed by employer-paid premiums. Under CESA, an employer must pay premiums into the fund based on wages paid to current employees and the amount of claims made by

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[3] Specifically, we granted certiorari to consider:

1. Whether the court of appeals erred in holding that 220 delivery drivers were Diligent employees because they did not provide delivery services to others while they provided such services to Diligent.
2. Whether the court of appeals erred when it held that 220 delivery drivers were subject to Diligent's control and direction.

former employees. §§ 8-76-101, -102.5, C.R.S. (2013); Colo. Div. of Emp't & Training v. Accord Human Res., Inc., 2012 CO 15, ¶ 13. Services performed by one person for another "shall be deemed to be employment" for tax liability purposes unless the employer can prove that the putative employee is actually an independent contractor. § 8-70-115(1)(b). Under the statute, the employer can prove that the putative employee is actually an independent contractor by satisfying two conditions. Id.; Long View Sys., 197 P.3d at 298. First, the employer must demonstrate that the individual is free from the employer's "control and direction." § 8-70-115(1)(b). Second, the employer must prove that the individual is "customarily engaged in an independent trade, occupation, profession, or business related to the service performed." Id.

¶13 Diligent argues that the court of appeals erred when it found that it did not satisfy either of the prongs of the independent contractor test. We address each of the prongs separately, beginning with a discussion of the independent business prong and then turning toward the control and direction prong. While we make no determination as to whether the drivers were independent contractors, we nevertheless find that the court of appeals erred in this case.

A. Independent Trade or Business

¶14 In Softrock, also issued by this Court today, we announced a totality of the circumstances test for determining if an individual is customarily engaged in an independent trade or business. ¶¶ 17, 19. In that case, we held that "whether an individual is customarily engaged in an independent business is a question that can only be resolved by applying a totality of the circumstances test that evaluates the

dynamics of the relationship between the putative employee and the employer." Id. at ¶ 19. In so holding, we rejected the argument -- which the court of appeals also relied on in this case -- that a court or agency could determine whether an individual is an independent contractor based on a single-factor inquiry into whether the individual performed work in the field for someone else. Softrock, ¶ 18. As we explained in Softrock, that test unfairly subjects the employer to a hindsight review of whether the putative employee engaged in other work during the period in question and does not consider the myriad of reasons that an independent contractor might not engage in other employment despite being free to do so. Id. Furthermore, the single-factor test is not necessary to adequately protect an individual from the vagaries of involuntary unemployment because a totality of the circumstances test that considers the dynamics of the relationship between the individual and the employer can also adequately provide such protection. See id.

¶15 As such, because neither the ICAO panel nor the court of appeals applied the Softrock totality of the circumstances test, we reverse the decision of the court of appeals and remand the case to that court to return the case to the ICAO for proceedings consistent with this opinion.

B. Control and Direction

¶16 In its opinion, the court of appeals also concluded that Diligent exercised control and direction over the drivers, and therefore, that this prong provided an independent justification for classifying the drivers as employees. W. Logistics, ¶¶ 30, 34.

¶17 Given the potential that the two issues before us are interrelated, at this point, we decline to address whether Diligent exercised control and direction over the drivers. Hence, we remand the case to the court of appeals with directions to vacate the portion of its decision that addresses the control and direction prong and to return the case to the ICAO for additional proceedings.

IV. Conclusion

¶18 For the foregoing reasons, we reverse the judgment of the court of appeals and remand the case to that court with directions to vacate the portion of its decision that addresses the control and direction issue and to return the case to the ICAO for additional proceedings consistent with this opinion.

COLORADO COURT OF APPEALS **2014COA5**

DATE FILED: January 29, 2015
CASE NUMBER: 2014CA889

Court of Appeals No. 14CA0889
Industrial Claim Appeals Office of the State of Colorado
DD No. 17075-2013

Whitewater Hill, LLC,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; and Division of Unemployment Insurance Employer Services – Integrity Employer Audits,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE NEY*
Loeb, C.J., and Roy*, J., concur

Announced January 29, 2015

John Behrs, as Authorized Representative of Whitewater Hill, LLC

Cynthia H. Coffman, Attorney General, John August Lizza, First Assistant Attorney General, Sophia Lenz, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

No Appearance for Respondent Division of Unemployment Insurance Employer Services – Integrity Employer Audits

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2014.

¶ 1 This case raises the issue of whether certain agricultural work constituted "employment" under the Colorado Employment Security Act (CESA). The dispute centers around the interpretation of section 8-70-120(1)(a), C.R.S. 2014, a CESA provision that defines when agricultural labor is deemed statutory employment.

¶ 2 A hearing officer and the Industrial Claim Appeals Office (Panel) reached differing and conflicting interpretations of this statute which, in turn, resulted in conflicting conclusions as to whether the work was covered employment.

¶ 3 We conclude that the hearing officer's interpretation of the statute was correct and that the work performed was not employment as defined under CESA. Consequently, we set aside the Panel's order and remand with instructions to reinstate the hearing officer's decision.

I. Procedural Background

¶ 4 Petitioner, Whitewater Hill, LLC (Whitewater), operates a small vineyard and winery. Following an audit, the Colorado Department of Labor and Employment (Department) issued a liability determination concluding that agricultural work performed by

certain individuals (the workers) for Whitewater amounted to covered employment and that Whitewater must pay taxes on amounts it paid the workers.

¶ 5 Whitewater appealed the liability determination arguing, as pertinent here, that the services were "agricultural labor" and therefore fell outside CESA's definition of employment. Following an administrative hearing, the hearing officer made findings concerning the number of workers Whitewater had employed. Based on those findings and her interpretation of section 8-70-120(1)(a), the hearing officer concluded that the workers' services were not employment, but rather exempt agricultural labor. Consequently, the hearing officer concluded that Whitewater was not required to pay taxes on the amounts it paid the workers.[1]

¶ 6 On review, the Panel disagreed with the hearing officer's interpretation of section 8-70-120(1)(a) and set forth its own differing interpretation of the statute. The Panel set aside the

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[1] The hearing officer also determined that, as a threshold matter, the workers' services constituted employment under the general provisions of section 8-70-115, C.R.S. 2014. We do not address this determination, however, because Whitewater did not challenge it at the administrative level and, instead, focused solely on the agricultural labor exemption issue.

hearing officer's decision and remanded for additional factual findings.

¶ 7 On remand, the hearing officer made supplemental findings as instructed but adhered to her original interpretation of section 8-70-120(1)(a). Based on that interpretation, the hearing officer again concluded that the workers' services constituted exempt agricultural labor.

¶ 8 Whitewater appealed a second time. On review, the Panel applied its previous interpretation of section 8-70-120(1)(a) to the hearing officer's new findings and concluded that the workers' services constituted covered employment. Whitewater now seeks judicial review of the Panel's order.

II. Analysis

¶ 9 Whitewater contends that the workers' services were exempt agricultural labor under CESA and that the Panel misinterpreted section 8-70-120(1)(a). We agree.

A. Standard of Review

¶ 10 We may set aside the Panel's decision if it is erroneous as a matter of law. *See* § 8-74-107(6)(d), C.R.S. 2014. We are bound by

the hearing officer's evidentiary findings of fact, which are not in dispute here, if they are supported by substantial evidence in the record. *Harbert v. Indus. Claim Appeals Office*, 2012 COA 23, ¶ 7. However, we review de novo an agency's legal conclusions, including its interpretation of statutes. *Commc'ns Workers of Am. 7717 v. Indus. Claim Appeals Office*, 2012 COA 148, ¶ 7; *see Indus. Claim Appeals Office v. Softrock Geological Servs., Inc.*, 2014 CO 30, ¶ 9 ("[W]hether the ICAO . . . applied the appropriate test is a question of law that we review de novo.").

B. Agricultural Labor/Covered Employment

¶ 11 Section 8-70-109, C.R.S. 2014, defines certain work activities that constitute "agricultural labor." The parties do not dispute that the workers' services in this case fall within this definition.

¶ 12 Section 8-70-126, C.R.S. 2014, provides that covered employment "does not include services performed by an individual in agricultural labor . . . except as provided in section 8-70-120." *See also* § 8-70-113(1)(d), C.R.S. 2014 (providing that the term "employer" means "[a]ny employing unit for which agricultural labor as defined in section 8-70-109 is performed and is defined as

employment in section 8-70-120").

¶ 13 Section 8-70-120, in turn, describes the limited circumstances in which agricultural labor may be treated as covered employment subject to taxation. In this appeal, the parties dispute the meaning of section 8-70-120(1)(a). That subsection provides, in pertinent part, as follows:

> (1) "Employment" means services performed . . . by an individual in agricultural labor . . . when:
>
> (a) Such service is performed for a person who . . . for some portion of a day in each of twenty different calendar weeks . . . in either the current or the preceding calendar year, employed in agricultural labor . . . ten or more individuals, regardless of whether they were employed at the same moment of time.

C. The Meaning of Section 8-70-120(1)(a)

¶ 14 Whitewater and the hearing officer interpret section 8-70-120(1)(a) to require that, during the current or preceding year, a putative employer employed ten or more agricultural workers within each of twenty different weeks. More simply stated by the hearing officer, the statute requires "[twenty] weeks with ten [or more] agricultural workers each." Because Whitewater had employed ten

or more agricultural workers in only four different weeks from 2011 through the first quarter of 2013, the hearing officer concluded that the workers' services were not "employment" under section 8-70-120(1)(a).

¶ 15 In contrast, the Panel interprets section 8-70-120(1)(a) to require merely that a putative employer hired ten or more agricultural workers within a year and employed at least one agricultural worker in twenty different weeks. Because Whitewater employed more than ten total agricultural workers during 2011 and 2012 and employed at least one such worker in more than twenty weeks during both years, the Panel concluded that the workers' services constituted employment.

¶ 16 We agree with the hearing officer's and Whitewater's interpretation of the statute.

¶ 17 Our primary task in construing a statute is to give effect to the General Assembly's intent. *Yotes, Inc. v. Indus. Claim Appeals Office*, 2013 COA 124, ¶ 14. We first look to the plain and ordinary meaning of the words the General Assembly chose to utilize. *Accord Human Res., Inc. v. Indus. Claim Appeals Office*, 275 P.3d 697, 700

(Colo. App. 2010), *aff'd*, 2012 CO 15. We give consistent, harmonious, and sensible effect to all parts of the statute, and we seek to avoid an interpretation that would render any statutory language meaningless. *Yotes*, ¶ 14. We also must "not ascribe a meaning that would lead to an illogical or absurd result." *Id.*

¶ 18 In our view, the Panel's interpretation of section 8-70-120(1)(a) ignores the statute's express requirement that a putative employer have employed ten or more workers *in each* of twenty different calendar weeks. The word "each" is a "'distributive adjective pronoun, which denotes or refers to every one of the persons or things mentioned.'" *Hayes v. Ottke*, 2013 CO 1, ¶ 20 (quoting *Black's Law Dictionary* 507 (6th ed. 1991)); *see Mut. Sav. & Bldg. Ass'n v. Canon Block Inv. Co.*, 67 Colo. 75, 79, 185 P. 649, 650 (1919) (concluding that the expression "each year" meant "every one of two or more years").

¶ 19 The Panel argues that interpreting the statute to require the hiring of ten or more workers in each of twenty different weeks renders meaningless the phrase "regardless of whether they were employed at the same moment of time." We disagree. That phrase

simply means that all individuals who worked on a given day must be counted toward the total, regardless of whether they worked at the same time during that day. This interpretation allows us to give effect to both this phrase and to the "in each" language appearing earlier in the same sentence.

¶ 20 Our interpretation of section 8-70-120(1)(a) also comports with the General Assembly's intent that CESA provisions be construed to conform with federal authorities. *See* § 8-70-108, C.R.S. 2014 (providing that if any provisions of CESA "are determined to be in nonconformity with federal statutes," the Division of Unemployment Insurance "is authorized to administer said articles so as to conform with the provisions of the federal statutes"); *see also Indus. Comm'n v. Bd. of Cnty. Comm'rs*, 690 P.2d 839, 845 (Colo. 1984).

¶ 21 Section 8-70-120(1)(a) is based on 26 U.S.C. § 3306(a)(2)(B) (2012). As pertinent here, that statute provides that concerning agricultural labor, the term "employer" means any person who

> on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least 10 individuals in employment in agricultural labor for some portion of the day.

¶ 22 This federal provision plainly requires that, to be deemed an

employer, the putative employer must have hired at least ten agricultural workers in each of twenty different weeks. Our interpretation of section 8-70-120(1)(a) is consistent with this federal counterpart. *See Bd. of Cnty. Comm'rs*, 690 P.2d at 845.

¶ 23 The disputed language in section 8-70-120(1)(a) first appeared in 1977 as one of numerous definitional amendments to CESA. *See* Ch. 91, sec. 4, § 8-70-103(10)(f.3)(I)(A), 1977 Colo. Sess. Laws 1615. As Whitewater notes, the legislative history of these 1977 amendments shows they were intended to make CESA conform to recent changes in federal law. *See* Hearing on H.B. 77-1614 before the S. Bus. Comm., 51st Gen. Assemb., 1st Sess. (Apr. 20, 1997); Hearing on H.B. 77-1614 before the H. Bus. Comm., 51st Gen. Assemb., 1st Sess. (Mar. 29, 1997); *see also People v. Rockwell*, 125 P.3d 410, 418-19 (Colo. 2005) (discussing statute's legislative history to show that it did not contradict court's interpretation based on clear and unambiguous language).

¶ 24 The Panel asserts that section 8-70-120(1)(a) reflects the General Assembly's intent to create a broader definition of employment than that contained in 26 U.S.C. § 3306(a)(2)(B).

However, the Panel cites nothing from the legislative history of section 8-70-120(1)(a) or its predecessor, former section 8-70-103(10)(f.3)(I)(A), to support this assertion. Instead, the Panel relies solely on its expansive reading of section 8-70-120(1)(a) which, as we have already concluded, is erroneous because it renders the language "in each" meaningless.

¶ 25 Finally, the Panel's reliance on *Laub v. Industrial Claim Appeals Office*, 983 P.2d 815, 817 (Colo. App. 1999), is misplaced. In *Laub*, a division of this court addressed whether work performed for a nonprofit organization constituted "employment" under section 8-70-118, C.R.S. 2014. Although that statute contains language similar to section 8-70-120(1)(a) describing the number of workers a putative employer must hire over a specified time period, in *Laub* it was "undisputed" that these "timing provisions" of the statute had been "satisfied." *Laub*, 983 P.2d at 816-17. Thus, *Laub* is not instructive because the division did not interpret section 8-70-118's similar timing language.

III. Conclusion

¶ 26 In sum, we conclude that because Whitewater employed ten or

more agricultural workers during each of only four different weeks in the audit period, the workers' services did not constitute covered employment as defined in section 8-70-120(1)(a). Consequently, Whitewater was not required to pay unemployment taxes on amounts it paid the workers.

¶ 27 The Panel's order is set aside insofar as it concluded that the workers' services constituted covered employment rather than exempt agricultural labor, and the case is remanded with directions to reinstate the hearing officer's decision.

CHIEF JUDGE LOEB and JUDGE ROY concur.