ABLE & AVAILABLE
160-Effort to secure employment or willingness to work
160.1-Application for work Seeking waiven

STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

CHARLES HABERMAN, Appeal Docket No. B77-3056-57623

Claimant Social Security No. 377-09-5262

THE STROH BREWERY COMPANY,

Employer

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DECISION OF BOARD OF REVIEW ON REHEARING

This matter comes before the entire Board of Review pursuant to an order allowing oral rehearing issued by the Board on March 5, 1981. The rehearing was requested by the Michigan Employment Security Commission. A prior decision of the Board dated January 7, 1981 was set aside by such order.

Oral argument was presented to the entire Board on March 24, 1981 by Ms. Doris A. Goleniak, a representative of the Commission.

The claimant in this matter had worked for the involved employer for a period of some 21 years as a bottler. Employees in this classification perform all jobs related to packing and bottling. These include driving a lift truck (hi-lo), performing warehouse and janitorial work, and working on a soaking machine (T.pp.40-41).

In June of 1971, the claimant suffered a job related injury which prevented him from driving a hi-lo when such work required him to look straight up (T.pp.23-26). Also, he could not work on top of high machinery (T.p.25). After the injury, the claimant stacked empty bottle cases and performed janitorial work (T.pp.17-19). He continued performing these duties until the date of his mandatory retirement, July 30, 1976 (T.p.17).

After he filed a claim for unemployment benefits, the Commission, on January 17, 1977, issued a redetermination finding the claimant eligible for benefits under the ability and availability provisions of Section 28(1)(c) of the MES Act. The employer appealed this adjudication to a referee.

At the referee's hearing held on May 18, 1977, the claimant testified that he was able to perform the duties which he had performed prior to retirement (T.p.26). During 10 months of unemployment, he sought work with three employers as a service station attendant, driver of a light delivery truck, and a battery rebuilder (T.pp.45-49). The claimant admitted that he was not attached to the labor market during the period from January 15, 1977 through April 1, 1977 (T.pp.49-50).

By decision dated September 15, 1977, the referee held the claimant ineligible for benefits for the period from August 1, 1976 through May 18, 1977 under the

seeking work provisions of Section 28(1)(a) and the ability and availability provisions of Section 28(1)(c). The claimant appealed that decision to this Board.

Sections 28(1)(a) and (c) of the MES Act read as follows:

> "Sec. 28. (1) An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that:
>
> (a) He has registered for work at and thereafter has continued to report at an employment office in accordance with such rules as the commission may prescribe and is seeking work.
>
> (c) He is able and available to perform suitable full-time work of a character which he is qualified to perform by past experience or training, and of a character generally similar to work for which he has previously received wages, and he is available for such work, full time, either at a locality at which he earned wages for insured work during his base period or at a locality where it is found by the commission that such work is available."

In order to be eligible for benefits under these Sections of the Act, a claimant must register for work at and report to an unemployment office in accordance with the Rules promulgated by the Commission. In addition, the claimant normally must be seeking work (Section 28[1][a]) and must be able and available to perform suitable full-time work of a character which he is qualified to perform by past experience or training (Section 28[1][c]). His efforts to obtain employment are deemed to be indicative of his availability and his attachment to the labor market. Dwyer v UCC, 321 Mich 178 (1948).

Under Section 28(1)(a)(2) of the Act, the Commission, except during a period of disqualification, may waive the seeking work requirement. Such a waiver was in effect for the entire period in question in this matter, August 1, 1976 through May 18, 1977. From the record, it appears that the claimant was not made aware of the waiver. The Commission, through oral argument, asserts that a claimant need not be aware that the seeking work requirement has been waived to be benefitted by the waiver. We agree.

In Hinga v Brown Company, ___ Mich App ___ (1980), the court held that a claimant's failure to seek work cannot be used as a criterion of availability when the seeking work requirement is waived. Although the Court of Appeals implies that the claimant there had knowledge of the waiver, there is nothing in the referee's, Appeal Board's, or Circuit Court's decisions in Hinga to indicate that the claimant was in fact aware of the waiver during the period in question. Indeed, the referee's decision in Hinga expressly contradicts such a surmise where it is stated, "He advances no reason for his failure to make any

more than the number of prospective employer contacts previously mentioned." Hinga (Brown Co), B75-2157, Aff'd by Appeal Board, 1976 AB 50644. Therefore, it does not appear that in Hinga there was any knowledgeable reliance on the waiver. While we fully agree with the sentence in the Court of Appeals decision that a claimant may rely on a seeking work waiver, we are convinced that the Court of Appeals did not intend actual knowledge of a "seeking work" waiver as a condition of eliminating seeking work from the test of availability. We add that if actual knowledge were required, seeking work waivers might become virtually meaningless because in our reviewing experience it has been extremely rare that seeking work waivers in effect were brought to claimant's attention.

Finally, it must be kept in mind that the MES Act is social legislation with a remedial function. As a result, the maxim "the law does not require the performance of a useless act," has special application here. See McCauley (Service Systems Corporation), 1978 BR 55189 (B77-3812).

Turning to the issues of ability and availability, a review of the record in this matter indicates that the claimant met the eligibility requirement of Section 28(1)(c) of the Act for the period from August 1, 1976 through January 15, 1977 and from April 3 through May 18, 1977. In fact, the referee acknowledges that the claimant's physical limitations only prevented him from driving a hi-lo or working on top of high machinery. He was not prevented from performing many of the jobs he had performed in the past. Further, the record is clear that the claimant did return to work for the employer after incurring an injury in 1971 which resulted in the physical ailments referred to by the referee. He continued to work for this employer until the date of his mandatory retirement in 1976.

For the period January 16, 1977 through April 2, 1977, the claimant acknowledged that he was not attached to the labor market.

Before closing, we wish to state our agreement with Members Viventi and Cohl that branch office personnel should be more vigilant in alerting parties to the existence of seeking work waivers.

The decision of the referee is hereby modified.

The claimant is eligible for benefits under Sections 28(1)(a) and (c) of the MES Act from August 1, 1976 through January 15, 1977 and from April 3, 1977 through May 18, 1977.

Thomas L. Gravelle, Member

Frank Salomone, Member

Beverly A. Hall, Chairperson

JAMES VIVENTI (MEMBER) AND MORRIS W. B. COHL (MEMBER) CONCURRING:

We agree with the majority as to the outcome of this case in that the claimant should not be held ineligible for benefits for the periods from August 1, 1976 through January 15, 1977 and from April 3, 1977 through May 18, 1977 under Sections 28(1)(a) and (c) of the MES Act. However, we would make the following observations.

After retirement, the claimant filed a petition for Worker's Compensation benefits alleging disability as a result of the June, 1971 injury. At the referee's hearing, the employer sought to introduce the results of a medical examination performed on the claimant on January 17, 1977. The referee excluded this document as hearsay. Although the weight to be given this statement in the light of the claimant's testimony would have been within the judgment of the referee, the signed statement should have been admitted since it directly related to an issue before the referee--the claimant's ability to perform his customary work.

A claimant may collect unemployment benefits and at the same time collect Worker's Compensation benefits so long as the claimant had not been employed in a "made job" merely out of the sympathies of the employer. If that were the situation, it could be said that the claimant was outside of the labor market. Henry v Ford Motor Co, 291 Mich 535 (1939).

In the instant case, the claimant, with few exceptions, was able to perform all the duties of employees in the bottler classification after his injury in June of 1971 and continued to do so until he retired on July 30, 1976. The employer does not allege that he was given restricted or favored work. In these circumstances, the claimant has established his ability to perform his customary work.

We turn now to the question of the claimant's availability.

In Dwyer v UCC, 321 Mich 178 (1948), the Michigan Supreme Court had before it the question of whether a claimant's failure to adequately seek work should result in his ineligibility under the availability provision of Section 28(1)(c) of the Act. Act No. 360, Pub. Acts 1947 added the seeking work requirement to Section 28(1)(a) but had not been adopted during the eligibility period in question. The court stated that this amendment did not impose a new requirement upon the right to benefits. Rather, the purpose of the amendment was to clarify existing legislative intent.

To be eligible for benefits, a claimant must demonstrate a genuine attachment to the labor market. A test of such attachment is the claimant's availability for work. Since this test is subjective in nature, we must look to the claimant's mental attitude to determine if he wants to work or is content to remain idle. Evidence of his attitude is his attempt to obtain work. "A person who is genuinely attached to the labor market and desires employment will make a reasonable attempt to find work and will not wait for a job to seek him out." Dwyer, supra.

From the analysis provided to us in Dwyer, it is clear that the availability requirement of Section 28(1)(c) requires a finding of fact on the claimant's efforts to seek work. Therefore, the referee did not err by ruling on the claimant's eligibility under both Section 28(1)(c) and Section 28(1)(a) even though this latter Section was not specifically covered in the redetermination appealed to her.

Under Section 28(1)(a)(2), the Commission may waive the seeking work requirement for a claimant when he is not in a period of disqualification. This Section reads as follows:

> "(2) Except for period of disqualification, the requirement that the individual shall seek work may be waived by the commission where it finds that suitable work is unavailable both in the locality where the individual resides and in those localities in which the individual has earned base period credit weeks."

The mechanics for determining whether suitable work is available in the localities specified by the Act are set forth in Rule 216(2) of the Commissions Administrative Rules, revised April 18, 1980. In addition to waiving the seeking work requirement based upon the unemployment rate in a labor market area, the Commission excepts from this waiver individuals who possess skills for job vacancies known to exist in that area.

When questioned about the Commission's procedures for disseminating information about waivers and their exceptions, Ms. Goleniak stated that, to the best of her knowledge, neither claimants nor employers are made aware of this information. The claimants are not advised of the waivers because of the difficulty of doing so in light of the volume of claimants serviced by the Commission's branch offices.

While we sympathize with the difficulties facing the Commission in these times of high unemployment, some of the problems which arise from its handling of the waivers should be noted.

Failure to disclose the existence of a waiver of the seeking work requirement to a claimant results in his seeking work in an area and during a time when the Commission knows his likelihood of obtaining employment is remote. Further, the uninformed claimant, discouraged in his early attempts to obtain employment in an area covered by a waiver, may abandon further effort. Yet, to obtain his benefits, he must certify that he has been seeking work. It appears that claimant Haberman exemplifies this situation (See T.p.47). No claimant should be required to certify to a requirement which has been voided.

The Commission's failure to advise the employer of waivers and the exceptions thereto results in unfairness to the employer who is denied the opportunity to challenge the Commission's ex parte decision that a claimant's job experience does or does not fall within an exception to the waiver. In our reviewing experience, only rarely does the Commission indicate on its adjudications that the seeking work requirement has been waived.

In Hinga v Brown Company, ___ Mich App ___ (1980), the court held that a claimant's failure to seek work cannot be used as a criterion of availability when the seeking work requirement has been waived. In the second-to-last paragraph of its decision in Hinga, the Court of Appeals states: "Thus plaintiff was entitled to rely on the representation that he need not seek work in order to be eligible for benefits." The majority appears convinced that the Court of Appeals did not find that the claimant had knowledge of the waiver of the seeking work requirement in Hinga v Brown Company, ___ Mich App ___ (1980). We are not convinced that the Court would use the phrase "rely on the representation" as loosely as the majority would have us believe.

Webster defines "rely" as follows:

> "1. To have confidence; trust."

The term "representation" is defined as;

> "4. [often pl.] A description, account or statement of facts, allegations or arguments, esp. one intended to influence action, . . ." Webster's New World Dictionary of the American Language (2nd College Edition), pp. 1200-1201, 1206.

Applying these definitions to the phrase used by the court in Hinga, we conclude that the rule of law from that case is that a claimant's failure to actively seek work cannot be used as critereon to determine his availability when such failure resulted from his awareness that a seeking work waiver was in effect.

We will, however, concur in the majority's decision because of the ambiguity contained in the Hinga decision and because it would be unfair to penalize the claimant for the Commission's failure to inform him of the waiver where he has fulfilled the other requirements for eligibility.

James Viventi, Member

Morris W. B. Cohl, Member

MAILED AT DETROIT, MICHIGAN June 30, 1981

This decision will become final unless a written request for rehearing or appeal to the appropriate circuit court is RECEIVED on or before

July 20, 1981

TO PROTECT YOUR RIGHTS YOU MUST BE ON TIME.