A.D. No. B88-12018-110101
S.S. No. [redacted]
B.O. No. [redacted]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

ARTHUR GOLEMBIEWSKI,
Appellant,

v

COMPLETE AUTO TRANSIT
and
MICHIGAN EMPLOYMENT SECURITY COMMISSION,
Appellees.
_____/

Case No. 89-1046 AE
4.2.90
HON. VALDEMAR WASHINGTON

110101

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Attorney for Appellee

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for the State of Michigan
BY: DAVID A. VOGES (P25143)
Assistant Attorney General
Attorneys for Appellee
Michigan Employment Security Commission

OPINION

Flint, Michigan

Monday, April 2, 1990

THE COURT: This is the matter of Arthur Golembiewski, I guess that's close enough, G-O-L-E-M-B-I-E-W-S-K-I, versus Complete Auto Transit and Michigan Employment Security Commission, 89-1046-AE.

Is this Mr. McHugh?

MR. VOGES: Your Honor, I'm David Voges, Assistant Attorney General, representing the Michigan Employment Security Commission.

THE COURT: Okay. And this is?

MR. LAWRENCE: Jeff Lawrence, your Honor. I'm representing Complete Auto Transit. I'm with Attorney Larry Hanba's office.

THE COURT: Okay, so where's. . . .oh, I see. You all want to go ahead then in Mr. McHugh's absence?

MR. VOGES: Yes, please, your Honor.

THE COURT: Okay.

As I understand the issue here, it's whether or not the Defendant, or I should say the claimant, did something -- well, I should state it this way: Does a simple act of -- does a single act of simple negligence which causes the employer great monetary loss constitute misconduct under Section 29A of the Michigan Employment Security Act?

State the issue fairly succinctly, gentlemen?

MR. VOGES: Yes, your Honor.

MR. LAWRENCE: I would agree with that statement of the issue.

THE COURT: Okay. Factually though what we have is a case where the claimant was an over-the-road trucker and he drove for Complete Auto Transit, and as I understand what happened in this case, there was the accident and there was a disciplinary layoff from April 19th of 1988 until May 16th of 1988. And the claimant applied for unemployment benefits and they were granted. The employer requested a redetermination and the redetermination allowed the benefits. The employer appealed to the referee who affirmed the redetermination.

The referee found further that on April 12th, 1988, claimant was involved in an accident. The accident occurred when his truck struck an overpass resulting in damage in excess of sixteen thousand dollars. And it appeared that it was done negligently and not deliberately.

But, I think what's more important in this case is that factually what we had here, we didn't have a truck driver who just for the heck of it decided not to lower the ramps on his truck. This is one of those over-the-road car hauler type trucks where they're alternating heights, I guess, in determining -- depending on the type of load that you're carrying.

Apparently what happened is that the claimant was lowering the ramps on his truck, and after lowering the first ramp he was distracted by a malfunctioning jump pin. He spent approximately 30 minutes trying to repair it. He then returned to his cab without completing the lowering process of the last ramp.

And apparently, also, prior to this accident the claimant had never had a major chargeable accident.

The Board of Review decides that they were going to reverse the referee's decision based upon the amount of damage and the holding in the Woiderski case, and I guess that's W-O-I-D-E-R-S-K-I.

I think clearly under the facts as set forth in this case we have to look at the, what the courts mean by misconduct. In the Karr case the Supreme Court said, or it has defined misconduct as, quote, Conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such a degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employer's -- excuse me -- of the employee's duties and obligations to his employer."

And it said, "On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, inadvertence or ordinary negligence and isolated incidents of good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute."

And I think clearly in this case the claimant wasn't Calamity Sue or a person who had trouble that followed him. I forget the character in Dog Patch, but he always had a dark cloud over his head, and you don't find that here. In fact, you find a man who inall of his years seemed conscientious. He was also in the process of doing that which he was charged with doing; that is, lowering his ramps, and he got distracted.

Now, it would be one thing if he had been distracted in something that was an adventure or lark of his own, but he was distracted because he was looking after his employer's equipment. There was a jump pin that was malfunctioning and he spent 30 minutes trying to fix it. And he apparently did fix it and in the process forgot to lower the last ramp.

Now, I have recognized that the employer says, well, it costs us a lot of money; our insurance rates have probably gone through the roof. How can we forget to lower ramps and hit overpasses? I understand all of that,

but you're talking here about misconduct and I don't think it exists. And I think that the Board of Review abused their discretion -- I should say they applied the wrong standard for misconduct, and as a result of it it should be reversed and the benefits paid to the claimant.

I guess you all can call Mr. McHugh and tell him that he can prepare the order.

MR. VOGES: Well, your Honor, the M.E.S.C. concurred with the position of the appellant, so the M.E.S.C. can prepare and submit an order.

THE COURT: That's fine, okay.

MR. VOGES: Thank you very much.

THE COURT: Thank you, gentlemen.

MR. LAWRENCE: Thank you, your Honor.

THE COURT: Okay.

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STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

ARTHUR T. GOLEMBIEWSKI, Appeal Docket No. B88-12018-110101

Claimant Social Security No. [redacted]

COMPLETE AUTO TRANSIT,

Employer

DECISION OF BOARD OF REVIEW

This matter is before the Board of Review on the employer's appeal of a Referee's decision which held the claimant not disqualified for benefits pursuant to the provisions of Section 29(9) of the Michigan Employment Security Act.

Having reviewed the record of this matter, the majority of the Board of Review panel assigned to consider this matter finds the facts to be:

The claimant worked for the involved employer as a over-the-road driver from 1975 through April 19, 1988. The claimant's responsibility was to deliver automobiles to dealerships. The claimant was a member of Teamsters Local #332.

The claimant made a delivery run to Holly, Michigan.

When the claimant had loaded the cars onto his truck, he lowered deck #3. However, after he lowered the deck, a pin on one of the jump skids stuck, and the claimant's spent approximately 30 minutes trying to correct the situation. As a result, the claimant forgot to lower deck #4 when he decided to drive to his next delivery.

Normally, the employer's delivery trucks have a sticker on the door to the cab which tells the driver to be sure to check to make sure that the decks are lowered. However, the claimant testified that his truck did not have such a sticker.

While the claimant was en route, he struck an underpass and damaged one of the cars he was carrying beyond repair and tore the roof off of another causing approximately $16,000 in damage. In addition, the accident spewed debris over the highway he was traveling on which resulted in damage to three passenger cars being operated by other parties on the roadway. The employer had to pay the insurance deductibles for repairs to those cars.

The employer offered evidence to the effect that it had numerous safety meetings with its drivers at which they were verbally warned to completely check their truck before they drove away, that the warning stickers were

installed in all of their trucks, and that the employer frequently issued bulletins warning the drivers about the risk of accident if the decks were not lowered.

The claimant admitted the accident and admitted failing to lower the fourth deck, but testified that because of his attempts to repair the jump skid pin, he forgot about the deck being up. The claimant further offered evidence that for six years he had received awards from the employer for performing damage-free work. He further testified that he had no prior suspension for any major violations of the employer's policies.

The employer did admit upon questioning from the Referee that the accident resulted from negligence rather than from any intentional act on the part of the claimant.

The employer testified that the claimant was put on a disciplinary layoff on April 19, 1988, and from the date of the accident, April 12, 1988, through the date of the suspension, April 19, 1988, no action was taken against the claimant because the employer was busy investigating the accident.

The employer cited to the Referee the decision of another Referee in Woiderski (Complete Auto Transit), Appeal Docket No. B88-04820-108690W (1989), in which the Referee held that a co-worker of the claimant's who was involved in a similar incident was disqualified for benefits under the disciplinary layoff provisions of Section 29(9) of the Act for the single incident of negligence, although, as the Referee found, that single incident of negligence would not have been enough to support a finding of misconduct under the discharge provisions of Section 29(1)(b) of the Act. The Board of Review affirmed the Referee's decision.

Applying the law to the facts of this matter, the majority finds:

By the claimant's own admission, he was aware of the fact that he was required to lower both decks before he drove his vehicle on the highways. However, he admitted that he only lowered one of the two decks and he admitted further that he neglected to lower the other deck before making the decision to drive to the next delivery spot and try to correct the situation there. While it is true that the claimant's overall record demonstrates one of safety in the operation of the employer's vehicles on the roads, this single incident of negligence caused the employer extensive damage in excess of $16,000. Furthermore, although this is only a single incident, the majority finds that the holding in Woiderski, Supra, is applicable to the present matter. Pursuant to the holding of that decision, the majority finds that the claimant's actions constituted misconduct.

The Referee's decision is reversed.

The claimant is disqualified for benefits pursuant to the provisions of Section 29(9) of the Act for the period from April 19, 1988, through May 14, 1988.

The claimant is required to make restitution of benefits received pursuant to Section 62(a) of the Act in an amount to be determined by the Commission.

The employer is entitled to a credit to its rating account pursuant to Section 20 of the Act in an amount to be determined by the Commission.

This matter is referred to the Commission for further proceedings consistent with this decision.

Morris W. B. Cohl, Member

Nancy A. Farmer, Chairperson

FRANK SALOMONE (MEMBER) DISSENTING:

I disagree with the majority.

I find the Referee's decision to be in conformity with the law and the facts.

I affirm the Referee's decision.

Frank Salomone, Member

MAILED AT DETROIT, MICHIGAN November 9, 1989

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

December 11, 1989

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME.