PROCEDURE/APPEALS

Sections 32, 32a, 33-36, 38

PROCEDURE/APPEALS cont.

APPEALS, Benefit check protest, Collateral estoppel, Determination, Failure to protest determination, Final order, Reconsideration, Res judicata

CITE AS: Roman Cleanser Co v Murphy, 386 Mich 698 (1972).

Appeal pending: No

Claimant: William J. Murphy
Employer: Roman Cleanser Company
Docket No: B68 2459 36521

SUPREME COURT HOLDING: When a determination is not protested it becomes a final order which is protected by res judicata and collateral estoppel; unless good cause for reconsideration is established a subsequent protest to a benefit check will not result in a redetermination of the original determination.

FACTS: On March 13, 1968, the Commission mailed a determination holding the claimant eligible for benefits. No protest was made within the 15-day period provided in the Act. A benefit check protest was filed in a letter dated May 17, 1968. On June 13, 1968, the Commission redetermined that the claimant was still eligible. The employer appealed, and prevailed on the merits in circuit court. The Court of Appeals affirmed.

DECISION: The original determination is final.

RATIONALE: "All of the questions raised in this case were properly discussed and disposed of in the well-reasoned minority opinion of Judge Charles L. Levin in the Court of Appeals. We adopt the following portion of that opinion as the opinion of this Court:

> '[I] do not think we can properly reach the meritorious question; the determination of March 13, from which no appeal was taken and which thereupon became final, is, by reason of the doctrines of res judicata and collateral estoppel, not subject to collateral attack.'"

Section 32a

APPEAL, Final order, Good cause for reconsideration, Notice of denial, Restitution determination, Subsequent claim for benefits

CITE AS: Mracna v Chrysler Corp. No. 80-035-442 AE, Wayne Circuit Court (February 24, 1981).

Appeal pending: No

Claimant: Bruce A. Mracna
Employer: Chrysler Corp.
Docket No: B79 04568 71371

CIRCUIT COURT HOLDING: Where a new claim for benefits triggers a protest of a restitution determination which has become final, the request for reconsideration must be denied.

FACTS: When the claimant filed an application for benefits in February, 1979, he was asked to repay $48.50 to the Commission. He then protested the restitution determination, which was issued in October, 1976.

DECISION: The restitution determination is final.

RATIONALE: "[I]t is apparent that the referee was correct in holding that the appellant had not timely requested the reconsideration of the original determination." "Under Section 32(a)(2) of the Michigan Employment Security Act the appellant seeks to reopen a matter two years beyond the one year limitation period." "It is the opinion of this Court the referee and the Board of Review were correct in their holdings in this matter; therefore, affirms the decision of the Board of Review and dismisses the appellant's appeal for lack of timely prosecution under Section 32(a)(2) of the Michigan Employment Security Act."

APPEALS, Check copy determinations, Finality of determinations and redeterminations

CITE AS: Kwit (Manufacturing Data Systems, Inc.) 1984 BR 89652 (B82 17032 R01).

Appeal pending: No

Claimant: Steven W. Kwit
Employer: Manufacturing Data Systems, Inc.
Docket No: B82 17032 R01 89652

BOARD OF REVIEW HOLDING: The Referee lacks jurisdiction to consider either an issue that has become final for lack of a protest or an issue not set forth in the notice of hearing unless the Referee advises the claimant of the new issue and secures a knowing and informed waiver.

On September 7, a redetermination was issued holding claimant ineligible for the week of August 15, which only the claimant appealed. The notice of hearing did not refer to the period in the redetermination, but the Referee defined the scope of the hearing as the period covered in the redetermination. However, the Referee held the claimant ineligible for the period from July 4, through October 21.

DECISION: The Referee did not have jurisdiction to consider the issue of claimant's eligibility for any week other than the week of August 15.

RATIONALE: Section 32(d) allows the employer to protest check determinations after the date of the determination or redetermination allowing the benefits which are the subject of the appeal before the Referee up to the date of the Referee hearing. The employer did not protest or appeal from a determination or redetermination allowing benefits. "Therefore, benefits paid to the claimant became final after the statutory twenty day period and were not "subject to further consideration pursuant to MES Section 33." The Referee was thus time barred from reviewing the claim ant's eligibility with the exception of the one week denial protested by the claimant ... "

"MES Board of Review rule 206(2) prohibits, absent a knowing and informed waiver, the taking of any evidence on an issue of which the parties have not been placed on notice by means of the notice of hearing. Thus, even if benefit checks had been issued shortly before the Referee hearing but with regard to which the check copy determinations had not yet become final by the date of that hearing, we would nevertheless reverse the Referee's findings as to those weeks and find the claimant had satisfied the availability requirements of Section 28(1)(c)."

EDITOR'S NOTE: Also see Rule 206 of the Rules of Practice, which has been revised since Kwit.

APPEAL, Timeliness of request for reconsideration to Commission, Newly discovered evidence, Good cause

CITE AS: Herman v Chrysler Corporation, 106 Mich App 709 (1981).

Appeal pending: No

Claimant: James F. Herman, et al
Employer: Chrysler Corporation
Docket No: B74 12159 49662

COURT OF APPEALS HOLDING: A "late discovery that a good case existed for appealing the MESC ruling" is not "newly discovered evidence."

FACTS: "[Claimant] was out of this state seeking work when the October 15, 1974, determination was delivered to her home but her mother informed her over the telephone that it arrived. [Claimant] did not file a timely request for reconsideration of the October 15 determination. However, sometime later she inadvertently saw one of the other [claimants] and an attorney and was informed by them that there might be a basis for an appeal. Therefore, on March 1, 1975, she filed a request for a reconsideration with MESC."

DECISION: Claimant's appeal is dismissed.

RATIONALE: "[Claimant's] 'newly discovered evidence' consists of her late discovery from another claimant and her attorney that a good case existed for appealing the MESC rulings pertaining to her case. This, however, is not 'newly discovered evidence.'"

"[Claimant] received actual notice of the MESC order disqualifying her for benefits in a telephone conversation with her mother. She did not attempt to appeal that decision within the 15-day appeal period. All facts pertinent to determining whether she should or should not have appealed the MESC redetermination were available to her at the time that she received notice of her disqualification for benefits. She chose not to seek legal assistance at that time. Her late attempt to do so does not amount to 'newly discovered evidence' constituting good cause to reopen her case."

APPEALS, Timeliness of appeal to Appeal Board, Filing appeal by mail, Mailing not filing

CITE AS: King v Calumet & Hecla Corp, 43 Mich App 319 (1972).

Appeal pending: No

Claimant: Bruce D. King
Employer: Calumet & Hecla Corporation
Docket No: B69 671 37597

COURT OF APPEALS HOLDING: Mailing does not constitute filing of an appeal from a Referee decision; filing requires delivery to, and receipt by, the Appeal Board.

FACTS: The claimant's last day for appealing a Referee decision was May 5, 1969. The circuit court stated; "The undisputed record shows that the envelope containing the notice or claim of appeal addressed to the Appeal Board at its Detroit office was stamped and postmarked at the Post Office at Hancock, Michigan, on May 5th, 1969, and was stamped as received at the office of the Appeal Board two days later on the 7th of May, 1969."

DECISION: The claimant did not file a timely appeal from the Referee decision.

RATIONALE: "Defendant, Michigan Employment Security Commission, contends that inasmuch as 'mailing' generally has been held not to constitute 'filing', the plaintiff-claimant, on the basis of the record, must be deemed to have filed his claim of appeal on May 7, 1969. On that date, according to the record, said claim was delivered to and received by the Appeal Board. It cites, among other cases, Beebe v Morrell, 76 Mich 144 (1889); People v Madigan 223 Mich 86 (1923); and Detroit United Railway v Department of Labor and Industry, 231 Mich 539 (1925), all of which support defendant's position as herein advanced.

In Beebe v Morrell, it is stated at p 120: 'A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file ...'"

Section 33

APPEALS, Constructive notice, Good cause, Legal advice, Timeliness of appeal to the Board of Review

CITE AS: Whitcomb v Stow Davis Furniture, No. 78827 (Mich App May 2, 1985).

Appeal pending: No

Claimant: Wayne Whitcomb
Employer: Stow Davis Furniture
Docket No: B82 11192 RO1 86744W

COURT OF APPEALS HOLDING: Delay in seeking legal advice does not constitute good cause for reopening a Referee's decision.

FACTS: Plaintiff failed to file a timely appeal to the Board of Review and, subsequently, sought to obtain an order from the Referee to reopen the decision. The Referee denied that request. The Board of Review affirmed, as did the circuit court. Plaintiff claimed that he contacted a lawyer because he did not know he could protest a restitution order. Moreover, claimant argues that he received the decision late, beyond the twenty-day appeal period, because he had moved and had not made the required address changes.

DECISION: Claimant's request to reopen is denied.

RATIONALE: Plaintiff has no one but himself to blame for his failure to leave a forwarding address. A person is charged with constructive notice where he had the means of obtaining knowledge but does not use them. Failure to receive a decision under these circumstances cannot constitute good cause. Ignorance of the law resulting from delay in seeking legal advice is not good cause.

APPEALS, Notice of hearing, Waiver of adjournment, Issue before Board of Review, Admissible evidence

CITE AS: Szypa v Kasler Electric Co., 136 Mich App 116 (1984).

Appeal pending: No

Claimant: William Szypa
Employer: Kasler Electric Company
Docket No: B82 05600 83572

COURT OF APPEALS HOLDING: Where the notice of hearing limits itself to an issue, where neither party requests an adjournment for further development of additional issues, where the Board of Review does not remand for the taking of further testimony on such additional issues and, where a knowing and informed waiver of an adjournment of the referee hearing was not obtained from the parties, the decision of the referee must be limited to the issue contained in the notice of hearing.

FACTS: The Referee limited his decision to the issue contained in the notice of hearing which was voluntary leaving. Employer attempted to introduce evidence of claimant's misconduct. Employer appealed to the Board of Review. The appeal did not mention the misconduct discharge issue. The Board of Review decided that claimant was discharged for misconduct connected with work. The Circuit Court reversed the Board of Review because the decision was based upon an issue not properly before the Board.

DECISION: The Referee's decision was appropriate based upon the admissible evidence presented; and the decision of the Circuit Court reversing the Board of Review was correct.

RATIONALE: " ... if the notice of hearing does not place the parties on notice of an issue which is raised at the referee hearing the hearing shall either be adjourned for a reasonable time if requested by either party, or in any event, evidence shall not be taken on the issue nor a decision be made thereon unless a knowing and informed waiver of adjournment is obtained from the parties.

"The employer and the referee had the opportunity to adjourn the hearing to allow the employee to gather rebuttal evidence on the misconduct issue and they failed to do so. The Board had the authority to remand the case for further testimony and it failed to do so. The employee had the right to assume that the only issue before the referee was whether he had voluntarily quit ... "

EDITOR'S NOTE: Also see Rule 206 of the Rules of Practice, which has been revised since Szypa.

Section 33

APPEALS, Appeal to court from remand order, Final order, Interlocutory appeal, Superintending control

CITE AS: Radke v ESC, 37 Mich App 104 (1971)

Appeal pending: No

Claimant: Herman Radke
Employer: Nelson Mill Company
Docket No: B68 3396 37329

COURT OF APPEALS HOLDING: Where an employer fails to appear at either the Referee hearing or the Appeal Board hearing, but the Appeal Board remands the matter for the employer's testimony, the remand order is not a final order, but it is a clear abuse of discretion which entitles the claimant to " ... circuit court review under the power of superintending control."

FACTS: A Commission redetermination held the claimant disqualified under the labor dispute provision of the Act. The employer made no appearance at the Referee hearing. The Referee reversed the redetermination, and an Appeal Board hearing was scheduled at the employer's request. The claimant and his attorney attended; the employer did not. The Appeal Board remanded the matter for the employer's testimony. On appeal by the claimant, a circuit court reversed the remand order.

DECISION: The claimant is " ... entitled to circuit court review under the power of superintending control."

RATIONALE: "Upon inspection, we find that the Genesee County Circuit Court could not properly entertain an appeal pursuant to MCLA 421.38; MSA 17.540. But, even if the Appeal Board's remand order is not a final order appealable under statute, we may view an appeal to circuit court as an application for an order of superintending control."

"We hold that upon this factual situation, there was a clear abuse of discretion by the MESC Appeal Board and, consequently, claimant was entitled to circuit court review under the power of superintending control. For us to rule otherwise would be an endorsement that the MESC Appeal Board has the right to place multiple stumbling blocks in front of a claimant in order to recover benefits but excuse the most extravagant and indefensible neglect of the entire proceedings by an employer."

Section 32a

APPEAL, Timeliness of request for reconsideration, Delay in checking mail, Negligence, Non receipt of redetermination, Post office box, Request for reconsideration

CITE AS: Golembiewski v Kysor Industrial Corp, No. 76-20218 AE, Kent Circuit Court (August 23, 1978).

Appeal pending: No

Claimant: Hope Golembiewski
Employer: Kysor Industrial Corp.
Docket No: B75 3449 48053

CIRCUIT COURT HOLDING: Where a party uses a post office box for receiving mail, negligence in checking the box is not good cause for reconsideration.

FACTS: A redetermination was mailed to the claimant on December 16, 1974. "On January 13, 1975, appellant filed a statement protesting redetermination and stating, 'I am late with this request because we have post office box and my husband did not pick up the mail.'"

DECISION: The redetermination is final.

RATIONALE: "Twenty-eight (28) days after the redetermination was mailed by the M.E.S.C., appellant filed a request for reconsideration pursuant to Sec. 32a." "Regulation 270 issued by the M.E.S.C. pursuant to the Act defines what constitutes good cause for reconsideration of a prior determination where there has been an untimely filing." "In his decision, the Referee stated:

> 'The claimant states she and her husband had a post office box since April, 1974. She further states that during this period of time neither she nor her husband went to the post office to pick up their mail. The redetermintion was mailed to the proper address, and the claimant's negligence in not getting the mail is attributable solely to her for her failure to protest timely.'"

Section 32a

APPEAL, Good cause, Lack of written notice, Personal service of document, Record of receipt, Substantial evidence, Testimony of non-receipt, Timeliness of protest, Verbal notice

CITE AS: Donahoo v Michigan Department of Social Services, No. 79- 17785 AE, Washtenaw Circuit Court (March 3, 1980).

Appeal pending: No

Claimant: Leonard Donahoo
Employer: Michigan Department of Social Services
Docket No: B78 50580 61097

CIRCUIT COURT HOLDING: Where there is no substantial evidence that a party received a copy of a determination, the party has good cause for a late protest.

FACTS: The Commission denied the claimant's late request for a redetermination. The Referee stated:

"The claimant testified that he never received a copy of the determination dated November 30, 1977. However, the Branch Office copy of the Determination (Exhibit #6) indicates that it was personally served on November 30, 1977."

"The claimant stated that even though he was not given a copy of the determination on November 30, 1977, he was verbally advised that it was unfavorable and that he would be sent a copy."

DECISION: The appeal is remanded for a Referee hearing on the merits.

RATIONALE: "Upon reading the Briefs and hearing oral argument in the above cause, the Court finds that there is no competent, material and substantial evidence to support a finding that the Plaintiff/Appellant was ever served with a Determination Notice by the Michigan Employment Security Commission. Absent such evidence, the 20 day statutory appeal period was not and could not have been triggered. The court further finds that the Plaintiff's appeal was timely and/or that he has established good cause for a late appeal."

APPEALS, Filing appeal, Loss of mail, Manner of filing appeal, Non receipt of determination, Timeliness of appeal to Referee

CITE AS: Mellor v Pro-Golf of Royal Oak, No. 80-205 AE, Macomb Circuit Court (June 19, 1980).

Appeal pending: No

Claimant: Craig Mellor
Employer: Pro-Golf of Royal Oak
Docket No: B78 11552 65901

CIRCUIT COURT HOLDING: Non receipt of a mailed request for appeal is not good cause for late filing of an appeal.

FACTS: "Mr. Mellor claims that on June 19, 1978 he mailed a timely appeal request to the MESC. On July 27, 1978 he personally appeared at the MESC offices and requested a reconsideration of the June 8th redetermination. The MESC contends that it never received the June 19th request and, therefore, the July 27th request was tardy and of no effect."

DECISION: The redetermination is final.

RATIONALE: "The effect of the MESC's nonreceipt of the June 19th letter is governed by King v Calumet & Hecla Corporation, 43 Mich App 319 (1972). The claimant in King had 15 days in which to file an appeal with the MESC Appeal Board. He mailed his appeal on the 15th day and, consequently, the Commission did not receive it until the 15 day appeal period had expired. The King court held that mailing did not constitute filing and that the Commission was justified in denying the claimant's appeal as untimely."

"The MESC contends and the Court agrees that, 'The "good cause" provision was intended to protect those who, absent culpable fault, were unable to present the merits of their case by making a timely request for redetermination or appeal.' Appellee's brief P 10."

Section 32a, 33

APPEAL, Timeliness of appeal to Referee, Negligence, Good cause

CITE AS: Terry v Capitol Area Comprehensive Health Planning Association, No. 74-16447 AE, Ingham Circuit Court (January 30, 1985).

Appeal pending: No

Claimant: Dorothy L. Terry
Employer: Capitol Area Comprehensive Health Planning Association
Docket No: B73 5291 44482

CIRCUIT COURT HOLDING: "Negligence in filing an appeal is not good cause ... "

FACTS: "A review of the record on appeal from the Michigan Employment Security Commission in this case along with briefs by the parties clearly indicates to this Court that Dorothy L. Terry did not file her original appeal within the fifteen day period. That the referee and the appeal board found that good cause did not exist in her delay in filing said appeal."

DECISION: "The claimant's request for an appeal is denied."

RATIONALE: "A careful review of this case and the record indicates that the decision of the appeal board and the referee is supported by competent, material and substantial evidence on the whole record and that said order or decision is not contrary to law."

"Negligence in filing an appeal is not good cause and the record clearly shows that she had no new and material evidence to present on the merits of her claim which would be good cause for a rehearing and it is clear that she was present and had knowledge of her right to appeal based upon the ruling of the referee from the case as he heard it. The mere failure to avail oneself of a right to appeal within the appeal period and later determining that you should appeal, whatever the reason, does not in and of itself constitute good cause."

APPEALS, Referee bias

CITE AS: Berry v APCOA, No. 104859 (Mich App March 15, 1989).

Appeal pending: No

Claimant: Nizar M. Berry
Employer: APCOA, Inc.
Docket No: B86 01519 RM1 103536W

COURT OF APPEALS HOLDING: A referee need not be disqualified merely because he has worked with a party's attorney in the past.

FACTS: Claimant was observed leaving work before the end of his shift on four separate occasions in an eight-day period. Claimant's time cards were stamped to falsely indicate that he left work later than observed. Claimant contended that he went home for lunch and returned later to punch out, but his testimony was contradicted by observations of employer's witnesses which the referee found more credible. Claimant also asserted that he was engaged in surveillance work for employer, but presented no credible testimony in this regard. During the hearing claimant's attorney moved to disqualify the Referee because the Referee had worked with the employer's attorney in the past. The Referee declined to disqualify himself. The Referee found the claimant disqualified for misconduct. In a petition for rehearing the claimant's attorney again raised the Referee disqualification issue and also alleged the employer's attorney and Referee spoke to each other after the hearing for ten minutes.

DECISION: Claimant was disqualified for misconduct. The Referee was not required to disqualify himself from deciding the appeal.

RATIONALE: While actual bias or prejudice need not be shown, allegations of bias must be supported by facts. "A hearing before an unbiased and impartial decisionmaker is a basic tenant of due process. ... Actual bias or prejudice is not required to be shown. Where the situation is one which 'experience teaches that the probability of actual bias on the part of a decisionmaker is too high to be constitutionally tolerable,' then a decisionmaker must be disqualified. City of Livonia v DSS, 423 Mich 466, 509; 378 NW2d 402 (1985), citing Withrow v Larkin, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). In Crampton, supra, p 351 our Supreme Court stated: Among the situations identified by the [Withrow] Court as presenting that risk are where the judge or decisionmaker (1) has a pecuniary interest in the outcome; (2) 'has been the target of personal abuse or criticism from the party before him'; (3) is 'enmeshed in [other] matters involving petitioner...'; or (4) might have prejudged the case because of prior participation as an accuser, investigator, factfinder or initial decisionmaker. We find that the present claim does not fall within any of the above circumstances."

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3, 9:A

APPEAL, Timeliness of appeal to Board, Administrative clerical error, Delay of mail, Filing appeal by mail, Good cause, Postal delay,

CITE AS: Bertels v Ironwood Products Co., No. 74-133 AE, Gogebic Circuit Court (January 25, 1978).

Appeal pending: No

Claimant: Joseph H. Bertels
Employer: Ironwood Products Co.
Docket No: B73 1567 RO RO 46033

CIRCUIT COURT HOLDING: Where an appeal is late because the United States Postal Service took nine days to deliver a letter of appeal betweeen two cities in Michigan, and there is other evidence of poor mail service between the two points, the postal delay constitutes an administrative clerical error.

FACTS: The claimant mailed a letter of appeal in Bessemer, Michigan, on October 23, 1973. The deadline for appealing was October 26, 1973. The letter was delivered to the Appeal Board in Detroit on November 1, 1973. The appeal was rejected as untimely. A subsequent request for reopening was denied by the Referee. The claimant's copy of the order of denial was apparently lost in the mail. The Appeal Board affirmed the denial.

DECISION: The claimant has good cause for late appeal.

RATIONALE: "[W]hile I assume that the provisions of Regulation 270 relating to administrative clerical errors relates to the M.E.S.C., the fact that the United States Postal Service took nine days to deliver a letter from Bessemer, Michigan, to Detroit, Michigan, containing the Claim of Appeal of the Plaintiff here, it certainly could constitute a clerical error of some kind insofar as the Postal Service is concerned."

"[I]t would appear at least, that mail communication between Bessemer, Michigan, and Detroit, Michigan, leave much to be desired. As stated in the brief of the Defendant, M.E.S.C., the term good cause as used in the Act presents a mixed question of law and fact. This court does not believe that one administrative agency of our State Government can hold the failure of an administrative agency of the Federal Government to promptly deliver mail does not constitute good cause for reopening ... "

Section 38

APPEALS, Circuit Court standard of review

CITE AS: Cummings Realty Apartments v Houston, No. 91016 (Mich App February 18, 1988).

Appeal pending: No

Claimant: Everett Houston
Employer: Cummings Realty Apartments
Docket No: B83 09820 91646

COURT OF APPEALS HOLDING: The Circuit Court applied the correct standard of review to review and affirm the decision of the Board of Review.

FACTS: The employee discharged the claimant for intoxication on the job. The Referee held the claimant not disqualified under Section 29(1)(b) because the employer failed to meet its burden of proof since the evidence was conflicting. The Referee also found the claimant not disqualified because the employer had condoned and tolerated claimant's intoxication in the past thereby requiring the employer to warn claimant before discharge. The Board of Review and the Circuit Court affirmed.

DECISION: The claimant is not disqualified under Section 29(1)(b).

RATIONALE: "From our consideration of the record, it is clear that the circuit court correctly considered and applied the foregoing standards. The evidence presented at the referee hearing on claimant's alleged misconduct conflicted... . After recognizing the conflict in the testimony, deciding that he was faced with 'equal testimony,' and correctly assigning the burden to show misconduct to the employer, Tuck, supra, p 588, the hearing referee concluded that the employer failed to meet its burden. The circuit court found that the hearing referee's decision, and the MESC's board's affirmation of that decision, was authorized by law and supported by competent, material and substantial evidence. Since this is the proper standard, and it was correctly employed by the lower court, we affirm the circuit court determination."

Section 34, 38

APPEALS, Appeal to court from Board remand order, Adequate remedy, Appeal on the merits, Circuit court review, Final order, Interlocutory appeal, Superintending control

CITE AS: Baldwin v Hubbard Apiaries, Inc, No. 79-11-708, Lenawee Circuit Court (February 1, 1980).

Appeal pending: No

Claimant: Lu Ann Baldwin
Employer: Hubbard Apiaries, Inc.
Docket No: B76 19013 RO 58074

CIRCUIT COURT HOLDING: A remand order of the Board is not appealable to circuit court. The order is not final, and a party " ... has an adequate remedy by appeal if an adverse decision on the merits makes it necessary."

FACTS: A Referee denied the claimant's request for reopening. "The Board of Review 'set aside' the 'denial of reopening and Referee decision and remanded for a hearing on the merits of the redetermination of October 8, 1976.'" The employer sought circuit court review of the remand order.

DECISION: The appeal to circuit court is dismissed.

RATIONALE: The Court based its decision on the holding in Ashford v UCC, 328 Mich 428 (1950). The Court distinguished the present case from the facts in Radke v ESC, 37 Mich App 104 (Reh den 1972).

"Nothing in the instant case indicates the attempted use by the employee of anything amounting to the 'subtly coercive effects of economic pressure.' Furthermore, at the time of the Radke decision GCR 1963, 711.2 prohibited the use of superintending control, 'if another plain, speedy and adequate remedy is available to the party seeking the orders.' Radke p110. This now has been amended and superintending control may not be used 'if another adequate remedy is available to the party seeking the order.' GCR 1963 711.2. The employer has an adequate remedy by appeal if an adverse decision on the merits makes it necessary."

Section 32a

APPEALS, Proof of service, Time limits, One year limit

CITE AS: McBride v Americana Mobile Home Park, Inc., 173 Mich App 275 (1988).

Appeal pending: No

Claimant: Jimmie McBride
Employer: Americana Mobile Home Park, Inc.
Docket No: B85 04773 100673

COURT OF APPEALS HOLDING: When there is no proof of service of a determination on a party, the 30-day period in which to protest the determination is tolled, and even if the protest is filed more than 1 year later, Section 32a does not bar the Commission from considering and ruling upon it.

FACTS: Employer filed a protest to a determination issued July 23, 1982 on March 14, 1985. Employer alleged non-receipt of the determination as its basis for failure to timely protest. The Referee and the Board of Review found that employer was entitled to no relief because it filed more that 1 year after the determination was issued.

DECISION: Employer has 30 days from the date of the Court of Appeals decision to file a protest to a determination more than 2 years old.

RATIONALE: "We believe that in order to reflect compliance with the statutory mandate relative to notice, the MESC file should contain some proof reflecting the fact that defendant was personally served with or sent a copy of the determination. We are simply unable to conclude that there was compliance with the notice provisions of the statute in this case.

We are therefore constrained to conclude that there was no competent, material and substantial evidence on the whole record to support the implicit finding that the defendant had been notified of the MESC determination and that, therefore, the applicable appeal periods began running. There being no proof that notice of the determination was sent to the defendant, defendant has the now applicable 30-day appeal period in which to file an application for review of the determination."

APPEALS, Board of Review, de novo fact finding

CITE AS: Sprowl v Village of Merrill, No. 80822 (Mich App August 25, 1986).

Appeal pending: No

Claimant: Harold Sprowl
Employer: Village of Merrill
Docket No: B82 18119 R01 89984W

COURT OF APPEALS HOLDING: It is within the statutory authority of the Board of Review, solely upon a review of the record, to make findings of fact different from those made by a Referee.

FACTS: A police officer was discharged after he damaged a door in the employer's police department and locked himself in an office for 3 hours while enraged over receiving 2 additional reprimands for other infractions. The MESC Referee found disqualifying conduct. The Board reversed.

DECISION: Claimant is not disqualified under Section 29(1)(b).

RATIONALE: "While neither statute expressly provides that the MESC board of review is to exercise de novo review of a referee's decision, they do give the board of review wide power and authority. We conclude that the Legislature granted the MESC board of review the power of de novo review pursuant to Sections 34 and 35 of the Michigan Employment Security Act, and left to the appeal board to decide whether such de novo review would occur on the basis of only the written record, or whether additional testimony would be taken."

Section 32, 32a

APPEALS, Failure to protest determination, Collateral estoppel, Final order, Issue before referee, Res judicata, Restitution determination

CITE AS: Van Tuhl v Henry Vroom and Son, Inc, No. 80-019-307 AE, Wayne Circuit Court (October 31, 1980).

Appeal pending: No

Claimant: Richard Van Tuhl
Employer: Henry Vroom and Son, Inc.
Docket No: EB78 07923 67964

CIRCUIT COURT HOLDING: A disqualification determination which has become final may not be reopened by protesting a restitution determination which results from the disqualification.

FACTS: The claimant did not protest the determination which found him disqualified for misconduct discharge. He did protest a subsequent determination which held that he had received benefits during a period of disqualification.

DECISION: The disqualification determination is final.

RATIONALE: "As the determination had become final, the only issue before the Referee in Case Number EB78 07923 67964, which is the disqualified matter of this appeal, was whether the claimant had received benefits during the period of requalification, which have to be repaid."

"The Referee properly did not consider the question raised by the determination of June 19, 1978, that is, the separation issue stemming from the claimant's discharge by the Hale Area Schools. In Roman Cleanser Co. v Murphy, 386 Mich 598, 703-704 (1972), the Supreme Court held that the doctrine of res judicata and collateral estoppel applied to administrative matters, and an issue once settled in a determination, redetermination, or decision, which has become final is not subject to collateral attack."

APPEALS, Timeliness, Good cause for late protest, Average reasonable claimant, Definition of good cause, Misunderstanding of procedure, Notice of denial

CITE AS: Jaeger v Sears, Roebuck and Co, No. 80-010-766 AE, Wayne Circuit Court (July 18, 1980).

Appeal pending: No

Claimant: Catherine Jaeger
Employer: Sears, Roebuck and Co.
Docket No: B78 52058 59617

CIRCUIT COURT HOLDING: A party's lack of understanding of the appeal process can constitute good cause for a late protest.

FACTS: The claimant was found disqualified and ineligible. She continued to report to the branch office, but did not protest the determination until three months later. The claimant said she had not understood the protest procedure. A Notice of Denial was issued.

DECISION: The claimant has good cause for a late protest.

RATIONALE: "[T]he parameters of 'good cause' are not rigidly defined. The record in this case clearly demonstrates a rigid definition by the Commission to the effect that 'good cause' is limited to the situations defined in the regulation."

"The Board of Review has taken the position that a party's lack of understanding of the determination or of the appeal process cannot constitute good cause. This is an erroneous conclusion of law. A factual determination, as was made in this case, that there was a good faith misunderstanding by a lay person of the 20-day time limit on appeal, where the appeal is immediately filed when there is awareness within time parameters such as those existing in this case, can constitute good cause within the meaning of the Act and the regulation. The standard of conduct to be applied in determining such matters is the standard of conduct of the average reasonable claimant in light of all the circumstances, not the standard of conduct of the average Referee or Board of Review member."

Section 38

APPEALS, Circuit Court standard of review

CITE AS: Starr v Southwicke Square Cooperative, No. 102931 (Mich App October 21, 1988).

Appeal pending: No

Claimant: Lora Starr
Employer: Southwicke Square Cooperative
Docket No: B85 12577 101680

COURT OF APPEALS HOLDING: The Circuit Court exceeded its authority in reversing the Board of Review. A reviewing court may reverse the findings made by the Board of Review only if the decision is contrary to law or is not supported by competent, material and substantial evidence on the whole record.

FACTS: Claimant worked as resident manager of a cooperative housing development. Her performance was reviewed by an independent accountant who recommended she be discharged. Claimant eventually resigned because of alleged harassment. The Referee awarded benefits to her but the Board of Review reversed. The Circuit Court reversed the Board "stating, 'ultimately, I guess it's on the basis that this is not spurious, it's not frivolous, and she should be entitled to her unemployment worker's compensation.'"

DECISION: Claimant is disqualified under Section 29(1)(a).

RATIONALE: "This Court has described 'substantial evidence' as 'evidence which a reasoning mind would accept as sufficient to support a conclusion,' adding that '[w]hile it consists of more than a mere scintilla of evidence it may be substantially less than a preponderance of the evidence ...' [citations omitted]. Thus, this Court has acknowledged that it is not the function of a court of review to resolve conflicts in the evidence or to pass on the credibility of witnesses ... [citations omitted] ..."

"Under the limited scope of review applicable to appeals from Board of Review decisions, the circuit court was not at liberty to reverse the Board's decision unless it found that that decision was not supported by competent, material and substantial evidence on the whole record."

Section 32a

APPEAL, Good Cause, Timeliness of appeal to Referee

CITE AS: Jones v Showcase, No. 81-103221 AE, Wayne Circuit Court (November 5, 1981).

Appeal pending: No

Claimant: Gwendolyn Jones
Employer: Showcase Corporation
Docket No: B79 07537 67950

CIRCUIT COURT HOLDING: Good cause implies a situation out of the claimant's direct control.

FACTS: The Commission mailed a redetermination on October 12, 1978, which held the claimant disqualified. The claimant requested a Referee hearing on April 9, 1979, based on the fact that she had "just made up [her] mind that racial discrimination was a good and justified reason for quitting."

DECISION: The claimant failed to establish good cause for the untimely appeal.

RATIONALE: Good cause is not defined in the Act. MESC regulation 270(4) lists the following: 1) newly discovered material facts which through no fault of the claimant were not available at the time of the determination 2) when MESC has additional or corrected information 3) when an administrative clerical error has been discovered.

Regulation 210(2)(b) and 270 and Rule 109 also define good cause. Good cause under these rules includes acts of God (such as floods, storms or other natural disasters), work, reliance on a promise of work, or seeking work where a reasonable indication that work is available exists, the closing of MESC offices, physical incapacity, attendance at a funeral, incarceration or jury duty.

"The examples given for good cause in the MESC rules and regulations, while not meant to be definitive or exclusive, clearly imply a situation out of the claimant's direct control. Procedural deadlines would be meaningless if claimants could bring appeals months after the expiration of time limitation simply because they have changed their minds about taking action."

APPEALS, Collateral estoppel

CITE AS: Storey v Meijer, Inc., 431 Mich 368 (1988).

Appeal pending: No

Claimant: William F. Storey
Employer: Meijer, Inc.
Docket No: NA

SUPREME COURT HOLDING: MESC determinations are not to be used to collaterally estop the litigation of issues in a subsequent civil suit but are limited to the purpose of determining a claimant's eligibility for benefits.

FACTS: Claimant was denied benefits by the MESC because of theft connected with his work. The Referee concluded there was neither theft nor discharge, but that finding was reversed by the Board of Review. While that appeal was pending at the Board, claimant filed a wrongful discharge action in circuit court. Employer moved for summary disposition on the basis the Board's factual findings regarding claimants disqualification collaterally estopped him from relitigating those issues. The circuit court granted summary disposition and the court of appeals affirmed.

DECISION: The circuit court's summary disposition in favor of the employer is reversed. Remanded for further proceedings.

RATIONALE: "We find that Section 11(b)(1) clearly and unambiguously prohibits the use of MESC information and determinations in subsequent civil proceedings unless the MESC is a party or complainant in the action.

Furthermore, our decision in this case advances the legislative purpose of the unemployment compensation system and is supported by considerations of public policy that underly the exceptions to the application of collateral estoppel. ...

Due to the full range of remedies available in a civil action, the parties have a greater incentive to fully litigate the civil claim than the claim for unemployment benefits. If collateral estoppel is applied to determinations of the MESC, both claimants and employers will be forced to fully litigate the administrative claim, potentially delaying the determination of benefit rights and burdening the unemployment compensation system."

Section 38

PROCEDURE/APPEALS, New Issue, Remand, Scope of Review

CITE AS: Rybski v Mt. Carmel Mercy Hospital, No. 95927 (Mich App June 25, 1987).

Appeal pending: No

Claimant: Judith A. Rybski
Employer: Mt. Carmel Mercy Hospital
Docket No: B85 03717 99829

COURT OF APPEALS HOLDING: Where the redetermination and notice of hearing only referenced a voluntary leaving issue, where there was no informed waiver of adjournment to permit consideration of a misconduct issue, and where the Board did not remand, the circuit court erred in remanding for a new hearing on the additional issue.

FACTS: The redetermination issued by the MESC held claimant disqualified under Section 29(1)(a) for voluntary leaving. The notice of hearing only referenced Section 29(1)(a). The Referee held claimant not disqualified under Section 29(1)(a) and also not disqualified for misconduct under Section 29(1)(b). The Board reversed and held claimant disqualified for misconduct. Because the Board had not given the claimant an opportunity to present evidence on the misconduct issue, the circuit court remanded for further proceedings on the misconduct issue.

DECISION: Claimant is not disqualified for voluntary leaving. Remand for proceedings regarding the discharge issue is set aside.

RATIONALE: In reversing the circuit court's remand the Court of Appeals relied on Szypa v Kasler Electric Co., 136 Mich App 116; (1984), and found the only issue before the Referee was voluntary leaving.

"The circuit court in this case determined that, in the interest of justice, the matter should be remanded to the referee for a hearing on the issue of whether plaintiff was guilty of misconduct within the meaning of Section 29(1)(b). We are not persuaded that justice required remand in this case. ... The employer had an opportunity to request an adjournment of the referee hearing so that the issue of misconduct could be properly developed, or to ask that the Board of Review remand for further evidence. It did neither. Plaintiff was on notice that the sole issue was whether she was disqualified under Section 29(1)(a). Justice does not require that the employer be given yet another opportunity to present the misconduct issue."

11/90
3, 6, d14:NA

Section 32a

PROCEDURE/APPEALS, Timeliness, Mailing not filing

CITE AS: Midwest C.O.M. Systems, Inc. v MESC, No. 87383 (Mich App August 28, 1986); lv den 428 Mich 882 (1987).

Appeal pending: No

Employer: Midwest C.O.M. Systems, Inc.
Docket No: L83 08498 1778

COURT OF APPEALS HOLDING: A protest of a determination may not be the basis for a redetermination unless the appeal is received by the MESC within one year of when the determination was issued.

FACTS: The employer failed to submit a required quarterly report and as a result its unemployment tax rate was increased from 4.8% to 9.0% by means of a determination issued March 27, 1981. The missing report was provided to the MESC in May, 1981. The employer alleged it submitted a request for redetermination of the March 27 determination on June 2, 1981, but there was no evidence that protest was ever received by the MESC. The employer did request a redetermination by a letter sent in May, 1982 which was received by the MESC. Because that protest was received more than 1 year after the determination the MESC denied the employer's request for redetermination.

DECISION: The MESC properly denied the employer's request for a redetermination where that request was received by the MESC more than 1 year after issuance of the disputed determination.

RATIONALE: "The Board of Review's decision is supported by competent, material, and substantial evidence. The board correctly held that the mailing of the June 2, 1981 request does not constitute a filing. King v Calumet & Hecla Corp, 43 Mich App 319, 326; 204 NW2d 286 (1972). The only written request for redetermination that was actually received by MESC was a letter sent in May 1982, past the one-year deadline for filing an appeal. Thus, the Board of Review correctly denied plaintiff's request for redetermination."

The court went on to reject the employer's contention that filing of the missing report in May, 1981 constituted a request for redetermination. "MCL 421.32a(2) states that a request for redetermination must be filed. Merely sending missing reports does not constitute a request for redetermination."

Section 16, 32a

APPEALS, Time limits, One year limit, Disputed issue

CITE AS: Lee v ESC, 346 Mich 171 (1956).

Appeal pending: No

Employer: Vincent Lee d/b/a Master Polishing & Buffing Co
Docket No: L53 1161 880, 881

SUPREME COURT HOLDING: The one year statute of limitations on challenging determinations in Section 32a does not bar an employer from collecting a refund of erroneously collected contributions made more than one year after the determination setting the contribution rate, because even though Section 32a bans any protest of a legally contested issue, it is not applicable to a request for refund of contributions voluntarily paid and accepted. Section 16 allows a claim for refund of overpayment up to 3 years afterwards, if paid erroneously.

FACTS: One of the partners of a co-partnership purchased the other partner's interest at dissolution and filed a report to determine liability. There were errors in the report regarding the number of weeks and number of employees which the business had during the period in issue. A determination was issued, but the employer did not contest it for more than 1 year. After 1 year the employer filed for a refund. A commission audit in the interim observed the obvious errors but did not bring about an adjustment of the rate.

DECISION: The employer was entitled to a refund pursuant to Section 16.

RATIONALE: "Section 32a also provides that the commission may reconsider a determination for good cause, provided it is made within one year from the date of mailing of the original determination of the disputed issue.

The words 'disputed issue'. as used in Section 32a, refer to a contested issue or a matter in dispute between the employer and the commission. In such disputed matters relief must be requested within 15 days or within one year for good cause shown. In our opinion matters not in dispute, such as payments voluntarily made and accepted, do not fall within the restrictions of Section 32a."

Section 32a, 62(b)

RESTITUTION, Time limits, One year limit, Fraud

CITE AS: Royster v Chrysler Corp, 366 Mich 415 (1962).

Appeal pending: No

Claimant: Turner Royster
Employer: Chrysler Corp
Docket No: B59 1749 23274

SUPREME COURT HOLDING: Section 32a does not bar a protest of claimant's eligibility made more than 1 year after the payment of benefits based upon fraud.

FACTS: Claimant was laid off January 10, 1958. On January 15, 1958 he filed a claim for benefits. Claimant was recalled and worked the week ending January 25, 1958. He received wages of $87.78. He was laid off again on January 25, 1958.

On January 29, 1958 the claimant appeared at an MESC office and reported he had not worked and had no earnings for the weeks ending January 18, and January 25, 1958. Based on his representation, the Commission paid him benefits for the week ending January 25, 1958.

Chrysler discovered the discrepancy on February 4, 1959. Chrysler sought a redetermination of ineligibility for that week - more than one year after the determination of eligibility.

DECISION: The Commission did have jurisdiction of the misrepresentation issue. The claimant was subject to the fraud provisions of Section 62(b).

RATIONALE: In contrast to the eligibility issues which were in question when the claimant was paid benefits in January, 1958, "the presently disputed issue is whether plaintiff intentionally concealed his earnings for the week in question, and ... it became the disputed issue only after defendant's protest on February 4, 1959." The employer's position is supported by Lee v ESC, 346 Mich 171. (See Digest 16.26)

Section 32a

PROCEDURE, Good cause for late protest, MESC Rule 270

CITE AS: Laycock (Chrysler Corp), 1978 BR 54055 (B76 15558).

Appeal pending: No

Claimant: Marilyn F. Laycock
Employer: Chrysler Corp
Docket No: B76 15558 54055

BOARD OF REVIEW HOLDING: Denial of receipt of a Commission document creates an issue of fact which must be decided by the trier of fact.

FACTS: Claimant's protest of determination was not received within 20 days after the determination was mailed. Claimant testified she did not receive the determination, but had received all other MESC mailings. She lived in a single family dwelling and had no known problem receiving her mail. The Referee, relying on an earlier Board decision Chasca (Detroit Edison), B76-3345-51196, held that claimant's testimony of non-receipt was inadequate as a matter of law to rebut the presumption of mailing.

DECISION: Remanded for hearing on whether the document was in fact received by the claimant or at her mailing address.

RATIONALE: Chascsa is at odds with higher court rulings to the effect that the presumption of receipt is rebuttable. Testimony of the party denying receipt is often the only testimony and is not weightless because it is "self-serving".

APPEALS, Scope of review, Issues before Board

CITE AS: Hoagland (Chrysler Corp), 1986 BR 96529W (B82 22052).

Appeal pending: No

Claimant: Connie Hoagland
Employer: Chrysler Corp
Docket No: B82 22052 RO1 96529W

BOARD OF REVIEW HOLDING: On protest or appeal of a ruling by the Commission covering multiple issues, only the issue or issues which were decided adversely to the appealing party are preserved by the appeal.

FACTS: A Commission determination held claimant ineligible under the able and available requirement of Section 28(1)(c) and subject to restitution under 62(a) but not subject to the penalty provisions of 62(b) for intentional misrepresentation. Employer protested, contending claimant shall be subject to the fraud penalty. The employer's protest was timely, but nevertheless a Notice of Denial was issued. Employer appealed. The Referee found good cause on the procedural issue, then proceeded to affirm the findings of the determination. Employer did not appeal further. Claimant, however, requested a rehearing. Her request was denied and she then appealed to the Board of Review.

DECISION: Claimant's appeal dismissed in a decision by the full Board.

RATIONALE: The full Board noted the claimant did not protest the original determination. Further, she was not the appealing party at the appeal heard by the Referee. In light of that, the only issue properly before the Referee was the matter of the misrepresentation penalty appealed by the employer. As the Referee's decision on that issue was not adverse to the claimant, there was no basis for her appeal to the Board.

The Board observed a party "choosing to appeal from a ruling which is adverse to it should not confronted with the risk that other issues in which it has prevailed might be reversed, to its detriment, by virtue of such appeal."

Section 34, 35

APPEALS, Scope of Review, Reason for disqualification, Commission determination not binding on Board

CITE AS: Persky v Woodhaven School District, No. 71462 (Mich App June 12, 1984).

Appeal pending: No

Claimant: Cynthia Persky
Employer: Woodhaven School District
Docket No: B80 17079 76383

COURT OF APPEALS HOLDING: The Board of Review is not bound by the Commission's basis for determining the disqualification of the claimant; but it may base disqualification on a different basis so long as the record contains sufficient evidence to support the decision.

FACTS: Claimant was a school teacher. Her union struck the employer. On April 2, 1980 a Circuit Court Judge ordered the teachers back to work. On April 4 and 14, 1980, the employer sent recall letters to the teachers notifying them to return by April 18, 1980. Claimant left for England on April 14, 1980 and did not return until April 22, 1980. Her father called her in England and told her the strike had ended. She requested he call the school. He called on April 18, 1980 and said she was ill.

DECISION: Claimant is disqualified for benefits pursuant to Section 29(1)(b).

RATIONALE: "The MESC Board of Review is vested with independent duty as well as plenary authority to decide each claimant's qualification for benefits without regard for the fact or nature of opposition, if any, by the employer or for that matter by the Commission itself ..."

"An employer's failure to assign a particular episode as reason for discharge does not affect the Board's finding of misconduct, so long as 'the testimonial record does actually contain evidence of such conduct.'"

APPEALS, Court of Appeals, Appeal of right

CITE AS: Blom v Thermotron Corp, 139 Mich App 50 (1984).

Appeal pending: No

Claimant: Sonia Blom
Employer: Thermotron Corp
Docket No: B82 02617 82905

COURT OF APPEALS HOLDING: Since the amendment of GCR 806.1, a party has an appeal by right from an adverse unemployment compensation decision of the Board of Review and the Circuit Court.

FACTS: The claimant lost an appeal of an adverse decision of the Board of Review at the circuit court. The claimant, in turn, appealed pursuant to GCR 806.1 to the Court of Appeals. The employer argued that Lasher v Mueller Brass Co., 392 Mich 221 (1974) did not grant the claimant the right to appeal.

DECISION: Claimant is entitled by right to appeal an adverse ruling of the Board of Review and circuit court to the Court of Appeals pursuant to GCR 1963, 806.1.

RATIONALE: "The Lasher decision, however, is now obsolete, because it was based on language which was formerly contained in GCR 1963, 806.2(4), but which was removed from the rule to avoid the result reached in Lasher. [Citations omitted] ... Under the current version of the rule GCR 1963, 801.1 allows an appeal by right to this court in the circumstances presented here ..."

Section 33, 34

APPEALS, Credibility, Board of Review, De novo fact finding

CITE AS: Chrysler Corp v Graziani, No. 78 813-213 AE, Wayne Circuit Court (September 21, 1978).

Appeal pending: No

Claimant: Carmine Graziani
Employer: Chrysler Corp
Docket No: B76 13435 55112

CIRCUIT COURT HOLDING: The Board of Review may not summarily discount a Referee's articulated credibility assessments.

FACTS: Claimant voluntarily retired at age 65. He was held eligible for benefits. At the Referee hearing, claimant, through an interpreter, claimed to have sought work, but could remember few specifics of his seeking work activities. At a second hearing, claimant presented a list of 56 locations where he sought work. The Referee found claimant's testimony not consistent and not credible in several respects and held him ineligible. The Board of Review reversed. It concluded that deficiencies in claimant's presentation were entirely due to his difficulty in reading or writing the English language.

DECISION: Referee decision reinstated. Claimant is ineligible.

RATIONALE: The court, after reviewing Section 34 and 35 of the MES Act concluded: "It is difficult to conceptualize what language the legislature could have employed which would more clearly express its intent to confer power upon the Board of Review to make findings of fact independently of the hearing referee ... [T]he manifest intent of the legislature ... [was] to confer independent, de novo fact finding powers upon that Board. These independent and de novo powers must necessarily include the power to assess weight and credibility if they are to have any meaning at all."

In this case, however, the Board erred because: "Where a hearing Referee's decision is founded upon either an evaluation of conflicting testimony of a subjective nature or upon articulated assessments of witness presence, sincerity, or demeanor, the Board of Review, while not bound by the Referee's assessment, must predicate disagreement with that decision upon evidence substantial enough to overcome the weight a reviewing court may ascribe to the Referee's 'unique opportunity' to view the witness."

Section 32a

PROCEDURE, Rule 270

CITE AS: Hoppe v City of Warren, No. 67671 (Mich App August 26, 1983); lv den 418 Mich 975 (1984).

Appeal pending: No

Claimant: Chester M. Hoppe
Employer: City of Warren
Docket No: SUA78 03015 60728

COURT OF APPEALS HOLDING: The enumerated examples of "good cause" in Rule 270 are not self-limiting. A good faith misunderstanding of agency procedures or reliance upon misinformation or incorrect instructions given a claimant by an MESC employee may constitute good cause; but did not in this case.

FACTS: Claimant retired involuntarily and filed for unemployment benefits. He was held ineligible in a Redetermination issued January 4, 1977. Claimant appealed untimely on December 19, 1977. At the Referee hearing, claimant testified that he failed to read the instructions on the Redetermination concerning the time limit for an appeal. Claimant asserted that he did not appeal timely because he had stopped reporting regularly to the MESC. Claimant relied on erroneous information from MESC personnel when he decided to stop reporting.

DECISION: Affirm Denial of Request for Redetermination or Reconsideration.

RATIONALE: Claimant's failure to appeal timely was not due to a good faith misunderstanding of agency procedures or reliance on erroneous information given by the MESC. The untimely appeal was due to claimant's negligence in failing to read the instructions on the Redetermination relative to preserving his right of appeal.

Section 36

APPEALS, Signature requirement, Board Rule 201

CITE AS: Jones (UPS), 1988 BR 104679 (B86 12382).

Appeal pending: No

Claimant: William R. Jones
Employer: United Parcel Service
Docket No: B86 12382 104679

BOARD OF REVIEW HOLDING: A typewritten name appearing below the text of an appeal document was the intended signature of its author for the purpose of authenticating such instrument.

FACTS: Throughout the Commission adjudications concerning claimant, the Frick Co. was employer's agent. Frick prepared the wage and separation information. On behalf of the employer, Frick appealed the Determination. Both the wage and separation information and the protest of the determination bore handwritten signatures of the preparer. The protest of the Redetermination was in the form of a MAILGRAM and bore the typewritten name of the preparer. The Referee held that the lack of a handwritten signature violated Rule 201 of the MES Board of Review Rules of Practice and dismissed the appeal.

DECISION: Remand to Referee for hearing on the merits.

RATIONALE: In a full Board decision, the Board reasoned the legal definition of the word "sign" encompasses any known means of impressing the name of the signer upon paper with the intention of signing the instrument, authenticating it, and giving effect to the contents.

Section 33, 36

PROCEDURE, Right to counsel, Board Rule 207

CITE AS: Langhart v Westside Automotive Technology, No. 71190 (Mich App April 26, 1984).

Appeal pending: No

Claimant: James L. Langhart
Employer: Westside Automotive Technology
Docket No: B81 127463 RO1 80896

COURT OF APPEALS HOLDING: The Referee's failure to advise claimant orally of his right to counsel, where the Notice of Hearing contained such information thereon, and claimant's failure to present evidence because of lack of counsel, did not constitute a good and valid reason for allowing a rehearing.

FACTS: The Referee sent the claimant a Notice of Hearing on which were printed instructions, including the claimant's right to representation by counsel if he chose to have counsel. The claimant appeared at the hearing without counsel. The Referee did not orally advise claimant of his right to be represented by an agent or attorney.

DECISION: Request for rehearing denied. The court affirmed claimant's disqualification for benefits pursuant to Section 29(1)(b) of the Act.

RATIONALE: "We do not interpret R421.1207(9) to require that the referee orally inform the claimant of his right to have an attorney present. The referee here explained the procedure to be used, informed plaintiff of his right to cross-examine witnesses and to present his own witnesses. The referee excluded certain hearsay testimony ... and questioned plaintiff and defense witnesses to clarify their testimony. We find that the referee complied fully with the promulgated rules."

Sections 14, 33, 34

APPEALS, Interested party, UA Rule 201

CITE AS: Riutta v Chrysler Corp, No. 47475, (Mich App July 30, 1980).

Appeal pending: No

Claimant: Wayne Riutta
Employer: Chrysler Corp
Docket No: B76 9910 52480

COURT OF APPEALS HOLDING: An employer's liability status and statutory rights and obligations are not directly affected by a determination to grant extended benefits. Employer's interest is insufficient for it to be deemed an interested party. As a result the employer is not entitled to protest or appeal the Commission's determination that claimant was eligible for extended benefits.

FACTS: In April, 1976, claimant was held to have no benefit entitlement changeable to the employer because the prorated weekly amount of his pension from employer exceeded his benefit rate. Employer appealed a redetermination holding claimant "eligible" but not specifying the period of eligibility. Based on MESC Rule 201 (R421.201), the Referee dismissed the appeal for lack of jurisdiction because the employer was not an "interested party" under the Rule. "Interested parties" have the right to receive copies of Commission determinations and may protest or appeal them as provided in the MES Act. Extended benefits are funded by a reserve account to which all employer's contribute. Though the employer was not chargeable for any benefits paid to the claimant, the employer was concerned that in the future, the amount of claimant's pension might drop below his benefit rate and he would become eligible to receive extended benefits.

DECISION: Affirm dismissal of employer's appeal. Employer not an interested party.

RATIONALE: Although any employer may claim an interest in ensuring that extended benefit claims are only paid when proper, every employer cannot be given standing to challenge every claim which might impinge on the solvency of the reserve account which funds extended benefits. To hold otherwise "would be illogical, would prove burdensome to the Commission, and would open the floodgates of litigation."

Section 33

PROCEDURE, Evidence, Hearsay, Admissible evidence

CITE AS: Shank v Kelly Health Care, No. 95069, (Mich App September 11, 1987).

Appeal pending: No

Claimant: Michael Shank
Employer: Kelly Health Care
Docket No: B84 06896 97086W

COURT OF APPEALS HOLDING: Hearsay evidence is admissible in an administrative contested case, particularly if the evidence is from records prepared for a business purpose.

FACTS: At the Referee hearing the employer had a witness testify from her summation of the employer's business records (claimant's personnel file) to establish the nature and reason for the claimant's termination. Also, the witness offered some direct testimony from personal knowledge of the events in issue.

DECISION: Affirmed the Circuit Court decision holding claimant disqualified pursuant to Section 29(1)(a) of the Act.

RATIONALE: "The standard for admission of evidence in administrative proceedings is not the same as those in a court of law .... In an administrative contested case, any evidence may be admitted and given probative effect if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."

Section 31

APPEALS, Representation by non-attorney agent, Unauthorized practice of law.

CITE AS: State Bar of Michigan v Galloway; 422 Mich 188 (1985).

Appeal pending: No

Plaintiff: State Bar of Michigan
Defendant: James Galloway (Gates McDonald and Co.)
Docket No: NA

SUPREME COURT HOLDING: The last sentence of Section 31 allows non-attorney agents to represent employers in any proceeding before the MESC including representation before the Referees without engaging in the unauthorized practice of law.

FACTS: In 1963 the State Bar of Michigan obtained a permanent injunction enjoining Gates McDonald from representing employer clients at MESC hearings. In 1981 Defendants sought dissolution of the injunction. The circuit judge denied the motion but the Court of Appeals reversed.

In another case the Michigan Hospital Association brought an action to permit its non-attorney agents to represent member hospitals in MESC proceedings. The circuit court granted the relief requested but a panel of the Court of Appeals reversed.

Those conflicting Court of Appeals decisions were considered by the Supreme Court.

DECISION: Non-attorney agents are allowed to represent employers in hearings before MESC Referees and in any proceeding before the MES Commission without engaging in the unauthorized practice of law.

RATIONALE: The statute provides: "any employer may be represented in any proceeding before the Commission by counsel or other duly authorized agent." "Counsel" clearly means attorney. "Other duly authorized agent" provides for representation by non-attorney agents. This specific statutory enactment erected an exception to the to the older, more general statutes prohibiting the unauthorized practice of law.

Section 28(1)(a)

PROCEDURE, Notice of hearing, Adequacy of notice

CITE AS: Snyder v RAM Broadcasting, No. 82 23718 AE, Washtenaw Circuit Court (April 26, 1983).

Appeal pending: No

Claimant: Ann M. Snyder
Employer: RAM Broadcasting
Docket No: B81 02050 R01 78066

CIRCUIT COURT HOLDING: A Notice of Hearing which did not give a plain statement that claimant's eligibility pursuant to Section 28(1)(a) in regard to seeking work right be raised was not an adequate notice of the issue when it merely used the words "Ability/Availability/Seeking Work/Eligibility" in the Notice and did not specify that it was an issue for consideration at the Referee Hearing.

FACTS: Claimant worked for the employer from May 13, 1980 through August 1, 1980. She resigned and filed for unemployment. The Commission disqualified her pursuant to Section 29(1)(a). The redetermination stated: "Ability/Availability/Seeking Work/Eligibility Sections 28, 42, 46, 48 and 50. Last day of work thru date of hearing." The Referee merely reiterated that language in his Notice of Hearing in claimant's appeal of her disqualification pursuant to Section 29(1)(a). The Referee asked the claimant questions regarding her seeking work efforts and held the claimant ineligible under Section 28(1)(a).

DECISION: Claimant not ineligible for benefits pursuant to Section 28(1)(a) from August 1, 1980 through February 26, 1981 because she was not given adequate notice that her seeking work activities would be a matter for consideration.

RATIONAL: "This 'notice', as quoted alone, is inadequate for two reasons. First, it is not a plain statement of the matters asserted. These words and phrases divided by slashes and followed by a string citation to give sections of the Act do not provide a reasonably understandable notification that an issue will be considered, especially where the notification is intended for a lay person, and most especially where the notice is of an issue which was not addressed below. Second, this phrase, even if understandable, was not listed in the notice of hearing as an issue which would be presented before the referee. Instead, it was set forth as an issue which was included in the January 28, 1981 Redetermination."

Section 34, 29(1)(a)

PROCEDURES, Abuse of discretion defined

CITE AS: Tilles v Shaw College at Detroit, No. 79-17700-AE, Washtenaw Circuit Court (July 31, 1980).

Appeal pending: No

Claimant: Catherine A. Tilles
Employer: Shaw College of Detroit
Docket No: B77 7341 R0 58530

CIRCUIT COURT HOLDING: To show a Referee abused his discretion in denying a rehearing required a finding the Referee's decision evidenced a perversity of will, defiance of judgement or the exercise of passion or bias. Mere disagreement with the results is insufficient.

FACT: Claimant was a Physical Education instructor. She had a Master of Arts in teaching Social Studies. She quit citing health reasons. At the hearing she raised other issues but admitted the health matters were her primary concern. Claimant also conceded she was not medically prevented from teaching Social Studies. The Referee found claimant disqualified under Section 29(1)(a). Claimant requested a rehearing because Social Studies are not a college level discipline. The Referee denied a rehearing which was affirmed by the Board of Review and circuit court since claimant was not prevented from raising that information at the initial hearing.

DECISION: Claimant disqualified under Section 29(1)(a). Referee denial of rehearing was not an abuse of discretion.

RATIONALE: The court adopted the following from Spaulding v Spaulding, 355 Mich 382 (1959) as the standard for an abuse of discretion:

> "Where, as here, the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse of discretion involves more than a difference in judicial opinion between the trial and the appellate courts. The term discretion itself involves the idea of choice, of an exercise of will, for a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias ..."

Section 33

PROCEDURE, Adequacy of Referee hearing

CITE AS: Downtown Properties, Inc v Traylor, No. 93796 (Mich App August 26, 1987).

Appeal pending: No

Claimant: Jack Traylor
Employer: Downtown Properties, Inc
Docket No: B84 01336 95636

COURT OF APPEALS HOLDING: When the party having the burden of proof on a matter does not appear at a Referee Hearing but the appealing party does appear, the Referee is required as fact finder to take sworn testimony and evidence on the issue appealed.

FACTS: Claimant appealed a redetermination which held him disqualified for misconduct. At the Referee hearing the employer did not appear. The Referee took no substantive evidence from the claimant yet the Referee found claimant denied the allegations and reversed the redetermination, stating the employer had not carried its burden of proof.

DECISION: The Court of Appeals affirmed a circuit court remand for testimony on the merits and the assessment for the costs of the appeal against the MESC.

RATIONALE: The Referee did not inquire of claimant as to the reason for his discharge although prior statements to the Commission were part of the file before the Referee. The court found the Referee hearing was conducted in a totally inefficient manner since the record lacked any competent, material, and substantial evidence to support the Referee's findings.

16.42

Section 33, 36(1)

PROCEDURE, Evidence, Business records, Board Rule 207

CITE AS: Williams v Arnold Cleaners, 25 Mich App 672 (1970); lv den 384 Mich 788 (1970).

Appeal pending: No

Claimant: Louise V. Williams
Employer: Arnold Cleaners
Docket No: B67 5361 36096

COURT OF APPEALS HOLDING: If a proper foundation is established, it is permissible for a Referee to allow testimony regarding time records even if the records themselves are not introduced into evidence.

FACTS: Claimant was fired for allegedly failing to shut off a boiler before leaving work on a number of occasions. The Referee found claimant disqualified for misconduct. The claimant contended the Referee erred by, among other things, allowing testimony relating to the employer's time records without requiring they be introduced into evidence.

DECISION: The Referee conducted a proper hearing and there was sufficient evidence to support disqualification for misconduct.

RATIONALE: In reviewing the appeal the court interpreted an earlier version of current Board Rule 207. "Appellant contends that the failure to make the time records a part of the record was a dereliction of the referee's duty under the rule. However, in an administrative hearing, this procedure is acceptable if there is a foundation identifying such records and establishing that they are kept in the ordinary course of business. For the purposes of this hearing such a foundation was established. Giddens v Employment Security Commission (1966), 4 Mich App 526; District Unemployment Compensation Board v Wm. Hahn Co. (CADC, 1968), 399 F 2d 987."

Section 33

PROCEDURE, Reopening, Notice of issues

CITE AS: Selonke v Michigan National Bank, unpublished per curiam Court of Appeals March 19, 1999 (No. 201514).

Appeal pending: No

Claimant: Michael A. Selonke
Employer: Michigan National Bank
Docket No. B92-35032-RRR-132922W

COURT OF APPEALS HOLDING: Where the issue noticed was misconduct, the allegations of threats did not constitute a new issue, therefore good cause for reopening was not established.

FACTS: The employer discharged claimant for yelling vulgarities and obscenities at Jason Trautz, vice-president of technical services. Mr. Trautz testified the claimant made certain statements which he perceived as threats. Claimant admitted making some statements and denied others. The Referee found the claimant disqualified for misconduct. The Board dismissed claimant's untimely appeal for lack of jurisdiction.

Claimant then requested a reopening of the Referee decision claiming the allegation of threats against Mr. Trautz was a new issue he had not been aware of prior to the Referee hearing. The Referee denied the claimant's reopening request. On appeal, the Board affirmed the Referee. But, the circuit court agreed with claimant finding the allegation of threats constituted a new issue and the claimant should have had an opportunity for an adjournment. The court remanded.

DECISION: Circuit court reversed. Good cause for reopening not established.

RATIONALE: Rule 109 of the Rules of Practice defines the term "good cause." The claimant claimed he had a witness who could clear him of the allegations of threats. The claimant did not show he had newly discovered material evidence since there is no indication he was unaware of the alleged exculpatory witness at the time of the hearing. Claimant has not shown a legitimate inability to act sooner. The notice of hearing stated the issue was misconduct. Documentary evidence in the record stated the claimant verbally attacked Mr. Trautz. The claimant admitted making statements Mr. Trautz perceived as threats. The basic issue of whether the claimant was discharged for misconduct remained the same. A new issue did not arise at the Referee hearing, and the claimant did not establish good cause for reopening.

7/99
22, 24: K

Section 32a

PROCEDURE, Time limits, Proof of service, Board Rule 104

CITE AS: Alam v Brown AS Development Co., Oakland Circuit Court No. 96-535902-AE (January 21, 1998).

Appeal pending: No

Claimant: Joseph Alam
Employer: Brown A. S. Development Co.
Docket No. B95 02284-136203W

CIRCUIT COURT HOLDING: There must be evidence that the determination was served on the claimant for the appeal period to run. Service on the claimant's attorney without service on the claimant was insufficient.

FACTS: The claimant received regular unemployment insurance and federal supplemental benefits in 1990 and 1991. In 1993, the MESC determined the claimant had received benefits fraudulently and owed restitution of $8,250.00 and penalties of $2,000. Allegedly, the Commission mailed the determination to the claimant on April 15, 1993, and a copy to the claimant's attorney on November 21, 1994. The copy mailed to the claimant's attorney was incomplete. The claimant's attorney filed a protest of the determination December 28, 1994. The Commission found the protest was not timely and issued a Notice of Denial of Request for Reconsideration. On appeal by the claimant, the Notice of Denial was affirmed by the Referee. The Referee's decision was affirmed by the Board.

DECISION: Remanded for a Referee hearing on the merits of the determination.

RATIONALE: Under Rule 104 of the Rules of Practice, the claimant and his attorney were entitled to be served with the determination. There was no witness testimony that the determination had been served on the claimant. The evidence offered by the Commission was inadequate to conclude service had been properly effectuated. Moreover, the copy of the determination served on the claimant's attorney was incomplete. Therefore, the time period for protesting the determination had not run.

7/99
12, 21: L

Section 32a

PROCEDURE, Timeliness of request for reconsideration, One year limit, Benefit interpretation

CITE AS: Allen v GTE North, Muskegon Circuit Court, No. 96-3-35589-AE (May 29, 1997)

Appeal pending: No

Claimant: Bernie Allen, et al.
Employer: GTE North
Docket No. B96-02994-140610W

CIRCUIT COURT HOLDING: "One year after the mailing of the determination or redetermination in dispute, the Commission no longer has any jurisdiction to review its decision."

FACTS: Claimants applied for unemployment benefits after they accepted an early retirement package in 1993 and 1994. Claimants were found eligible for benefits subject to a pension reduction based on their prorated lump sum pension payment. The Commission issued determinations to each of the claimants holding them ineligible pursuant to the pension set-off provisions of Section 27(f)(5) of the Act. Sixteen of the claimants filed timely protests, and were issued redeterminations, but failed to appeal further. The other ten claimants did not protest the determinations. In November of 1995, the Commission issued a new Benefit Interpretation reversing its position on the treatment of lump sum pension payments subsequently rolled into an IRA account. In January 1996, based on the Commission's change in position, the claimants sought reconsideration of the determinations and redeterminations issued on their claims and contended that under the Commission's revised position, they would be entitled to receive unemployment insurance benefits. The claimants' requests for reconsideration were denied because they were filed more than a year after the issuance of the determinations and redeterminations claimants sought to have reconsidered.

DECISION: The claimants' requests for reconsideration were properly denied.

RATIONALE: The Commission lacks jurisdiction to reconsider a determination or redetermination after one year has passed since the mailing of the adjudication. Good cause for reconsideration is not a factor to be considered after the expiration of one year. "The Court further finds that the Commission's Benefit Interpretations lack the force of law. The fact that these Benefit Interpretations may have been revised following the initial determination does not change the current situation or afford the claimants additional rights."

7/99
22, 21: F

16.46

Section 32a

PROCEDURE, Good cause for reconsideration , Low intelligence

CITE AS: Powser v I.T.T. Automotive Baylock Division, Iosco Circuit Court No. 97-659-AE (June 11, 1998)

Appeal pending: No

Claimant: Robin S. Powser
Employer: I.T.T. Automotive Baylock Division
Docket No. B97-01212-143855

CIRCUIT COURT HOLDING: Although claimant's contention, that he had demonstrably low intelligence and was therefore unable to comprehend the significance of the 30 day limit within which to appeal, might have supported a finding of good cause for reconsideration had it been raised promptly following the initial denial of request for reconsideration, the claimant could not claim ignorance of the filing deadlines when he failed to appeal timely the second time.

FACTS: The Commission issued a determination holding the claimant ineligible for benefits. The claimant protested and the Commission issued a redetermination affirming the determination on September 10, 1996. The claimant did not appeal until November 7, 1996. The Commission issued a Notice of Denial of Request for Reconsideration on November 8, 1996. The claimant failed to protest the November 8, 1996 Notice of Denial until January 6, 1997. The Commission issued a second Notice of Denial on January 15,1997, which the claimant appealed to the Referee. Claimant contended he should be found to have good cause for reconsideration because he was of demonstrably below-average intelligence and was therefore unable to comprehend the significance of the 30 day time limit for filing an appeal.

DECISION: The claimant did not establish good cause for reconsideration.

RATIONALE: "[H]aving lost an appeal of the September 10th determination due to untimeliness without good cause, plaintiff can hardly argue ignorance of the 30 day limit as to his second tardy appeal -- that of the November 8th decision."

7/99
12, 21:H

Section 38

PROCEDURE, Jurisdiction, Timeliness of appeal to circuit court

CITE AS: Gunderson v Rose Hill Realty, 136 Mich App 559 (1984)

Appeal pending: No

Claimant: Judy Gunderson
Employer: Rose Hill Realty
Docket No. B78-10356-62930

COURT OF APPEALS HOLDING: The circuit court has no jurisdiction over an appeal not filed within the statutory appeal period.

FACTS: The claimant was paid unemployment benefits. Later, the Commission issued a redetermination requiring her to make restitution of the benefits received and found her disqualified for refusing an offer of work. The claimant appealed to the Referee. The Referee affirmed the redetermination. The claimant appealed to the Board of Review. The Board reversed the Referee decision. The employer requested rehearing by the Board. The Board granted rehearing and reversed its prior decision. The claimant then requested rehearing but her request was denied. Subsequently, the claimant filed a motion for a delayed appeal with the circuit court. The circuit court granted the claimant's motion. The request for rehearing was denied. The Commission appealed to the Court of Appeals

DECISION: The claimant's appeal is dismissed. The circuit court lacked jurisdiction.

RATIONALE: The statutory appeal period cannot be extended by court rules. The trial court erred in granting the claimant's delayed leave to appeal by incorporating GCR 1963, 701.2(2)(c) into GCR 1963, 706.2. The circuit court could only obtain jurisdiction if the claimant filed her appeal within the time prescribed by Section 38 of the Michigan Employment Security Act.

7/99
N/A

Section 32a

PROCEDURE, Good cause for reconsideration, Administrative clerical error, Business address, Adverse impact

CITE AS: Cottage Inn v Katt, Muskegon Circuit Court No. 84-19223-AE (February 10, 1985)

Appeal pending: No

Claimant: Peggy J. Katt
Employer: Cottage Inn
Docket No. B83-12877-93637

CIRCUIT COURT HOLDING: "Although an administrative clerical error may constitute 'good cause' for a late appeal, it does not do so unless it adversely or materially prejudices an interested party."

FACTS: The employer protested the determination after expiration of the protest period. The employer, a seasonal business, had notified the Commission that mail should be sent to the owner's home address instead of the employer's business address. Although the determination had the employer's home address listed on it, the determination was mailed to the business address. The employer did not check the mail at the business address regularly and did not discover the determination had been received until after the protest period had expired. The employer contended there was good cause for reconsideration because the Commission erred by mailing the determination to the employer's business address.

DECISION: Good cause for reconsideration was not established.

RATIONALE: Since the employer did not take reasonable steps to ensure that business mail would be received timely, the employer has no cause to say that any clerical error in mailing the determination adversely or materially prejudiced her. It was the employer's responsibility to check the mail at her business address or have it forwarded to her home. The employer's failure to check the mail at her business address, not the Commission's error in mailing it to that address, was the reason the employer did not actually receive the determination on time.

7/99
1, 9:N/A

Section 32a

PROCEDURE, Good cause, Illiteracy

CITE AS: Kassawa v MESC, Wayne Circuit Court No. 84-417205 AE (November 4, 1985).

Appeal pending: No

Claimant: Issam Kassawa
Employer: Joy Safeway
Docket No. B83 17163-R01-94842W

CIRCUIT COURT HOLDING: If an individual has a language problem, he must seek an interpretation from the Commission (now Unemployment Agency) of his rights to the extent necessary for him to understand them. Seeking advice from someone other than Commission personnel is not sufficient if the person giving advice does not explain the whole document.

FACTS: On April 15, 1983, the claimant requested reconsideration of a redetermination. The Commission denied claimant's request for reconsideration the same day. The claimant failed to file a further protest until August 19, 1983. The Commission issued a Notice of Denial of Request for Reconsideration which the claimant appealed to the Referee. The claimant contended he failed to file a timely appeal of the April 15, 1983 Notice of Denial of Request for Reconsideration because he does not read or write English. The claimant took the adjudication to his brother. His brother read it and told the claimant it was "nothing." The claimant continued to report to the Commission but failed to ask for an explanation of his situation until August 19, 1983.

DECISION: The claimant did not establish good cause for reconsideration.

RATIONALE: The claimant's inability to read English is not a sufficient explanation for failing to protest the adjudication. The claimant should have sought an explanation of the adjudication and his status when he reported to the Commission.

7/99
14, 15:N/A

16.50

Section 33

PROCEDURE, Due Process, Fair hearing, Referee bias, Board Rule 207

CITE AS: Pellar v Foster Medical Corporation, Wayne Circuit Court, No. 86-616117-AE (February 10, 1987)

Appeal pending: No

Claimant: Sharon Pellar
Employer: Foster Medical Corporation
Docket No. B85-10837-101190W

CIRCUIT COURT HOLDING: "[T]he referee failed in his duty to develop the evidence and assist the claimant, and indeed conducted the hearing showing possible bias on the part of the referee against the claimant. "

FACTS: The claimant appeared at the hearing without a representative or witnesses. The employer was represented at the hearing by the claimant's former supervisor and the employer's attorney. The majority of the hearing, 36 of 44 transcript pages, consisted of the Referee's examination of the claimant. The claimant came prepared to the hearing with notes. However, the Referee refused to allow the claimant to use her notes to verify dates as to specific occurrences. Nevertheless, the Referee criticized the claimant's failure to testify about specific dates or persons. The Referee frequently interrupted the claimant to ask her about some area other than that to which she was testifying or to cut off an answer. The Referee forbade her from developing an area of inquiry that she thought important and directed her to only answer his questions. The Referee took an active role in attempting to impeach the claimant's testimony without giving similar treatment to the employer's witness. The Referee openly expressed his disbelief of the claimant's testimony to the claimant. The Referee affirmed the redetermination holding the claimant disqualified under Section 29(1)(a).

DECISION: Remanded to a different Referee for a new hearing and new decision.

RATIONALE: Administrative Rule 207 requires the Referee to secure such competent evidence as he deems necessary to arrive at a fair decision. "[I]n the situation of an unrepresented claimant, due process concerns impose an affirmative duty on the hearing examiner to develop evidence." The Referee has a "duty to develop facts which not only would tend to result in a denial of the claim but also those facts which are supportive of a claim for benefits." The Referee is required to be "unbiased and conduct the proceedings in an unbiased manner." And "in developing evidence the referee must maintain and give the appearance of maintaining a scrupulous neutrality."

7/99
11, 15: N/A

Section 29(1)(b)

APPEALS, Circuit court standard of review, Board standard of review, De novo fact finding, Insubordination

CITE AS: Neal v Light Corp., unpublished per curiam, Court of Appeals, December 1, 1998 (No. 202007).

Appeal Pending: No

Claimant: Shirley Neal
Employer: Light Corporation
Docket No. B94-18326-135365

COURT OF APPEALS HOLDING: Where employer contested claimant's application for unemployment benefits after she was fired for refusing a work assignment, Circuit Court used improper standard of review when it reversed the Board of Review.

FACTS: Claimant, a long term employee, was sent home after refusing a work assignment. Next day claimant said she refused due to medical condition. She was fired. Agency denied benefits. Referee reversed, granted benefits. Board of Review reversed, found claimant refused reasonable order without adequate justification (claimant had been released to work with restrictions). The Circuit Court reversed the Board and held claimant not disqualified. It determined the referee was the fact finder and applied the substantial evidence test to the referee decision. The court found the referee decision was supported by uncontested evidence of claimant's medical condition.

DECISION: Claimant disqualified. Board of Review decision reinstated.

RATIONALE: While Section 34 does not expressly state the standard of review the Board of Review is to apply to referee decisions, it is clear 1) such review is "beyond de novo" inasmuch as the Board is permitted to consider evidence not presented to the referee, and 2) the MES Act does not require the Board to give deference to the referee's fact finding.

As to the competent, material and substantial evidence standard contained in Section 38 which is to be used by circuit courts reviewing Board of Review decisions, three principles are significant: 1) A reviewing court is not to displace the Board's choice between two reasonably differing viewpoints. 2) Substantial evidence is that which a reasonable mind would accept as adequate to support a decision. 3) Where there is sufficient evidence to support the Board's findings, a reviewing court must not substitute its discretion for that of the Board, even if the court would have reached a different result. The circuit court violated each of these principles and also erred by applying the substantial evidence test to the referee decision rather than the Board decision.

Claimant's insubordination was complete after the first instance in which plaintiff refused the order to pack without offering a medical excuse.

7/99
24, 16, d22: K

Section 35

PROCEDURE, Jurisdiction, Timeliness of appeal to Board

CITE AS: Manosky v Freedom Adult Foster Care Corp, Oakland Circuit Court, No. 93-464323-AE (July 18, 1994)

Appeal pending: No

Claimant: Susan Manosky
Employer: Freedom Adult Foster Care Corp
Docket No. B92-24907-123547W

CIRCUIT COURT HOLDING: There is no good cause exception to the time limit for filing an appeal.

FACTS: The claimant was discharged for allegedly making derogatory statements about her manager. The MESC held the claimant not disqualified for benefits by determination and redetermination. The employer appealed to the Referee. The Referee decision issued August 26, 1992, reversed the redetermination and held the claimant disqualified. The Referee decision contained a notice that any appeal must be received on or before September 25, 1992. Claimant's attorney mailed an appeal, but because he neglected to put a stamp on the envelope, it was not delivered. On September 29, 1992, the claimant's attorney hand-delivered an appeal letter explaining the reason for the delay. The Board of Review dismissed the appeal for lack of jurisdiction.

DECISION: Claimant's appeal was properly dismissed by the Board for lack of jurisdiction.

RATIONALE: "The statutes governing MESC procedures set strict time limits, usually of 30 days, for taking actions permitted by law. The statutes which authorize an interested party to seek reconsideration of a decision at each level of review also authorize such action after the 30-day period for good cause shown. . . . They do not, however, make a good cause exception to the time limitations for filing appeals."

7/99
12, 19:B

Section 32a

PROCEDURE, Timeliness of appeal to Referee

CITE AS: Kunard v Hop In Food Stores, Inc., Allegan Circuit Court, No. 93-16229-AE (March 14, 1994)

Appeal pending: No

Claimant: Penny Kunard
Employer: Hop In Food Stores, Inc
Docket No. B92-20344-122464W

CIRCUIT COURT HOLDING: The record must contain evidence of a timely appeal to the Referee before the Referee may exercise jurisdiction. Subject matter jurisdiction may be raised at any stage of the proceedings.

FACTS: The employer appealed to the Referee on March 13, 1992, from a redetermination issued February 11, 1992. The deadline for a timely appeal was March 12, 1992. At the Referee hearing the employer showed a copy of a redetermination issued February 12, 1992, however no evidence of a redetermination issued that date was included in the record. The only copy of the redetermination in the record showed a mailing date of February 11, 1992. By the time the matter was heard by the Circuit Court more than a year had passed since the issuance of the redetermination. Therefore, it was too late for the Commission to reconsider the redetermination.

DECISION: The employer's appeal of the redetermination was untimely. Therefore the Referee had no jurisdiction over the merits of the appeal. The redetermination holding claimant not disqualified became final.

RATIONALE: There was no evidence in the record to support the Referee's conclusion that the redetermination was issued February 12, 1992. Although the Referee indicated during the hearing that the employer had presented a copy of the redetermination dated February 12, 1992, that copy was not included in the record. The evidence in the record does not support a finding that the employer filed a timely appeal to the Referee.

> "Therefore, the referee lacked jurisdiction and his reversal of the redetermination was without effect. Any right to appeal that Hop-In Food Store may have had was extinguished 30 days after the redetermination order was mailed by the MESC; therefore the redetermination order became final. Herman v Chrysler Corp, 106 Mich App 709, 719 (1981). Since lack of subject matter jurisdiction can be raised at any stage of the proceeding, this issue is properly before this court. Goodman v Bay Castings, 49 Mich App 611, 625 (1973)."

Section 34

PROCEDURE, Board Rule 306, Evidence

CITE AS: Ruge v Glassen, Rhead, McLean, Campbell & Bergamini, unpublished per curiam Court of Appeals January 12, 1996 (No. 172017)

Appeal pending: No

Claimant: John P. Ruge
Employer: Glassen, Rhead, McLean, Campbell & Bergamini
Docket No. B89-17343-113896

COURT OF APPEALS HOLDING: The Board of Review cannot consider documentary evidence that has not been properly admitted into the record.

FACTS: The claimant signed a statement to the MESC admitting he was working forty hours a week in self-employment. The statement was not included in the record considered by the Referee. The employer sought to have the statement entered into evidence. The Board considered the statement without remanding the matter or notifying the parties that the statement would be considered, or otherwise complying with Rule 306. The Board reversed the Referee's decision and held the claimant ineligible based on the statement. The Circuit Court reversed the Board because the statement had not been properly admitted into evidence.

DECISION: The matter was remanded for the Board to consider the statement after compliance within Rule 306.

RATIONALE: The Court of Appeals remanded for consideration of the statement in compliance with Rule 306 because the employer should not be adversely affected by the Board's failure to follow correct procedures.

7/99
19, 11: K

Section 32a

PROCEDURE, Appeal, Restitution

CITE AS: McNally v Stanford Brothers, unpublished per curiam Court of Appeals, January 12, 1996, (No. 166182).

Appeal pending: No

Claimant: Jerome McNally
Employer: Stanford Brothers, Inc.
Docket No. B91-04367-119700W

COURT OF APPEALS HOLDING: Where the claimant has not committed fraud, where there is no administrative clerical error, and where the employer failed to protest within the thirty day protest period, the claimant is not liable for restitution of benefits paid prior to the employer's protest

FACTS: The employer failed to timely protest a redetermination which held the claimant not disqualified. On appeal to the Referee, the employer established good cause for reconsideration of the redetermination because the MESC failed to send the redetermination to the employer's address of record. The claimant was not present at the Referee hearing. The Referee held the claimant disqualified for voluntarily leaving his employment without good cause attributable to the employer and ordered the claimant to pay restitution. The circuit court affirmed on the merits but held, pursuant to Section 32a(3) that claimant was not required to make restitution.

DECISION: The claimant is not liable for restitution for benefits paid to him prior to the Commission's receipt of the employer's untimely protest.

RATIONALE: The MESC may reconsider a prior determination or redetermination if good cause is shown. But where that reconsideration disqualifies an individual from receiving benefits, it does not apply to the period for which benefits were already paid. "The claimant had a right to believe the matter was concluded after the thirty-day appeal period had expired. To order him to repay the benefits, months later, would be unconscionable."

7/99
20, 19: J

Section 38

PROCEDURE, Circuit court review, Claim of Appeal, Proof of service

CITE AS: Stevens v Payless Shoes, Inc., Ottawa Circuit Court, No. 90-12969-AE (July 19, 1994)

Appeal pending: No

Claimant: John F. Stevens
Employer: Payless Shoes, Inc.
Docket No. B89-03026-111804W

CIRCUIT COURT HOLDING: Proof that the claim of appeal was served on the Board of Review, the MESC, and the other party must be filed by the appellant before the circuit court has jurisdiction over those parties.

FACTS: Claimant attempted to appeal to the circuit court from a Board of Review order which denied claimant's request for reopening of the Board's underlying decision. First, the claimant filed a document with the court entitled "notice of appeal." The claimant did not name the MESC on the notice of appeal. He subsequently filed another document entitled "designation of records." Neither the "notice of appeal" nor the " designation of records" asserted that service of the claim of appeal had been made on the Board of Review, the MESC or the employer. The court ordered the MESC to produce the certified record. An affidavit was filed on behalf of the MESC averring that the certified record had not been produced because the claimant had not served a claim of appeal on the Board of Review, therefore the file had been purged.

DECISION: Claimant's appeal was dismissed for lack of jurisdiction.

RATIONALE: MCR 7.104(B)(1)(b) requires that the appellant file a claim of appeal with the court and prove that a copy of the claim of appeal was served on the board of review and all interested parties. " 'Service of the notice of the claim of appeal is the means whereby the circuit court obtains jurisdiction over the parties to the appeal.' Cody v Wickman, Inc., 137 Mich App 560,566; 358 NW2d 372 (1984)." Since the claimant failed to file proof with the court that the claim of appeal had been served, the court never obtained jurisdiction over the Board, Payless, or the MESC.

7/99
14, 13: N/A

Section 38

PROCEDURE, Appeal, Circuit court review, Final order, Remand

CITE AS: General Motors Corporation v King, Macomb Circuit Court, No. 88-3915-AE (March 14, 1989).

Appeal pending: No

Claimant: Vernon King
Employer: General Motors Corporation
Docket No. B86-09631-104800W

CIRCUIT COURT HOLDING: The Board of Review order remanding the matter to the Referee for additional evidence and a new decision is not a final order and may not be appealed to the circuit court.

FACTS: Claimant appealed a Referee decision holding him disqualified to the Board of Review. The Board majority remanded for additional evidence. The employer sought rehearing of the remand order. The Board denied the request for rehearing. The employer appealed to the circuit court. The MESC moved for summary disposition on the grounds that the Board had not yet issued a final order from which an appeal could be taken.

DECISION: The employer's appeal was dismissed for lack of subject matter jurisdiction.

RATIONALE: "[I]t is clear that there must be a final order or decision of the Board before the Court may review the questions of fact and law presented on appeal. In the instant case the Board remanded the matter to the Referee for the taking of additional evidence. MCL 421.35 expressly provides that the Board is empowered to take such action. Since additional evidence is to be taken and a new decision issued it is obvious the Referee's May 3, 1987 opinion is not a final opinion. GMC's arguments that additional evidence is unnecessary and the Referee's decision should be considered final because it is 'correct as a matter of law' begs the question. The Court does not have authority to address the merits of the appeal and determine whether the decision is supported by competent, material, and substantial evidence or contrary to law until the decision is properly before the Court. It is not the function of the Court to usurp the authority of the Board and deem an opinion final."

7/99
13, 14, 4:C

16.58

Section 32a

PROCEDURE, Timeliness of protest, Good cause for redetermination, Estoppel

CITE AS: Guthaus v St. Joseph Mercy Hospital, Oakland Circuit Court, No. 95-492777-AE (August 25, 1995).

Appeal pending: No

Claimant: Martha Guthaus
Employer: St. Joseph Mercy Hospital
Docket No. B94 01685-129107W

CIRCUIT COURT HOLDING: Reliance on the intercession of a state senator or others, while failing to file a timely protest, is not good cause for reconsideration. The Agency is not estopped from denying reconsideration when the Agency did nothing to deter the claimant from protesting within the thirty day period.

FACTS: Claimant received benefits after being laid off by one of two employers. The claimant did not disclose her employment with the second employer. The second employer notified the Agency of the claimant's earnings. The Agency found the claimant had committed intentional misrepresentation by failing to disclose her earnings with the second employer. On December 29, 1992, the Agency issued a determination holding the claimant liable for restitution and a penalty. The claimant received the determination timely and called the UA. She was told to refer to the appeal rights on the back. She read her appeal rights but chose to contact her state senator instead of following UA procedures. The claimant's senator and her attorney contacted the UA on her behalf to question the basis for the determination, but neither filed a protest on claimant's behalf. The claimant failed to protest until November 1, 1993.

DECISION: The claimant did not establish good cause for reconsideration.

RATIONALE: The claimant was aware of the time limit for protesting the determination. She did not have any newly discovered material evidence nor was there a clerical error which would justify reconsideration. The claimant chose not to protest because of her frustration with the Agency. Although claimant contends she relied on her senator and her attorney and believed the matter would be reviewed, she was not told by Unemployment Agency officials that she did not need to appeal within the thirty day protest period. There is no evidence anyone from the Unemployment Agency did anything within the thirty day period which caused her to forgo filing a timely application for redetermination.

7/99
22, 24: F

16.59

Sections 29(1)(b), 33

EVIDENCE, Hearsay, Referee assistance, Unrepresented party, Adjournment of hearing, Board Rule 207.

CITE AS: Riddle v Chrysler Corp., Wayne Circuit Court, No. 86-612033-AE, (March 4, 1987).

Appeal pending: No

Claimant: Joe Riddle
Employer: Chrysler Corp.
Docket No. B85-10733-101268W

CIRCUIT COURT HOLDING: The Referee properly excluded hearsay written statements of alleged witnesses to an incident. The Referee did not err in not adjourning the hearing to subpoena two alleged witnesses.

FACTS: There was an argument between the claimant and the superintendent at the plant where claimant worked. The superintendent and a supervisor testified the claimant struck the superintendent during this altercation. The claimant denied he struck the superintendent. In support of his version of events the claimant, who was unrepresented, offered two written statements from alleged witnesses to the altercation which stated the claimant did not strike the superintendent. These two witnesses did not appear nor were they subpoenaed. The Referee did not allow the written statements into the record and did not adjourn the hearing to allow the claimant to subpoena the witnesses.

DECISION: The claimant is disqualified under Section 29(1)(b).

RATIONALE: While Rule 207 of the Rules of Practice before the Referees and the MES Board of Review imposes a duty on the Referee to assist an unrepresented party, that duty is qualified by the obligation to be impartial and to secure competent evidence. Consistent with that duty the Referee had no obligation to admit the written hearsay statements. Additionally Rule 207 does not require the Referee to adjourn a hearing to provide an unrepresented party the opportunity to subpoena two witnesses who allegedly saw the incident and offered written statements in favor of claimant's version of the events. It is the duty of the parties, not the Referee, to secure the attendance of necessary witnesses.

7/99
14, 3: I

16.60

Section 33

PROCEDURE, Voluntary leaving, Settlement agreement

CITE AS: Johnson v MESC, Berrien Circuit Court, No. 83-3682-AEG, (May 16, 1986).

Appeal pending: No

Claimant: Eleanor Johnson
Employer: Mercy Hospital
Docket No. B82 23292-88432W

CIRCUIT COURT HOLDING: A settlement agreement between the claimant and the employer is not binding on the Unemployment Agency as to claimant's entitlement to benefits.

FACTS: Claimant was discharged for refusing to work in the location ordered by her supervisor and left the workplace without permission. The Referee decision held the claimant disqualified under the misconduct provision of the Act. The claimant charged the employer with discrimination. The claimant and employer settled the discrimination claims. The settlement provided the claimant's separation would be considered a voluntary quit and the claimant would be allowed to collect unemployment insurance benefits. The MESC (now Unemployment Agency), was not a party to the agreement. The claimant contended she should receive benefits based on the settlement agreement.

DECISION: The claimant is disqualified for misconduct.

RATIONALE: The MESC was not a party to the settlement agreement, and the agreement did not change the findings of fact by the Referee.

7/99
1, 14: N/A

Section 32a

PROCEDURE, Jurisdiction, Notice of Denial

CITE AS: Kos (Credit Bureau Services), 1994 BR 125763 (B93-03670)
(Editor's Note: Full Board decision; 4-1)

Appeal pending: No

Claimant: Sharon Kos
Employer: Credit Bureau Services
Docket No. B93-03670 125763

BOARD OF REVIEW HOLDING: The Referee has jurisdiction over a timely appeal from a Notice of Denial of Request for Reconsideration despite the Commission's failure to articulate reasons for denying reconsideration.

FACTS: The employer appealed to the Referee from a Notice of Denial of Request for Reconsideration (DRR). The Notice of Denial did not articulate the reason the MESC found there was no good cause for reconsideration. Since the adjudication did not explain the reason for denying reconsideration, the Referee found the adjudication defective and dismissed the employer's appeal.

DECISION: Remanded to the Referee for the taking of evidence on the question of whether there is good cause for reconsideration. If there is good cause, the Referee is to take evidence and issue a decision on the underlying merits.

RATIONALE: When there is a timely appeal to an MESC Referee, it is the function of the Referee to hold a hearing, receive evidence and decide the substantive and procedural issues governing the rights of the parties under the MES Act, except with respect to matters which have become final. The Notice of Denial did not become final because the employer appealed it to the Referee within thirty days of the date the adjudication was mailed or personally served. The Referee had jurisdiction over the employer's appeal and should have held a hearing.

The most efficient way to correct the Commission's failure to investigate the employer's reason for filing an untimely protest to the determination would have been for the Referee to ask the employer the reason and to give the employer the opportunity to present evidence of good cause for reconsideration. A defect, such as the Commission's failure to investigate or to state reasons for its conclusions in the redetermination or in the Notice of Denial of Request for Reconsideration cannot impede the appeal process. Although the Commission may have erred, the Commission's error was in respect to a non-essential part of the administrative review process and therefore cannot impair the jurisdiction of the Referee.

7/99
21, 22, 12, 18, d 24: H

Section 34

PROCEDURE, Reopening, Good cause, Board Rule 109, Legitimate inability to act, Delay in receiving decision

CITE AS: Meeker v Neuens Timber Products, Delta Circuit Court, No. 96-13082-AE (February 14, 1997)

Appeal pending: No

Claimant: Charles C. Meeker
Employer: Neuens Timber Products
Docket No. B94-07515-132640

CIRCUIT COURT HOLDING: There are two prongs to the exercise of discretion when the Board is presented with a late request for review of its decision. The first prong is whether there is good cause for the delay in seeking review of the underlying decision under Rule 109. The second prong is whether there is good cause for further review of the merits . Good cause found here where the Board appeal had been pending for seventeen months, claimant was only home intermittently, no longer could be expected to be vigilant for receipt of the decision, acted promptly after it was delivered to him.

FACTS: After a favorable Referee decision, a Board decision adverse to the claimant was issued November 30, 1995. The deadline for a timely appeal was January 2, 1996. Claimant filed a request for reopening by the Board on January 8, 1996. Claimant was an over-the-road truck driver and was only home five days between the date the Board's decision was issued and the date he requested review. Though the decision had probably been at claimant's home most of that period, claimant did not actually receive the decision personally until his wife handed it to him unopened on January 5, 1996.

DECISION: Remanded to the Board of Review for a finding of whether there was good cause to review the underlying merits.

RATIONALE: Under Rule 109, good cause for an untimely protest is established if the party had a legitimate inability to act sooner. "Given the holiday season, given that he was gone from his home in pursuit of his occupation, and given further that more than 17 months had elapsed since the referee hearing after which time the claimant could not be reasonably expected to ask his spouse if a decision had been received while he was away, and given that others in the home actually received the mailing and did not present it to the claimant until January 5, 1996, the board abused its discretion in failing to find good cause to at least consider the underlying merits of claimant's request for reopening and review."

7/99
24, 12, 16: K

Section 33

PROCEDURE, Referee bias, Recusal

CITE AS: Executive Art Studio v Cromwell, Ingham Circuit Court, No. 88-62036-AA, (May 17, 1989).

Appeal pending: No

Claimant: James Cromwell
Employer: Executive Art Studio
Docket No. B86-03955 -R01-105973

CIRCUIT COURT HOLDING: Affirmed Board's order denying rehearing.

FACTS: In an unrelated unemployment matter, the employer sued the Referee in federal court. By letter dated April 7, 1986, the Referee informed parties of the pending federal lawsuit, and invited filing a motion for him to recuse himself. The Referee set the deadline for a recusal motion at April 21, 1986. The employer took no action until May 14, 1986. The hearing was scheduled for May 15, 1986. The Referee denied the recusal motion as untimely. The employer failed to appear at the hearing. The decision, based on the claimant's testimony, was adverse to the employer. Instead of requesting rehearing by the Referee or appealing to the Board of Review, the employer filed an action in Circuit Court. The Circuit Court dismissed the employer's petition. The employer then filed a request for reopening by the Referee. The Referee denied the reopening finding the employer had not established good cause. The employer appealed to the Board of Review. The Board affirmed the Referee's denial of reopening, then denied rehearing.

DECISION: The Referee's decision not to recuse himself was upheld.

RATIONALE: The employer's motion for recusal of the Referee was untimely. The procedure adopted by the Referee assured the parties the opportunity to challenge his participation in the matter and protected the parties' right to a full and fair hearing. Therefore, the Referee did not violate the employer's right to a full and fair hearing by denying the request for recusal. The employer's unsuccessful petition to Circuit Court is not good cause for reopening the Referee's decision.

7/99
3, 11: N/A

Section 33

PROCEDURE, Dismissal, Lack of prosecution, Disruptive behavior

CITE AS: Sielaff v Ameritech New Media Enterprises, Inc., Wayne Circuit Court No. 99-909348AE (October 14, 1999).

Appeal pending: No

Claimant: Kurt Sielaff
Employer: Ameritech New Media Enterprises Inc.
Docket No. B98-R01-11384-150482W

CIRCUIT COURT HOLDING: Referee did not abuse his discretion when he dismissed appeal for lack of prosecution based on appellant's persistent disruption of the proceedings.

FACTS: Claimant appealed redetermination holding him disqualified for benefits. Claimant obtained assistance of counsel, but no appearance was filed and attorney was not present at the Referee hearing. Claimant became upset when Referee proceeded to conduct the hearing without his attorney present. Claimant disrupted the proceedings and was warned four times to cease interrupting the hearing. When the claimant failed to stop, the Referee dismissed the appeal for failure to prosecute it in an orderly fashion.

DECISION: Affirm Board of Review decision which affirmed Referee rehearing denial and dismissal of appeal for lack of orderly prosecution.

RATIONALE: Board decision not contrary to law and said decision supported by competent, material, substantial evidence. Claimant's behavior was rude and disruptive. He refused to stop acting out even after repeated warnings. Consequently, the Referee acted properly when he dismissed the case and did not abuse his discretion when he denied claimant's rehearing request.

24, 16, d22: k

Sections 29(1)(b), 38

APPEAL, Circuit Court standard of review, Court of Appeals standard of review, Last straw doctrine

CITE AS: Osborn v Superior Data Corp, unpublished per curiam Court of Appeals, November 30, 1999 (No. 207997).

Appeal pending: No

Claimant: Billy J. Osborn
Employer: Superior Data Corporation
Docket No. B96-04777-R01-141178W

COURT OF APPEALS HOLDING: Circuit Court erred in its determination that a Board of Review decision disqualifying the claimant for benefits based on his terrible attendance record was contrary to law. While the claimant's numerous absences may have been largely due to valid reasons, his failure to adequately respond to the requirement that he attend work more regularly amounted to statutory misconduct.

FACTS: Claimant was a single parent of four minor children. Upon hiring the claimant, the employer agreed to be flexible to accommodate family and job responsibilities. The employer's tolerance waned after a year and demanded the claimant resolve his attendance problem because it was adversely affecting his ability to complete assignments. The claimant's poor attendance persisted and it became clear he was unwilling to take action to fix his attendance problem.

DECISION: Reverse circuit court decision and reinstate disqualification imposed by Board of Review.

RATIONALE: Circuit court applied incorrect standard of review. It may reverse a Board of Review decision only if it finds the Board decision to be contrary to law or is not supported by competent, material, substantial evidence. Here the circuit court erroneously focused on whether or not individual absences were for good cause. The key issue was claimant's failure to address his employer's demand that he find a solution to his child care issues and improve his attendance.

When a circuit court decision is in turn being reviewed by the Michigan Court of Appeals, the level of scrutiny to be applied is "the clearly erroneous standard of review" that is, "a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made."

24, 16, d22:J

16.66

Sections 31,38

WAIVER OF BENEFITS, Scope of review, Voluntary leaving, Settlement agreement

CITE AS: Rousseau v St. Mary's Medical Center of Saginaw, unpublished per curiam Court of Appeals, June 27, 1997 (No. 191314).

Appeal pending: No
Claimant: Connie J. Rousseau
Employer: St. Mary's Medical Center of Saginaw
Docket No. B93-00440-126795

COURT OF APPEALS HOLDING: A settlement agreement between the claimant and the employer after the claimant's discharge providing the separation would be treated as a voluntary leaving does not change the nature of the separation for purposes of whether claimant is entitled to unemployment benefits. The claimant's leaving was not voluntary and to treat it as such would violate Section 31.

FACTS: The claimant was discharged for allegedly falsifying her time sheet on two occasions. Upon discharge claimant filed a complaint with the Michigan Department of Civil Rights. Subsequently, the parties entered into a settlement agreement of her claims which provided her employment record would be changed to indicate she left voluntarily. The employer contended that because the employment record was changed to indicate a voluntary resignation, the claimant was not entitled to unemployment benefits. The employer also contended Section 31 did not apply.

DECISION: The claimant is not disqualified for benefits as she was discharged for reasons other than misconduct.

RATIONALE: The court stated:

> [A]n agreement to voluntarily terminate employment that is entered into prior to the termination of employment does not constitute a waiver of rights to benefits such that the agreement is invalid. . . . However, . . . the parties' agreement here was not entered into prior to the termination of Rousseau's employment and did not provide that she would voluntarily resign. Rather, this agreement was entered into after she was discharged and provided that in exchange for her agreement not to bring certain claims, plaintiff would change her file to indicate that she had voluntarily resigned. This agreement did not change the fact that Rousseau was involuntarily discharged, thus §31 applies. Even if this agreement required Rousseau to waive her right to unemployment benefits, such a provision would be invalid under §31.

The court also observed that under §38 a circuit court may, as justice requires, review all issues considered by the Board of Review, not only those issues raised by the parties.

7/99
22,24: F

Sections 31, 38

APPEALS, Attorney fees, Assessment of costs

CITE AS: Winn v R K Tool, Wayne Circuit Court, No. 00-033312-AE (May 16, 2001)

Appeal pending: No

Claimant: Lisa M. Winn
Employer: R K Tool
Docket No. B2000-00943-155771

CIRCUIT COURT HOLDING: The MES Act does not authorize the awarding of costs and/or attorney fees, or sanctions, for the successful prosecution of an appeal in court of a Board or Referee decision or order.

FACTS: Claimant filed a motion for attorney fees, costs and sanctions after a successful appeal in circuit court of a Board decision.

DECISION: Claimant is not entitled to costs and/or attorney fees, or sanctions, under Sections 31 and 38. Motion for costs, attorney fees and sanctions dismissed.

RATIONALE: Costs are wholly statutory. Where there is no statutory authority to award costs, costs are not recoverable. Jeffrey v Hursh, 58 Mich 246, 258 (1885); Hester v Detroit Comm'rs of Parks & Boulevards, 84 Mich 450 (1891); Kuberski v Panfil, 275 Mich 495, 497 (1936); Gundersen v Village of Bingham Farms, 1 Mich App 647, 648-649 (1965).

Attorney fees may not be awarded absent statute or court rule. Nemeth v Abonmarche Development, 457 Mich 16 (1998); Davis v Koch, 118 Mich App 529(1982); State Farm Mutual Automobile Ins Co v Allen, 50 Mich App 71 (1973).

The court rule governing appeals under the MES Act, MCR 7.104, does not refer to attorney fees or costs. Section 31 of the MES Act, MCL 421.31, does not authorize costs or attorney fees; it is an "express limitation enjoining the charging of fees or the payment of attorney fees beyond what is approved by the Commission." Section 38 of the MES Act, MCL 421.38, provides for judicial review of unemployment benefit claim cases, and makes "no reference to exaction of costs or attorney fees." The claimant/appellant "has failed to establish a legally cognizable basis for an award of attorney fees or costs."

11/04

Section 38

APPEALS, Timeliness of appeal, Res judicata

CITE AS: Lewis v Oakwood Health Care Corp, Wayne Circuit Court, No. 02-243366-AE (April 29, 2003)

Appeal pending: No

Claimant: Donna M. Lewis
Employer: Oakwood Health Care Corp
Docket No. B2002-10089-RO1-165903W

CIRCUIT COURT HOLDING: An appeal to circuit court must be filed within 30 days of the mailing date of the Board's decision or order. Attempts to re-litigate an issue from an earlier appeal are barred under the doctrine of res judicata.

FACTS: Claimant appealed a November 15, 2002 Board decision to circuit court. The Board decision held claimant owed restitution under Section 62(a) of the MES Act. The claimant previously appealed the Board's June 2, 2000 decision holding her disqualified under Section 29(1)(a) to circuit court, and the court affirmed the Board in an order issued March 2, 2001. The claimant did not file a further appeal from that 29(1)(a) decision.

DECISION: The Board's November 15, 2002 decision is affirmed.

RATIONALE: The claimant's circuit court brief attempted to re-litigate the issue of her disqualification under 29(1)(a) and did not address the issue of restitution. The court lacked jurisdiction over the 29(1)(a) issue since the claimant had not filed her appeal within 30 days of the mailing date of the decision on that issue pursuant to Section 38(1). The court further noted that claimant's appeal was barred by the doctrine of res judicata since the issues were identical to her appeal to that court in 2000 and ruled on by the court in an order issued March 2, 2001. Res judicata applies where 1) the former suit was decided on the merits, 2) the issues in the second action were or could have been resolved in the former one, and 3) both actions involve the same parties. In Michigan res judicata is applied broadly. See Energy Reserves v Consumers Power Co, 221 Mich App 210, (1997); Pierson Sand and Gravel, Inc v Keeler Brass Co, 460 Mich 372 (1999); Sewell v Clean Cut Mgmt, Inc, 463 Mich 569 (2001); Dart v Dart, 460 Mich 573 (1999).

11/04

PROCEDURE, Good cause, Late protest, Personal reasons, UA Rule 270

CITE AS: Pool v R S Leasing, Inc, Wayne Circuit Court, No. 01-138871-AE (May 3, 2002)

Appeal pending: No

Claimant: Brinda J. Pool
Employer: R S Leasing, Inc
Docket No. B2001-08251-159781W

CIRCUIT COURT HOLDING: Where claimant's late protest was attributable to her parents' medical problems, good cause for reconsideration was established.

FACTS: On January 2, 2001 claimant received a determination holding her disqualified. The Agency received claimant's protest on March 12, 2001. The Agency requested an explanation for the untimely protest. Claimant disclosed that she had been out of town because her parents were ill. The Agency denied her request for redetermination. Claimant testified that after she received the determination, she left town to care for her parents, both seriously ill. She thought she would return before the 30-day appeal period expired, but did not return until February 28, 2001. She mailed her protest after the 30-day appeal period expired. She did not mail the protest before leaving town because her main concern was her parents' health. The Board found she failed to show good cause for her late protest.

DECISION: The claimant demonstrated good cause for her late appeal of the Agency's determination.

RATIONALE: The plain language of Rule 270(1) provides that the "Rule's [specific] list of grounds for finding good cause is not exclusive," and Rule 210(2)(e)(v) provides that "[g]ood cause for late filing of a new, additional, or reopened claim" includes "[p]ersonal physical incapacity or the physical incapacity or death of a relative . . .." Reading the two Rules together leads to the conclusion good cause was established.

11/04

PROCEDURE, Good cause, Late protest, Agency advice

CITE AS: Pinecrest Custom Homes v Meines, Kent Circuit Court, No. 02-03823-AE (October 8, 2002).

Appeal pending: No

Claimant: Janis Meines
Employer: Pinecrest Custom Homes
Docket No. B2001-14696-RM1-161795

CIRCUIT COURT HOLDING: Detrimental reliance on incorrect advice from a representative of the Agency constitutes "good cause" for filing a late protest.

FACTS: Claimant quit her job due to abusive conduct by the husband of the owner. Claimant filed for benefits. A determination held her disqualified for benefits under Section 29(1)(a). Claimant telephoned the claims examiner who issued the determination to ask what would be required to reverse the determination. Claimant testified the claims examiner told her (incorrectly) she would have to "prove with medical records or police reports that she had been 'physically injured.'" Claimant did not file a timely protest of the determination because she did not have such evidence. A few weeks later, claimant met the person who had replaced her. That person also quit due to abusive conduct from employer's husband and was seeking benefits. She told claimant other employees had quit for the same reason and had received benefits. Claimant then filed an untimely protest.

DECISION: The claimant established good cause for her late protest.

RATIONALE: "What justifies considering the late filing of a new, additional or reopened claim seems intuitively to justify considering the late protest of the initial determination of a claim." That definition of "good cause" is "a justifiable reason, determined in accordance with the standard of conduct expected of an individual acting as a reasonable person in light of all the circumstances, that prevented a timely filing or reporting to file...." The statement of a "representative of the Unemployment Agency that a protest could succeed only with evidence that one does not have compels the conclusion that there is no point to a protest; reasonable people do not do the futile. [I]t is not reasonable to expect lay-people to ignore whom the government holds out to be an expert." Claimant "had good cause for not protesting until she learned that she had been misled."

PROCEDURE, Substantial evidence

CITE AS: Ngo v Nabisco Inc/Lifesavers, Ottawa Circuit Court, No. 99-35034-AE (June 9, 2000)

Appeal pending: No

Claimant: Thiet Ngo
Employer: Nabisco Inc/Lifesavers
Docket No. B1999-03348-152225

CIRCUIT COURT HOLDING: Notwithstanding the opinion that evidence supporting a Board conclusion is less substantial when the Board disagrees with the Referee, the Board's decision must be affirmed if the record contains evidence a reasonable mind would accept as adequate to support a conclusion.

FACTS: Employer discharged claimant for violating rules prohibiting the removal of company property without written authorization. Security guards stopped claimant and found two 50-count boxes of lollipops under a Burger King bag in his lunch box. He did not have a receipt showing they were purchased at employer's company store and did not know when he bought them. The candy was not packaged like that for sale at the company store, and was not in a bag from the store. Claimant testified he unwrapped both boxes to snack on, but had not eaten any of the candy. The Referee found the claimant's testimony credible that he previously purchased the candy and had thrown the receipt away. The Board rejected the Referee's credibility finding and found claimant disqualified under Section 29(1)(b). The Board found the claimant not credible because he did not know when he bought the lollipops, bought them to snack on and removed the cellophane but did not eat any, then tried to remove them from the facility without a receipt.

DECISION: Claimant is disqualified for misconduct.

RATIONALE: Claimant argued that the Board did not give due deference to the Referee's credibility finding, citing Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc, 393 Mich 116, 127 (1974), for the proposition that "evidence supporting a review board's conclusion is less substantial when it disagrees with an experienced impartial examiner who has observed the witness," to argue that there was insufficient evidence to support the Board's conclusion. The court disagreed, observing that "less substantial" is not the same as "insubstantial" and that Section 34 authorizes the Board to "...reverse the findings of fact and decision of the referee."

11/04

Section 32a(2)

APPEALS, Timeliness of appeal, Fax, Definition of Day

CITE AS: Zuber (Ameritech Publishing Inc), 2002 BR 171048 (B2003-09495)

Appeal pending: No

Claimant: Kathy L. Zuber
Employer: Ameritech Publishing, Inc.
Docket No. B2003-09495-171048

BOARD OF REVIEW HOLDING: A protest or appeal is timely if RECEIVED before midnight of the deadline date.

FACTS: The determination was issued May 6, 2003. Employer faxed its appeal June 5, 2003 at 4:04 p.m. Central time. The Agency issued a redetermination August 27, 2003. Employer appealed the redetermination by fax on September 26, 2003 at 4:13 p.m. Central time. The Agency stamped employer's appeal as received on September 29, 2003; there was also a stamp indicating the fax was received September 26.

DECISION: The Agency timely received both the employer's protest of the determination and the employer's appeal of the redetermination.

RATIONALE: Claimant asserted the protests were untimely because they were submitted after the close of business. Section 32a states in relevant part that a protest of a determination or an appeal of a redetermination must be filed with the Agency "within 30 days after the mailing or personal service." The Act does not define the word "day." Rule 105(2) of the Rules of Practice states: "The calendar day on which compliance is required shall be included in the computation of time." Webster's Ninth New Collegiate Dictionary, defines "day" in relevant part: "the mean solar day of 24 hours beginning at mean midnight." We find the word should be given its ordinary meaning.

If the particular protest or appeal is in fact **received** on or before the date due, then the protest or appeal will be treated as timely. However, the Board is not mandating the Board or Agency to keep fax machines on 24 hours. Parties assume the risks associated with their choice of media. A party attempting a last minute appeal may find the fax number busy or turned off. Attempt does not equal receipt.

11/04