ARIZONA COURT OF APPEALS

DIVISION ONE

RYAN HARDWICK, Appellant, vs. FREEPORT-MCMORAN CORPORATION and ARIZONA DEPARTMENT OF ECONOMIC SECURITY, an agency, Appellees.	Court of Appeals Division One No. 1 CA-UB 21-0271 No. 1 CA-UB 21-0272 (Consolidated) A.D.E.S. Appeals Board No. U-1717149-001-B
RYAN HARDWICK, Appellant, vs. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, an agency, Appellees.	A.D.E.S. Appeals Board No. U-1717149-001-B

APPELLANT RYAN HARDWICK'S REPLY BRIEF

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INTRODUCTION

The Answering Brief filed by the Arizona Department of Economic Security ("ADES") fails to show that the Appeals Board's decision should be affirmed.

I. The Reconsidered Determination was neither timely nor effective.

A. This Court is not prohibited from addressing ADES's untimely reconsidered determination.

The Answering Brief argues that this Court is prohibited from addressing ADES's non-compliance with A.R.S. § 23-773 because Hardwick did not raise the issue with the Appeals Board. (An. Br. 12-13). But, as set forth in the Opening Brief, Hardwick did raise with both the Tribunal and the Appeals Board the issue of ADES's admitted untimeliness in acting on his employer's information. (1R. 9, 1; 1R. 3, 2)

The timeliness of ADES's actions is governed by A.R.S. § 23-773. Under that statute, ADES, on its own motion could have issued a reconsidered determination within the time for the appeal to expire (7 days from delivery or 15 days from mailing to the last known address). A.R.S. § 23-773(B) and A.R.S. section 23-773 (E). No reconsider determination was issued during the appeal time. Therefore, the only way a timely reconsider

determination could be made would be if it was made within a year of the initial determination, was based upon "newly discovered evidence that by due diligence could not have been previously discovered" and the other provisions of A.R.S. § 23-773 (E). There is no showing by ADES that this was done. To the contrary, the reconsidered determination admitted that ADES did not act timely. (1R., Ex. 11)

In the Answering Brief, ADES does not dispute that under the considerations set forth in *A.C. v. ADES*, 249 Ariz. 387 (App. 2020) the burden of showing the reconsidered determination satisfied the requirements of A.R.S. § 23-773 (which included timeliness) was on ADES. The Appeals Board did not consider the untimeliness of the determination, stating merely "we infer that Claimant argues that because the Department's response was delayed, you should be entitled to keep the benefits he received, even though he was not eligible to receive them." The issue of the untimeliness of the reconsidered determination was presented to the Appeals Board and therefore not precluded by A.R.S. § 41-1993.

B. Contrary to ADES's argument, the decision to reconsider Hardwick's May 2020 eligibility for benefits is a "reconsidered determination".

ADES further argues, citing A.R.S. § 23-773(F), that "if a claimant who is initially eligible to receive benefits later becomes disqualified, ADES's decision to discontinue benefits is not a "reconsidered determination" under the statute because it does not contradict the "original determination." (An. Br. 15) The statute says nothing of the sort. Further, ADES provides no other authority for this novel argument.

ADES first determined that Hardwick was eligible for benefits. Later it determined he was not. The latter is a reconsidered determination that contradicts the original determination. ADES's argument on this score fails.

ADES argues that it "found that [Hardwick] had become disqualified because of a change in circumstances – namely, that he had received severance and vacation pay that was statutorily required to be allocated to the same time." (An. Br. 15) However, ADES's documentary "evidence" is so cursory as to not to explain how ADES claims the chain of events occurred. And ADES presented no witnesses to testify as to this issue. Moreover, this position is directly contrary to ADES's admission in its Reconsidered Determination that it had not "addressed the information

provided by the employer in a timely manner that resulted in your disqualification." (1R., Ex. 11)

C. Contrary to ADES's attempted rewrite in its Answering Brief, the Reconsidered Determination admits that ADES did not act timely.

Despite the admission of ADES's untimeliness in the Reconsidered Determination, ADES now argues that language does not mean what it says, but instead means "that the information was *provided by the employer in a timely manner* and that the Department did not address it when it initially determined that Hardwick was eligible." (An. Br. 17)(emphasis in An. Br.) But here ADES re-writes the language of the Reconsidered Determination which does not say what ADES now claims. ADES provided no witnesses to explain the meaning of the language. The scant documentary evidence provides no support for this argument. And, ADES's latest interpretation is inconsistent with the deputies' classification of the alleged overpayment as not only "administrative" but also "departmental" (1R, Ex. 11), the latter indicating a departmental error. (A.A.C. R6-3-1301(6)). The Reconsidered Determination was untimely by ADES's own admission.

Hardwick properly raised the untimeliness of ADES's actions before the Appeals Board, an issue which implicated A.R.S. § 23-773. The issue is properly before this Court. ADES failed to demonstrate it met the burden of showing it acting timely. The Appeals Board decision should be reversed on this basis.

II. Hardwick provided services during the furlough.

A. Hardwick's argument he provided services to his former employer was supported by evidence admissible in this administrative proceeding and was considered by the Appeals Board.

Also without merit is ADES's argument that Hardwick provided no evidence he provided services to his former employer by following the requirement to check in weekly and refrain from working for a competitor while on furlough. Hardwick was not precluded from raising this issue or providing evidence when he raised it in his Petition for Board Review. A.R.S. § 23-674(D) provides that "[t]he tribunal and the appeals board may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs." Further, the Appeals Board did not exclude Hardwick's evidence/argument of his ongoing relationship with his employer between

May and September 2020, and in fact, specifically referenced it. (1 R5, 2) The Appeals Board simply disagreed as to the effect of the evidence. (*Id.*)

The Appeals Board was entitled to consider this evidence. See A.R.S. § 23-672(C) (permitting the Appeals Board to "take additional evidence or rehear the matter and affirm, reverse, modify or set aside the decision….") ADES's argument that this issue is not properly raised is without merit and its citation to *Bank of Yuma v. Zero Constr. Co.,* 106 Ariz. 582, 581 (1971) is inapposite as it applies to litigation filed under the Arizona Rules of Civil Procedure in Superior Court, not an administrative proceeding before ADES.

B. ADES fails to show that Hardwick did not perform services between May and September 2020.

ADES unsuccessfully argues that Hardwick's employer's requirement that he check in each week during the furlough and not take a job at a competitor did not constitute "performance of services" as set forth in A.R.S. § 23-621(C). ADES attempts to analogize the Arizona statute to "hours worked" under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201-219. (An. Br. 19-20). That statute is inapplicable. The FLSA defines hours worked in connection with determining minimum wage (§206) and

paying overtime hours (§207). This provides no analogy to the Arizona statutes which determine when an allocation of severance benefits should occur. Likewise, *Owens v. Local Number 169*, 971 F.2d 347, 350-52 (9th Cir. 1992) is inapposite. The issue there was whether the employer was required to compensate employees when the party was "on call", not for determining when an employee is entitled to unemployment benefits after having been furloughed. This case has also no bearing on the current matter.

Also inapplicable is the holding in *Bacon v. Hennepin County Medical Center,* 550 F.3d 711, 715 (8th Cir. 2008) that under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654, requiring an employee on leave to periodically check in with an employer is permissible. This case has no bearing on whether such a reporting requirement provides a service to the employer. ADES's argument in this regard is irrelevant.

ADES's reference to Black's Law Dictionary's definition of "service" supports Hardwick's position. Hardwick provided a service to his then-employer through his weekly contacts which provided the employer with the convenience of receiving updates on furloughed employees and not having to hunt down employees if the employer chose to put them back to

work. In addition, Hardwick's agreement not to work for a competitor during the furlough—which, contrary to the position taken in the Answering Brief, was a significant limitation on his employment opportunities—was also an obvious benefit to the employer. Under the Black's Law Dictionary, Hardwick's activities during the furlough constituted services.

III. Hardwick's due process rights were violated by ADES's failure to continue the hearing when he stated he believed he should have counsel and was clearly confused about the nature of the proceeding.

Finally, ADES argues that Hardwick's due process rights were not violated. ADES argues "Hardwick never indicated that he wanted more time to hire counsel or to reach out to advocates, even after the ALJ told him about the bulletin board." (An. Br. 21) . But ADES ignores the fact that Hardwick stated at the very beginning of the hearing that he felt he should have legal counsel, but that he couldn't afford it (R.1, 5:20-22; Op. Br. 34) This was the point at which the ALJ should have mentioned the bulletin board and provided Hardwick with an opportunity to obtain low-cost or no-cost counsel. However, the ALJ only elected to raise this issue at the end of the hearing after the process was completed. Here in light of Hardwick's

multiple attempts to obtain assistance from ADES—which resulted in no help whatsoever—his specific statement that he believed he needed counsel, and the ALJ's comments at the end of the case referring him to the bulletin board with low-cost and no-cost assistance, the ALJ should have postponed the hearing to allow Hardwick the opportunity to obtain legal assistance. That the ALJ chose not to the violation of Hardwick's rights to due process.

Also unavailing are ADES's arguments that Hardwick understood the proceedings. That Hardwick stated he understood the procedure is not the same as understanding the procedure. It was clear from the statements, particularly at the end of the case where he said he thought the procedure was regarding waiver, that Hardwick did not understand the procedures despite his comments. This case is therefore like the *Martin v. Industrial Commission of Arizona,* 120 Ariz. 616 (App. 1978) and should be reversed for that reason.

CONCLUSION

For the foregoing reasons, Appellant Ryan Hardwick respectfully requests that this Court reverse the decision of the Appeals Board, find that ADES failed to meet its burden to show authorization to enter the

Reconsidered Determination, reinstate the determination of eligibility and vacate the overpayment order, and remand to ADES for further actions consistent with this Court's ruling. In the alternative, Appellant respectfully requests that this Court reverse the decision of the Appeals Board and order that severance be applied starting September 1, 2020, and remand to ADES for further actions consistent with this Court's ruling.

RESPECTFULLY SUBMITTED this 17th day of January 2023.

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CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns a brief, and is submitted under ARCAP Rule 14(a)(5).

2. The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced and contains 1,810 words.

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/s/ Mark J. DePasquale

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