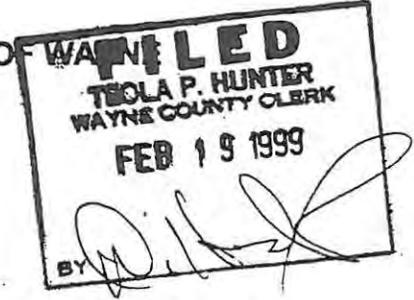


STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE



10821
SHELBY BAGGETT, et al

Appellants,

-v-

Case No. 98-820404-AE

RIVERSIDE OSTEOPATHIC HOSPITAL
and MICHIGAN EMPLOYMENT
SECURITY COMMISSION,

Hon. Wendy Baxter

Appellees.

OPINION

This appeal arises out of the Board of Review's decision to deny Claimants, nurses and service workers at Riverside Osteopathic Hospital, unemployment benefits. For the reasons set forth below, the Court will affirm the decision of the Board of Review.

Claimants went on strike May 24, 1990 and returned to work October 19, 1990. At some point during the strike the Claimants applied for unemployment benefits and the State of Michigan, Unemployment Agency, Department of Consumer and Industry Services (Agency)¹ originally determined that Claimants were disqualified from benefits from May 24, 1990 through June 30, 1990 pursuant to MCL 421.29(8).

The employer filed a protest asserting that Claimants should be disqualified for the entire duration of the strike. In lieu of a redetermination, the Agency transferred the

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The Agency was formerly known as the Michigan Employment Security Commission (MESCC).

protest to a referee for a hearing. The referee issued a decision which reversed the determination, finding Claimants to be disqualified from May 24, 1990 through October 19, 1990 under MCL 421.29(8).

Claimants appealed the decision to the Board of Review (Board). The Board affirmed the referee's decision.² Claimants filed a motion to reopen the proceedings because they did not receive copies of the decision nor were they notified of the decision until after the time for appeal. The Board granted Claimants' request to reopen the decision but denied their request for a rehearing. This appeal followed.

MCL 421.38 provides that the circuit court:

...may review questions of fact and law on the record made before the referee and the board of review involved in a final order or decision of the board, and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record.

The Michigan Employment Security Act, in general, is to be liberally construed, while the provisions regarding disqualification from benefits are to be narrowly construed. Korzowski v Pollack Industries, 213 Mich App 223, 229 (1995).

Claimants were found to be disqualified from receiving benefits under MCL 421.29. MCL 421.29 provides in pertinent part:

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The Board of Review modified the Referee's decision because it found that the decision regarding the Claimants on List B was not appealed and therefore, the redetermination as to those Claimants was final. The Claimants on List B are not involved in this appeal.

(8) Labor dispute. All of the following apply to an individual who seeks benefits under this act:

(a) An individual is disqualified from receiving benefits for a week in which the individual's total or partial unemployment is due to either of the following:

(i) A labor dispute in active progress at the place at which the individual is or was last employed, or a shutdown or start-up operation caused by that labor dispute.

The Court in Plymouth-Stamping, Division of Eltec Corp v Lipshu, 436 Mich 1 (1990) found an exception to the above provision when claimants are permanently replaced. The Court held that as of the date the claimants are permanently replaced, the labor dispute is no longer the cause of their unemployment and therefore, they are eligible to receive unemployment benefits.

In the case at bar, Claimants contend that the Board's finding that they were not permanently replaced was contrary to law. Claimants assert that the Board misinterpreted Plymouth-Stamping, and therefore, applied the wrong legal standard.

Claimants assert that according to Plymouth-Stamping, "[p]ermanent replacements are individuals hired to perform work done by strikers who are given permanent employment status by the employer. They are not necessarily employees who are hired with the intent to displace the strikers permanently." Claimants' Brief on Appeal, 10-11.

In Plymouth-Stamping, a plurality decision, a determination was not made as to whether the claimants were permanently replaced. As Justice Boyle noted:

Both parties agree that the claimants were permanently replaced, and the referee, the circuit court, and the Court of Appeals all so held. All lower bodies and courts implicitly or

expressly held that the employer failed to carry the burden of proof regarding disqualification, and no party to this proceeding has argued at any level, including before this Court, that these employees will not be permanently replaced. Both parties and all amici curiae have also structured the question in this case in the simplest terms possible, asking only whether such permanent replacement removed the disqualification under § 29(8).

Plymouth-Stamping at 37-38.

The Court held “that any striker who is permanently replaced is thereby entitled to benefits from that time forward unless and until some succeeding event again renders the labor dispute a substantial contributing cause of the unemployment.”

Plymouth-Stamping at 42.

As there was no disagreement that the claimants were permanently replaced, the Court then had to consider whether there was a succeeding event, in this case, work that became available after the strike concluded, that again rendered the labor dispute a contributing cause of their unemployment.

Justice Brickley, joined by Justices Riley and Griffin, stated “We read Justice Levin’s opinion as holding that, to the extent it can be determined on remand, any striker for whom a position became available during the strike is ineligible for benefits from the time each position became available.” Plymouth-Stamping at 60. This suggests that if there is a position available for a striking worker, he/she is ineligible for unemployment benefits.

This reading is consistent with Wohlert Special Products, Inc v Michigan Employment Security Commission, 202 Mich App 419, 426-427 (1993). In Wohlert, the

court held that the strikers' positions were never filled by permanent employees. The court noted that the strikers' jobs remained open throughout the strike and that the strikers had been advised by their employer that their jobs were available with the same duties and at the same or an increased wage rate. The Court also noted that every striker who requested to return to work was given a position.

The Supreme Court, 447 Mich 1022 (1994), vacated this decision in part because the Court of Appeals made findings of fact regarding the availability of positions for the claimants throughout the strike. The Court held: "Findings of fact should normally be made in the first instance by the administrative body, rather than the appellate court. On remand, the MESAC is first to decide who bears the burden of proof on the issue of availability of work and then make such findings of fact on that issue as are necessary to resolve the claims."

In the case at bar, the Board made findings of fact regarding the availability of work. The Board's decision reads in pertinent part as follows:

In Plymouth-Stamping, Div of Eltec Corp. v Lipshu, 436 Mich 1 (1990) the court held that a claimant "who is permanently replaced is entitled to benefits from that time forward unless and until some succeeding event again renders the labor dispute a substantial contributing cause of the unemployment."

What is at issue in this case is whether the employer hired permanent replacements, and if so, whether the labor dispute continued to be a substantial contributing cause of the claimant's unemployment.

The claimants offered no rebuttal evidence to the employer's evidence on this issue.

It was undisputed that after July 8, 1990, the employer began hiring employees who subsequently became permanent. It is also undisputed that from the date of the strike throughout the strike there were positions for all service employees who are part of this appeal. The employer withdrew its appeal to the Referee of the service employees who were either replaced or whose positions were eliminated. It is undisputed that the claimants were returned to positions at the conclusion of the strike.

We find that even though the employer hired replacements for some of the claimants; the claimants in LIST A had permanent positions available for them to return to. During the strike these claimants refused to return to these positions. As such, throughout the period in question, the labor dispute continued to be a substantial contributing cause of the claimants' unemployment.

The Court finds that the Board applied the correct legal standard. In the case at bar, the Board found that throughout the strike Claimants had permanent positions to return to and that Claimants were returned to positions at the conclusion of the strike. This finding is supported by numerous letters and a newspaper article, as well as testimony produced at the hearing. Further, the Board had evidence that the positions offered were for the rate of pay of the employer's last best offer (which would be an increase in pay), for the same or greater hours, the same department and the same classification. The Board had sufficient evidence to determine that claimants were not permanently replaced.

Claimants also assert that Board's determination that the strike once again became a substantial cause of the Claimants' unemployment after the employer communicated that it would hire strikers back was not supported by competent, material and substantial evidence on the whole record.

In order for the Board to reach the second holding of Plymouth-Stamping, it would have had to determine that the Claimants were permanently replaced. The Board's decision does not seem to indicate such a finding. A review of the Board's decision indicates that it did not state that the strike "once again" became a contributing cause for Claimants' unemployment. The Board found that the strike "continued to be a substantial cause of the claimants' unemployment."

In any event, the Court finds that there is competent, material and substantial evidence contained in the record to support the Board's finding that positions were available for the Claimants all throughout the strike and therefore, they were not permanently replaced.

For all the foregoing reasons, therefore, the decision of the Board of Review shall be affirmed.


Circuit Judge HON. WENDY M. BAXTER

DATED: FEB 19 1999