

A. D. No. B91-12323RR-131804
S. S. No. ~~70038-0022~~
B. O. No. 16

STATE OF MICHIGAN
IN THE 16TH JUDICIAL CIRCUIT COURT

SAM P. CIARAMITARO,
Claimant-Appellant,

v

Case No. 96-4644-AE
HON. MICHAEL D. SCHWARTZ

MODERN HARD CHROME SERVICE,
Employer-Appellee,

and MICHIGAN EMPLOYMENT
SECURITY COMMISSION,

Appellee.

MARK TAYLOR (P45413)
Attorney for Claimant-Appellant
2 Crocker Blvd Ste 102A
Mt Clemens, Michigan 48043
(810) 783-4919

FRANK J. KELLEY, Attorney General
for the State of Michigan
By: MAX E. SIMON (P20504)
Assistant Attorney General
Attorneys for Michigan Employment
Security Commission

ORDER AFFIRMING BOARD OF REVIEW DECISION

A. D. No. B91-12323RR-131804
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ORDER AFFIRMING BOARD OF REVIEW DECISION

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

SAM P. CIARAMITARO,

Claimant/Appellant,

vs.

File No. 96-4644-AE

MODERN HARD CHROME SERVICE,

Employer/Appellee,

vs.

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Agency/Appellee.

OPINION AND ORDER

Claimant Sam Ciaramitaro appeals from an April 29, 1996 Order of the Michigan Employment Security Commission ("MESC") Board of Review denying his application for rehearing and, in effect, affirming an April 13, 1994 MESC Referee Decision which in turn affirmed an April 9, 1992 MESC Referee Decision that claimant Ciaramitaro worked only 18 weeks in the 52 weeks immediately preceding his filing for unemployment benefits on October 2, 1990, and that claimant Ciaramitaro received a salary continuation during that same 52 week period which cannot be used for credit week purposes.

I.

The essential facts underlying this administrative appeal are undisputed. Claimant Ciaramitaro was involuntarily retired from

his production supervisor position at Modern Hard Chrome Service Company ("MHCS") on February 2, 1990 after working there for 34 1/2 years. MHCS presented claimant with a February 2, 1990 letter, which stated in part:

"Following are the terms of the early retirement package that Modern Hard Chrome Service Company has prepared for you:

Salary Continuation: 34 weeks of salary continuation, paid consecutively. First payment will be paid on Thursday, February 8, 1990 and continue through the last payment on Thursday, September 27, 1990."

Claimant Ciaramitaro received these 34 weekly gross payments of \$868.00 after which, on October 2, 1990, he applied for unemployment benefits.

In an August 1, 1991 MESC Redetermination, it was concluded that claimant Ciaramitaro was ineligible under Section 48 of the Michigan Employment Security Act because he could not establish twenty "credit weeks" in the 52 calendar weeks immediately preceding his application for unemployment benefits. Following an administrative hearing at which claimant Ciaramitaro testified, an April 9, 1992 MESC Referee Decision issued affirming the August 1, 1991 MESC Redetermination:

"It was valiantly argued that the 34 weeks of continuous pay was not severance pay, but rather regular salary that claimant was receiving. This could very well be true, but the fact remains that claimant performed absolutely no services whatsoever for the employer in order to earn such checks; therefore, the monies received during the 34 weeks can not be used for credit-week purposes."

On appeal to the MESC Board, the Board set aside the April 9, 1992 Referee Decision and remanded to the Referee for receipt of evidence regarding why MHCS made the 34 weeks of payments to claimant Ciaramitaro:

"While it is possible that the 34 weeks at issue could be credit weeks, what is determinative is the reason why the payments were made. If the employer was under no legal obligation to make those payments then they would be severance pay. Severance pay is not remuneration within the meaning of the Act and cannot be used to establish credit weeks. However, if the payments were made as a result of a legal obligation, then they would be remuneration and could be used to establish credit weeks. (citations omitted)"

On remand, the MESC Referee held a second hearing at which claimant Ciaramitaro again appeared, testifying that he was given the aforementioned February 2, 1990 letter when he was involuntarily retired, that he believed MHCS owed him a legal obligation to pay him the continuing 34 week salary, and that MHCS gave him 34 weeks salary as representing one week for every full year he had worked for them. Also received into evidence was a March 31, 1994 letter from MHCS Vice President Douglas Nicholl to the Referee stating MHCS "felt Mr. Ciaramitaro should be given some type of severance package", but that there was "no agreement between the Company and Mr. Ciaramitaro concerning this and no legal obligation to do so." In an April 14, 1994 Decision, the Referee again concluded claimant Ciaramitaro was not entitled to unemployment benefits, affirming the August 1, 1991 MESC Redetermination:

"Again, claimant performed no services for the

involved entity for the 34 weeks in question. It is found that there was no legal obligation on the part of the employer to give claimant 34 weeks of continued salary.

It is further found that the payment received by claimant for 34 weeks was for past services performed."

The MESC Board ultimately affirmed this Decision by Order of April 29, 1996.

II.

When reviewing an MESC decision, a circuit court must determine if the decision is authorized by law and supported by competent, material, and substantial evidence on the whole record. Senior Accountants, Analysts, and Appraisers Association v City of Detroit, 184 Mich App 551, 556-557; 459 NW2d 15 (1990) lv den 437 Mich 888 (1991). "Substantial evidence" is more than a scintilla of evidence, but substantially less than a preponderance of the evidence. Id., at 557. It is that amount of evidence a reasonable mind would accept as sufficient to support a conclusion. In re Payne, 444 Mich 679; 514 NW2d 121 (1994).

MCL 421.46(a)(1); MSA 17.550(a)(1) provides:

". . . . "benefit year" means the period of 52 consecutive calendar weeks beginning the first calendar week in which an individual files a claim in accordance with [MCL 421.32; MSA 17.534] and meets all of the following conditions:

(1) The individual has earned 20 credit weeks in the 52 consecutive calendar weeks before the week he or she files the claim for benefits."

MCL 421.48; MSA 17.552 reads in part:

"(1) An individual shall be deemed

"unemployed" with respect to any week during which he or she performs no services and with respect to which remuneration is not payable to the individual. . . .

(2) All amounts paid to a claimant by an employing unit of (sic) former employing unit for vacation or a holiday, and amounts paid in the form of retroactive pay, in lieu of notice, shall be deemed remuneration in determining whether an individual is unemployed under this section and also in determining his or her benefit payments under [MCL 421.27(c); MSA 17.529(c)], for the period designated by the contract or agreement providing for the payment, or if there is no contractual specification of the period to which such payments shall be allocated, then for the period designated by the employing unit or former employing unit. However, payments for a vacation or holiday made, or the right to which has irrevocably vested, after 14 days following such vacation or holiday, and payments in the form of termination, separation, severance or dismissal allowances, shall not be deemed wages or remuneration within the meaning of this section."

Whether payments from an employer constitute "remuneration" for purposes of qualifying for unemployment benefits is governed by MCL 421.48. Smith v Hayes Albion, 214 Mich App 82, 90; 542 NW2d 293 (1995).

As a matter of law, MCL 421.46(a)(1) and MCL 421.48 authorized the MESC to disqualify claimant Ciaramitaro from receiving unemployment benefits if the 34 weeks of payments he received from MHCS during the 52 consecutive calendar weeks before the week he filed a claim for benefits on October 2, 1990 were termination, separation, or severance payments. Smith, supra. While the Court agrees with claimant Ciaramitaro that the disqualification provisions of the Michigan Employment Security Act are to be

narrowly construed (see Kempf v Michigan Bell Telephone Company, 137 Mich App 574; 358 NW2d 378 (1984) lv den 424 Mich 857 (1985)), the Act specifically provides that "payments in the form of termination, separation, severance or dismissal allowances, shall not be deemed wages or remuneration". MCL 421.48(2). The MESC's Decision is authorized by law. Senior Accountants, supra.

Competent, material and substantial evidence before the Referee also supported the Referee's factual finding that the 34 weekly payments made to claimant Ciaramitaro constituted severance pay that "shall not be deemed wages or remuneration". MCL 421.48(2). Claimant Ciaramitaro offered no proof that he was legally entitled to receive a continuing weekly salary if involuntarily retired by MHCS. Although the February 2, 1990 letter references the "terms of the early retirement package", the Referee could reasonably find, as he did, that one of these "terms" was claimant Ciaramitaro's receipt of 34 weeks of severance pay as envisioned under MCL 421.48(2). A reviewing court should give due deference to administrative expertise, and should not invade the province of exclusive administrative fact-finding by displacing the agency's choice between two reasonably different views. Senior Accountants, supra. Claimant Ciaramitaro's argument that the 34 weeks of continuing salary were retroactive pay in lieu of notice is not supported by the record and cannot, in any event, displace the Referee's reasonably different view that the payments constituted severance pay and, thus, "remuneration". Id.

The challenged April 13, 1994 MESC Referee Decision is

authorized by law and supported by competent, material, and substantial evidence on the whole record. Senior Accountants and In re Payne, supra. Consequently, the MESC Board's April 29, 1996 Order affirming that Decision is hereby AFFIRMED. Taxable costs ONLY are hereby awarded appellee MESC.

IT IS ORDERED.

MICHAEL D. SCHWARTZ

MICHAEL D. SCHWARTZ, Circuit Court Judge

MDS/dj

NOV 1 1996

Dated: _____

cc: Mark Taylor, Esq.
Max E. Simon, Assistant Attorney General

A TRUE COPY

Carmela Schaub
CLERK

BY _____

DEPUTY CLERK

STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

SAM P. CIARAMITARO, Appeal Docket No. B91-12323RR-131804W
 Claimant Social Security No. 370-30-0722
MODERN HARD CHROME SERVICE,
 Employer

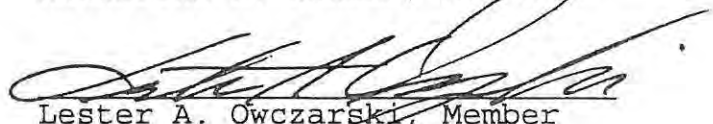
ORDER DENYING APPLICATION FOR REHEARING

This case is before the Board of Review upon application of the claimant for a rehearing by the Board in respect to its decision dated February 22, 1996. The Board of Review, having read and considered said application, and having reviewed the record in the matter, is of the opinion that said application should be denied.

IT IS THEREFORE ORDERED that said application shall be and the same is hereby denied.



Katherine L. Hansen, Member



Lester A. Owczarski, Member

MAILED AT LANSING, MICHIGAN APR 29 1996

This order will become final unless a written appeal therefrom is RECEIVED by the clerk of the appropriate circuit court on or before

MAY 29 1996

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME.