

2110.

OHIO UNEMPLOYMENT COMPENSATION ACT—SECTION 1345-1 (g) GENERAL CODE—“AVERAGE WEEKLY WAGES”—INDIVIDUAL IN EMPLOYMENT—REFERS TO AMOUNT OF REMUNERATION, NOT TO WEEKLY UNIT OF REMUNERATION—CLASSIFIED OCCUPATION—INTERMITTENT EMPLOYMENT—UNEMPLOYMENT COMPENSATION—REEMPLOYMENT—STATUS AS TO BENEFITS.

SYLLABUS:

1. *The term “average weekly wages,” as defined in Section 1345-1 (g) of the Ohio Unemployment Compensation Act, refers to the amount of remuneration received by an individual in employment and not to a weekly unit of remuneration which is customarily received by workers in a classified occupation.*

2. *An individual receiving unemployment compensation, who is re-employed before he has received the total amount of benefits payable to him in connection with eligibility which he acquired under his initial employment, and who subsequently becomes separated from re-employment, before he has acquired eligibility to benefits in relation to such re-employment, is entitled to a continuance of benefits at the rate and in the amount of the balance of the total benefits payable as determined at the time of his initial eligibility for benefits.*

COLUMBUS, OHIO, March 16, 1938.

HON. CHARLES S. LEASURE, *Chairman, The Unemployment Compensation Commission of Ohio, Columbus, Ohio.*

DEAR SIR: You recently requested my opinion on two hypothetical cases involving an interpretation of the term “average weekly wages,” as it is set forth in section 1345-1 (g) of the Ohio Unemployment Compensation Law.

According to this provision of the law,

“‘Average weekly wages’ means the weekly earnings that an employee subject to this act would average if he were employed full time, i. e., the full number of scheduled or customary working hours per week in the employment or employments in which he is or was engaged prior to applying for benefits under this act. The commission shall make suitable rules for the pur-

pose of calculating the average wages on the basis of which benefits under the act are to be paid, and for this purpose may average full time earnings over a period of three months or more in order to include reasonable proportions of busy and slack weeks, and may adopt such method or methods of calculating the said average weekly wages as may be suitable and reasonable under this act."

The first case which you present is stated as follows:

"CASE NUMBER ONE

X an employer subject to the Ohio Unemployment Compensation Law has in his employ A on a weekly salary of \$12.00 per week. He is employed six days a week. Later, X employs B to work two days per week at the rate of \$2.00 a day. Subsequently both A and B become unemployed, due to lack of business. Both A and B were employed by X more than 20 weeks and both are eligible to receive benefits.

QUESTION: What would be the average weekly wage of B?"

The issue raised by this question is: Does the quantity of "average weekly wages" depend on the amount of remuneration received by the claimant, or does it correspond with the prevailing weekly wage paid to workers in a classified occupation of which the claimant is a member; regardless of his actual earnings in employment under such classification?

It is my opinion that this enactment contemplates that the amount of benefits payable should be proportioned to the amount of remuneration (in terms of units described as "average weekly wages") actually earned by the claimant prior to his unemployment. This proposition is substantiated by both the general purpose of the law and a reasonable construction of section 1345-1 (g), General Code, which defines "average weekly wages" as hereinbefore quoted.

I shall discuss, first, the background of benefit payment as provided for by Section 1345-8 (b), General Code, which, quoted in part, is as follows:

"(b) Benefits shall be payable on account of each week of total unemployment after the specified waiting period at the rate of 50% of the individual's average weekly wages, but not to exceed a maximum of fifteen dollars per week. In cases of partial unemployment where by reason of less than full time work in any week, an individual's total remuneration payable with respect to such week is less than 60% of his average weekly

wages, benefits shall be paid as in case of total unemployment, except that the amount of such benefits shall be as follows:

Where the total remuneration payable to an individual for any week of less than full time work is less than 60% but more than 45% of his average weekly wages, benefits shall be 10% of his average weekly wages; 45% or less, but more than 30%, benefits shall be 20% of average weekly wages; 30% or less, but more than 15%, benefits shall be 30% of average weekly wages; 15% or less, benefits shall be 40% of average weekly wages."

Any shadow of ambiguity which exists regarding the amount of benefits payable for total unemployment is quickly dispersed in the light of an analysis of benefit payments provided for in the case of partial unemployment.

It is clear that "remuneration," as it stands in the last sentence above quoted, is considered as constituting the "average weekly wage." Any decreases in remuneration when equivalent to certain proportions of the "average weekly wage" result in partial unemployment for which benefits are payable in proportion to loss of remuneration which the claimant suffered. Indeed, it is only equitable that the benefits of unemployment insurance should be enjoyed in proportion to the amount of the "premiums" or contributions which are paid into the Ohio Unemployment Compensation Fund, for these contributions are calculated on the amount of remuneration received by the potential claimants.

Passing from a consideration of the general purpose of the act, I now turn to the matter of construing Section 1345-1 (g), General Code, the purpose of which is to provide a definition of a unit of remuneration in relation to which weekly benefit payments are to be proportioned. It is stated in this section that

"'Average weekly wages' means the *weekly earnings* that an employee subject to this act would average if he were employed full time." (Italics the writer's.)

The use of the words "weekly earnings" in the first sentence of Section 1345-1 (g), General Code, can refer only to remuneration actually received by the worker by reason of his employment. The purpose of the words "full time" is to indicate that the quantity of "weekly earnings" is dependent upon the amount of time for which the worker was engaged in his employment. Here it is significant to note that when an individual enters employment, such employment must be considered full time employment regardless of the numbers of hours which other

individuals in the same occupation may be employed; otherwise, a worker engaged for a fewer number of hours than others in the same occupation would be eligible for partial unemployment benefits from the time he started to work.

The subsequent explanatory part of this sentence speaks only in terms of time; thus it explains only in reference "full time" as it occurs in the preceding portion of the sentence. If irrelevant matter were eliminated, the sentence would read:

"'Full time' means the full number of scheduled or customary working hours per week in the *employment or employments* in which he is or was engaged prior to applying for benefits under this act." (Italics the writer's.)

Here the periods of time referred to are related to the "employment or employments" in which the worker is or was engaged. Now referring to Section 1345-1 (c), General Code, we find that "employment" as used in this act refers not to a classification of occupations within an industry, but to the separate relation which exists between an individual in employment and his employer.

Furthermore, it requires but a brief discussion to point out that the alternative construction, namely, that "average weekly wages" refers to the amount of remuneration which is generally received as a weekly wage by individuals within a classified occupation, is unreasonable in view of the purpose of the act. According to this, if clerks in a store customarily received \$15.00 a week, the "average weekly wage" of all clerks would be \$15.00 a week regardless of whether an individual in this classification worked one hour a week or six days a week. Suppose a clerk who never expected to be employed more than one day a week is separated from his employment. He now claims unemployment compensation. Is he entitled to benefits for unemployment on the basis of the "average weekly wage" paid to those who work six days a week when his loss of remuneration by reason of unemployment is only one day's wage? Clearly, this position is untenable for to establish a benefit-measuring unit without regard to the amount of the claimant's earnings would go beyond the purpose and intent of the law.

Therefore, on the basis of both the general purpose of the law and a proper construction of Section 1345-1 (g), General Code, it is my opinion that "average weekly wage" refers to a median unit of remuneration which an individual in employment actually earned prior to separation from his employment and not to a unit of weekly remuneration which commonly prevails among workers of a classified occupation.

Applying this conclusion, my answer to your question in connection

with Case Number One is that the "average weekly wage" of B is \$4.00 (two days a week at the rate of \$2.00 a day).

The second hypothetical case which you present is as follows:

"CASE NUMBER TWO

Worker A is in employment at the rate of 50c per hour for a 45 hour week, or a total remuneration of \$22.50 per week. He becomes unemployed and eligible for benefits. His 'average weekly wage' is \$22.50, his 'weekly benefit rate' \$11.25 per week. He draws benefits for ten consecutive weeks or a total of \$112.50. On the first day of the eleventh week he obtains employment at the rate of 40c per hour for a 45 hour week, works two weeks and again becomes unemployed.

QUESTIONS:

1. What would his 'average weekly wage' be, following his second period of unemployment?
2. Assuming that worker A remains totally unemployed, would he be entitled to benefits for the remaining six weeks at the first or higher benefit rate or at the second or lower benefit rate?
3. What would be the total amount of benefits due such worker during his benefit year?"

The issue raised by this case is: When employment is intermittent and of such short duration as not to permit the acquiring of eligibility in connection with it, as of what period of employment is the "average weekly wage" to be reckoned?

The term "average weekly wages" is significant only for the purpose of determining the amount of benefits to which an eligible claimant is entitled under the provisions of the Ohio Unemployment Compensation Law. Thus, in considering the relation between periods of employment and units of earnings, we are concerned with that period during which the worker was receiving remuneration because of employment and thereby accumulating eligibility to claim benefits.

In the present case, A became eligible for benefits during a period in which his "average weekly wage" was \$22.50. On the other hand, A did not acquire eligibility for benefits payable at this time by reason of his employment for the two weeks at \$18.00 a week. The employment in which A was engaged in when he was accumulating eligibility for benefits was the period prior to his first separation from employment. A's "average weekly wage" during this period was \$22.50. In view of the fact that A is eligible to draw benefits because of employment while

his "average weekly wage" was \$22.50, the amount of benefits to which he is entitled should be in relation to his earnings during that period. Therefore, in answer to question one of the second case, it is my opinion that A's "average weekly wage" following his second separation from employment, continues to be \$22.50.

In response to the second question, I am of the opinion, on the basis of the reasoning employed in answer to the first question, that A is entitled to benefits for the remaining six weeks at the initial or higher benefit rate, namely, \$11.25 a week.

The reasoning employed in the first question is applicable also in the third question which implicitly applies the provisions of Section 1345-8 (b), General Code, to the effect that total benefits to which an individual shall be entitled in any consecutive twelve months shall not exceed sixteen times his benefit for one week of total unemployment. Accordingly, the total benefits payable to A during this benefit year would be \$180.00 (\$11.25 for sixteen weeks).

Therefore, to summarize the propositions applied in answering your questions, it is my opinion that:

1. The term "average weekly wages," as defined in Section 1345-1 (g) of the Ohio Unemployment Compensation Act, refers to the amount of remuneration received by an individual in employment and not to a weekly unit of remuneration which is customarily received by workers in a classified occupation.

2. An individual receiving unemployment compensation, who is re-employed before he has received the total amount of benefits payable to him in connection with eligibility which he acquired under his initial employment, and who subsequently becomes separated from re-employment before he has acquired eligibility to benefits in relation to such re-employment, is entitled to a continuance of benefits at the rate and in the amount of the balance of the total benefits payable as determined at the time of his initial eligibility for benefits.

Respectfully,

HERBERT S. DUFFY,

Attorney General.