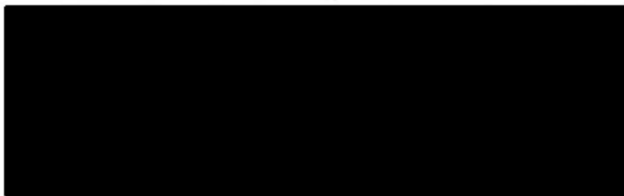

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

VAN WORMER INDUSTRIES,

Employer-Appellant,

-v-

MICHIGAN EMPLOYMENT
SECURITY COMMISSION
and JERRY L. McCULLOUGH,

Claimant-Appellees.
/

Civil Action No. 84-2768 AE

Dated: February 28, 1985

Before: Honorable Raymond R. Cashen

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OPINION OF THE COURT

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

VAN WORMER INDUSTRIES,

Employer-Appellant,

vs.

NO. 84-2768 AE

MICHIGAN EMPLOYMENT SECURITY COMMISSION and JERRY L. McCULLOUGH,

Appellees.

_______________________________________/

OPINION
OF THE COURT

This is an appeal from a decision of the Board of Review which reversed the decision of the referee and found claimant, Jerry L.McCullough, eligible for benefits for the week ending July 9, 1983.

Claimant McCullough is a hi-lo operator at Van Wormer Industries (hereafter "VWI"). On May 2, 1983, VWI posted a notice that the entire plant would be closed for a one week vacation period effective June 30, 1983 to July 11, 1983. Under the terms of the employment contract, the employer cannot shut down the plant for a vacation period unless such action is announced by the employer not later than May 1st. However, in the instant case it is undisputed that the notice was posted on May 2nd, not May 1st, which was a Sunday.

Claimant testified that on May 2, 1983, he handed in his slip requesting vacation time from July 16, 1983 to July 31, 1983. The claimant's vacation was approved on June 18, 1983. Claimant filed for and received unemployment compensation for the period of July 3, 1983 through July 9, 1983. The claimant contends that monies received for the week of the plant shut-down cannot be considered vacation pay but rather a bonus, and, therefore, he was

entitled to unemployment benefits. However, the employer asserts the notice effectively allocated one week of vacation pay to the shut-down period and, therefore, the allocation constituted remuneration and hence claimant is precluded from receiving unemployment.

The redetermination by the Michigan Employment Securities Commission (hereafter "MESC") found that claimant received gross amount of $1,386.15 on July 1, 1983 designated as vacation pay and allocated to a specific period by the employer and deemed remuneration as defined in Section 48 of the Act. Claimant was determined to owe restitution in the amount of $168.00.

Claimant appealed to the referee division, which found the employer properly allocated the time period in question as vacation and, therefore, affirmed the redetermination issued by the MESC.

The Board of Review determined that since the employer did not post notice of the shut-down until May 2nd, the employer failed to make a proper allocation and reversed the decision of the referee. Therefore, claimant was eligible for benefits for the week ending July 9, 1983 within the meaning of the MESC Act.

This Court reviews the agency determination pursuant to the standards set forth in MCL 421.38 and Const 1963, art VI, §28. The proper standard of judicial review to be employed is whether the decision is supported by competnet, material and substantial evidence on the whole record. King vs. Calumet & Hecla Corp., 43 Mich App 319; 204 NW2d 286 (1972). "Substantial evidence" has been defined as evidence which a reasoning mind would accept as sufficient to support a conclusion. While it consists of more than a mere scintilla of evidence, it may be substantially less than a preponderance of the evidence. Tompkins vs. Dept of Social Services, 97 Mich App 218, 222; 293 NW2d 771 (1980).

On appeal from decisions of the Board of Review, the Court may review questions of law or fact, Const 1963, art VI, §28; MCL 421.38; MSA 17.540, but it can reverse only if the order or decision is contrary to law or is unsupported by competnet, material and substantial evidence on the record. If there is no dispute as to underlying facts, questions presented on appeal are to be treated

as matters of law. Gormley vs. General Motors Corp., 125 Mich App 781, 784-785; 336 NW2d 873 (1983).

It is settled that an employer may lawfully designate a period during a lay-off for the allocation of vacation pay. Brown vs. LTV Aerospace Corp., 394 Mich 702; 232 NW2d 656 (1975) Rehearing denied, 395 Mich 912 (1975) Case dismissed 411 Mich 908 (1981). However, in the instant case, the Board of Review determined VWI failed to make an effective designation.

MCLA 421.48 provides, in part:

> "Sec. 48. (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, or with respect to any week of less than full-time work if the remuneration payable to the individual is less than his or her weekly benefit rate..."
>
> "(2) All amounts paid to a claimant by an employing unit or former employing unit for a vacation or a holiday, and amounts paid in the form of retroactive pay, or 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 section 27(c), for the period designated by the contract or agreement 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, and bonuses, shall not be deemed wages or remuneration within the meaning of this section."

Additionally R 421.302 of the Michigan Administrative Code, 1979 AC provides:

> "Rule 302. When an employer is entitled to designate, pursuant to section 48 of the Michigan employment security act, vacation pay to a period of layoff, forced vacation, or other separation, the employer shall either deliver to the affected employee and to the employee's bargaining representative, if any, on or before the employee's last day of work, written notice of such designation stating that such designation may render the employee ineligible for unemployment benefits during the designated period or shall post such notice conspicuously in easily accessible places frequented by employees and deliver a

copy thereof to the employees's bargaining representative, if any. However, as to an individual laid off prior to the time of designation, posting of the notice shall not substitute for the requirement of delivery of the notice to such individual by mail."

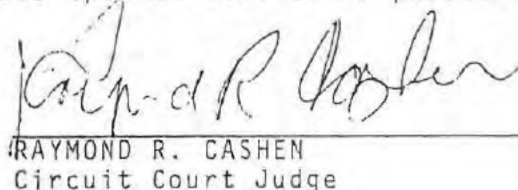
The terms of the collective bargaining agreement specify that the plant may be closed for a two week vacation period, announced by the employer not later than May 1st. (emphasis provided). It is undisputed that on May 2nd, the employer posted a notice stating the plant would be closed for a one week vacation period effective June 30, 1983 at 4:00 p.m. through July 11, 1983 at 7:30 p.m. The notice did not comply with specified requirements. Consequently, the decision of the Board of Review is supported by competent, material evidence and is not contrary to law. (See MCLA 421.38).

Furthermore, appellant's assertion that the notice complied with Rule 302's requirement that the employer deliver said notice to the employee or the employee's bargaining representative on or before the employee's last day of work is specious at best. Though Rule 302 does indicate notice must be given on or before the employee's last day of work, it further requires that notice to state that such designation may render the employee ineligible for employment benefits. VWI's posted notice did not contain that information. Therefore, appellant's assertion of compliance with Rule 302 is unpersuasive since it is clear appellant did not fully comply.

Finally, it must be kept in mind that the Michigan Employment Security Act is remedial in nature and is to be liberally construed to provide coverage, and its disqualification provisions are to be narrowly interpreted. Kempf vs. Michigan Bell Telephone Co., 137 Mich App 574; ____NW2d____ (1984).

After careful review, the Court finds the decision of the Board of Review supported by competent, material evidence and is not contrary to law. Therefore, the decision of the Board of Review is hereby AFFIRMED.

An order consistent with this opinion will enter pursuant to GCR 1963, 522.



RAYMOND R. CASHEN
Circuit Court Judge

Dated: February 28, 1985