

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

SALLY CHATFIELD
(Claimant)

INDUSTRIAL ASPHALT, INC.
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-420
Case No. 80-3166

Office of Appeals No. ONT-7008

The claimant appealed from the decision of the administrative law judge which dismissed the appeal as untimely filed.

STATEMENT OF FACTS

On February 22, 1980 the Department mailed to the claimant a determination that disqualified her for benefits on the ground that she was discharged for misconduct connected with her most recent work. An accompanying ruling relieved the employer's reserve account of charges pursuant to section 1030 of the Unemployment Insurance Code.

The claimant did not dispute the determination was received in the ordinary course of the mail. On the face of the determination the claimant was informed, through a combination of printed and typewritten language, that the last day on which a timely appeal could be filed was March 13, 1980.

The claimant filed her appeal in person on March 17, 1980 by delivering a completed standard appeal form to a local office of the Department. Such appeal, therefore; was filed four days, including Saturday and Sunday, beyond the indicated deadline.

At the hearing before the administrative law judge evidence was received on the question of timeliness of the appeal as well as on the merits of the case. The administrative law judge found the claimant had failed to demonstrate "good cause" for the late filing. He therefore dismissed her appeal and did not decide the matter on the merits.

The record reveals the claimant read the determination and was planning to file her appeal on Thursday, March 13, 1980, the date she was scheduled to report to the Department for an interview and the last day on which to file a timely appeal. On March 12, 1980, a friend of the claimant telephoned the local department office to advise them the claimant had left the area on March 11, 1980 to appear in court in Lancaster, California. The claimant's friend stated the claimant should be through by March 13 or March 14, 1980. The Department then rescheduled the claimant's appointment for the following Monday, March 17, 1980.

The claimant reported to the Department on March 17, 1980 for her scheduled interview and at that time filed her appeal. She was unaware that she would be delinquent in filing her appeal at that time. The claimant had no explanation for not mailing her appeal if her attendance in court prevented her from filing an appeal as planned at the time of her scheduled appointment on March 13, 1980.

REASONS FOR DECISION

In Gibson v. Unemployment Insurance Appeals Board (1973), 9 Cal 3d 494, 108 Cal Rptr 1, the California Supreme Court held that in determining whether good cause exists for extending an appeal period, a liberal interpretation should be applied which takes into account the legislative objective of reducing the hardship of unemployment. The program must be administered informally without resort to technicalities that might deprive the unsophisticated applicant of his rights to benefits.

Prior to January 1, 1976, section 1328 of the code neither stated nor suggested what might constitute "good cause." Effective January 1, 1976, section 1328 of the code was amended to lengthen the appeal period to 20 days and certain criteria were added for adjudicating "good cause." Effective January 1, 1980, section 1328 was again amended; however, the criteria for adjudicating good cause remained the same. Section 1328 in its present form provides in pertinent part:

"The department shall consider the facts submitted by an employer pursuant to Section 1327 and make a determination as to the claimant's eligibility for benefits. The department shall promptly notify the claimant and any employer who prior to the determination has submitted any facts or given any notice pursuant to Section 1327 or this section and authorized

regulations of the determination or reconsidered determination and the reasons therefor. . . . The claimant and any such employer may appeal from a determination or reconsidered determination to a referee within 20 days from mailing or personal service of notice of the determination or reconsidered determination. The 20-day period may be extended for good cause, which shall include, but not be limited to, mistake, inadvertence, surprise, or excusable neglect. . . ."

In Appeals Board Decision No. P-B-348 the Appeals Board considered the interpretation of the phrase "good cause" with respect to filing untimely appeals. However, that decision was limited to a consideration of the concept of "mistake" in the statute. This Board concluded that the statute is intended to cover only mistakes involving appeal rights, procedures and time limits as such but does not include mistakes relating to extrinsic matters.

The instant case does not involve a late appeal due to mistake. Therefore, we will consider whether the claimant's failure to file a timely appeal falls within the other concepts of inadvertence, surprise and excusable neglect or other excusable reason.

As noted by the court in Amaro v. California Unemployment Insurance Appeals Board (1977), 65 Cal App 3d 715, 135 Cal Rptr 493, the concepts of mistake, inadvertence, surprise and excusable neglect are taken generally from section 473 of the Code of Civil Procedure (hereafter CCP 473). Section 473 provides in part that a court may relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect.

We know of no appellate court decisions that have specifically interpreted the terms inadvertence, surprise or excusable neglect as used in section 1328 of the code in its present form. It may be presumed that the legislature was aware of numerous appellate court decisions interpreting this identical language in CCP 473 when such language was enacted into section 1328 of the code. Accordingly, we look to such judicial interpretations for guidance.

In Martin v. Cook (1977), 137 Cal Rptr 434, 68 Cal App 3d 799, the court stated the purpose of remedial statutes is not to grant relief from defaults which are the result of the inexcusable neglect of parties or their attorneys.

The court in Baratti v. Baratti (1952), 109 Cal App 2d 917, 242 P.2d 22, succinctly set forth a summary of the judicial definitions of mistake, inadvertence, surprise and excusable neglect with respect to granting or denying relief under CCP 473, as follows:

". . . A mistake of fact is when a person understands the facts to be other than they are; a mistake of law is when a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts. (People v. Kelly, 35 Cal.App.2d 571, 574 [96 P.2d 372].) Inadvertence is defined as lack of heedfulness or attentiveness, inattention, fault from negligence. (Webster's New Inter. Dict., 2d ed.; Greene v. Montana Brewing Co., 32 Mont. 102 [79 P. 693, 694].) Inadvertence in the abstract is no plea on which to vacate a default. (Shearman v. Jorgensen, 106 Cal. 483, 485 [39 P. 863].) The 'surprise' referred to in section 473 is defined to be some 'condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against.' (Miller v. Lee, 52 Cal App 2d 10, 16 [125 P.2d 627].) The 'excusable neglect' referred to in the section is that neglect which might have been the act of a reasonably prudent person under the same circumstances. (Elms v. Elms, 72 Cal.App.2d 508, 513 [164 P.2d 936].) A judgment will not ordinarily be vacated at the demand of a defendant who was either grossly negligent or changed his mind after the judgment. (Kromm v. Kromm, 84 Cal.App.2d 523, 529 [191 P.2d 115].) To obtain relief a defendant must have acted within a reasonable time. (Hewins v. Walbeck, 60 Cal.App.2d 603, 611 [141 P.2d 241].) A party will not be relieved from his default unless he shows he acted in good faith and that his mistake, inadvertence, surprise or excusable neglect was the actual cause of his failure to appear. . . ."

In Elms, supra, the court stated in part:

". . . It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief under section 473

will be denied. (Freeman, 483, 5th ed.) Courts neither act as guardians for incompetent parties nor for those who are grossly careless of their own affairs. All must be governed by the rules in force, universally applied according to the showing made. (Gillingham v. Lawrence, 11 Cal.App.231 [104 P. 584].) The law frowns upon setting aside default judgments resulting from inexcusable neglect of the complainant. The only occasion for the application of section 473 is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary prudence could not have guarded. Neither inadvertence nor neglect will warrant judicial relief unless it may reasonably be classified as of the excusable variety upon a sufficient showing. (Hughes v. Wright, 64 Cal.App.2d 897 [149 P.2d 392].)

"A judicial proceeding is not to be treated by a party as a game of blindman's buff in which the participants may enter or withdraw at will. . . . If judgment be entered against a party in his absence before he can be relieved therefrom he must show that it was the result of a mistake or inadvertence which reasonable care could not have avoided, a surprise which reasonable precaution could not have prevented, or a neglect which reasonable prudence could not have anticipated. (See McGuire v. Drew, 83 Cal. 225 [23 P.312].) . . ."

The provision of section 473 CCP to relieve a party from judgment taken against him through his mistake, inadvertence, surprise or excusable neglect is remedial in its nature and is to be liberally construed so as to dispose of cases on their merits (Ramsey Trucking Co. v. Mitchell (1961), 11 Cal Rptr 283, 188 Cal App 2d Supp 862; Hover v. MacKenzie (1954), 266 P. 2d 60, 122 Cal App 2d 852; Friedrich v. Roland (1950), 213 P. 2d 423, 95 Cal App 2d 543; Kromm v. Kromm (1948), 191 P. 2d 115, 84 Cal App 2d 523; Elms v. Elms (1946), 164 P. 2d 936, 72 Cal App 2d 508).

Carelessness and negligence are not akin to "excusable neglect" under section 473 of the Code of Civil Procedure (Doyle v. Rice Ranch Oil Co. (1938), 81 P. 2d 980, 28 Cal App 2d 18. Mislaying of process, forgetfulness or intentional disregard of service of process does not constitute mistake, inadvertence, surprise or excusable neglect (Price v. Hibbs (1964), 37 Cal Rptr 270, 225 Cal App 2d 209). However, inadvertence not based on "mere forgetfulness" but on a misunderstanding in carrying out properly given instructions is excusable (Bernards v. Grey (1950), 97 Cal App 2d 679). See also Slater v. Selver, 25 Cal App 525.

A defendant's failure to read a summons does not excuse a default for not appearing and answering a complaint within the statutory time limit (Gilio v. Campbell (1952), 250 P.2d 373, 114 Cal App 2d Supp. 853). Relief from a default judgment which resulted from the party's ignorance of the English language is not an abuse of discretion (Berri v. Rogero (1914), 45 P.95, 168 Cal 736). However, ignorance of the law coupled with negligence in failing to look up the law does not justify granting relief (Gilio, supra; Security Truck Line v. City of Monterey (1953), 117 Cal App 2d 441, 256 P.2d 366, 257 P.2d 755).

The courts have granted relief under CCP 473 for the party's default. Accordingly, totally erroneous and entirely gratuitous advice of persons not associated with any party is not a "mistake" of the party entitling him or her to relief (Ludka v. Memory Magnetics International (1972), 101 Cal Rptr 615, 25 Cal App 3d 316). However, courts are loath to penalize a litigant on account of some omission on the part of his or her attorney where the litigant has acted promptly and relied upon the attorney to his or her detriment (Orange Empire National Bank v. Kirk (1968), 66 Cal Rptr 240, 259 Cal App 2d 347; Stub v. Harrison (1939), 35 Cal App 2d 685).

In any case, a showing of due diligence has been held to be a prerequisite to granting relief under CCP 473 (DeMello v. Souza (1973), 111 Cal Rptr 274, 36 Cal App 3d 79). A lack of diligence is shown where a party delays to take action after knowledge of the facts or the effect of the delay on the adverse party (Roomer v. Retail Credit Co. (1975), 119 Cal Rptr 82, 44 Cal App 3d 926, 3 Witkin Cal. Procedure (2d ed) section 1048, p. 2623).

In cases where there is a doubt or not a strong showing under CCP 473, the courts have resolved such doubt in favor of relief (Griffin v. Bray (1968), 262 Cal App 2d 357). Relief should not be granted to those who wilfully slumber on their rights nor on flimsy excuses (Williams v. McQueen (1928), 265 P.339, 89 Cal App 659). Not every inadvertence or negligence warrants relief but only such inadvertence or negligence as may reasonably be characterized as excusable (Hummel v. Hummel (1958), 326 P.2d 542, 161 Cal App 2d 272).

With respect to appeals under section 1328 of the Unemployment Insurance Code, we recognize that in our administrative hearings we are not dealing with parties who are normally represented by counsel as is the case with litigants before the courts. The provisions of the Unemployment Insurance Code are to be liberally interpreted and should be applied

in a manner that takes into account the legislative objective of reducing the hardship of unemployment without resort to technicalities that would deprive unsophisticated applicants of a consideration of their case on the merits (Gibson v. Unemployment Insurance Appeals Board (supra)).

Therefore, although the judicial definitions and interpretations of mistake, inadvertence, surprise or excusable neglect with respect to CCP 473 provide some guidance in interpreting the identical terms in section 1328 of the Unemployment Insurance Code, they must be viewed in the light of the purposes and objectives of the unemployment insurance program. Where there is doubt as to a showing of "good cause" for an untimely appeal that doubt should be resolved in favor of the applicant, whether claimant or employer.

Various factors must be considered in determining whether a particular individual's conduct is that of a reasonably prudent person in his or her situation.

In Appeals Board Decision No. P-B-348 the Appeals Board held that in untimely situations all relevant factors should be considered, including:

- "(1) The length of the delay;
- "(2) The reason for the delay;
- "(3) The diligence of the appellant in acting to protect his rights;
- "(4) What prejudice, if any, may result for the other parties or the Department if relief is granted (e.g., will witnesses still be available; has evidence been destroyed; are pertinent records still available, etc.?)

"Each case of an untimely appeal should be evaluated on its own particular facts. Instead of rigid formulas, common sense and basic equity should be applied in making a decision as to whether relief should be granted to the dilatory appellant."

The Appeals Board also stated:

"The more substantial the delay, the more substantial must be the reason demonstrated for the delay, and an extraordinary delay must have an extraordinary explanation."

It would be inappropriate to attempt to define what inadvertence, surprise or excusable neglect constitutes "good cause" in all instances, as that determination must of necessity be made on a case-by-case basis (Appeals Board Decision No. P-B-348).

However, considering the aforementioned judicial definitions and interpretations, the purposes of the unemployment insurance program (Gibson v. Unemployment Insurance Appeals Board (supra)), the guidelines set out in Appeals Board Decision No. P-B-348 and the judicial preference to resolve cases on the merits rather than technicalities (Ramsey Trucking Co. v. Mitchell (supra)), we turn to the issue of whether the instant claimant has established "good cause" for her untimely appeal.

The record indicates the claimant had taken some action to file an appeal on or before March 13, 1980. She would have filed her appeal on March 13, 1980 at her scheduled interview on that date but for the necessity that she appear as a witness in court. The claimant filed her appeal promptly after she returned from her court appearance.

Had the claimant mailed her appeal on Thursday, March 13, 1980, it would have been considered timely. Dependent upon the mail service, her appeal may have been received on Friday, March 14, 1980, in the ordinary course of the mail. However, it is very possible her appeal would not have been received until the following Monday, March 17, 1980, the day on which she actually filed her appeal.

Whether the claimant acted as a reasonably prudent person under like circumstances in not mailing an appeal to insure its timeliness is not clear from the record. The extent to which the claimant may have been distracted by having to appear in court is not known. What is known is that the delay was minimal as it included a weekend, there was no prejudice to other parties and the claimant acted with reasonable diligence to file her appeal after her error in not mailing her appeal.

The record indicates the administrative law judge took testimony on the merits. The claimant's inadvertence or negligence resulted in only minimal delay with no prejudice to another party and it would not comport with the purpose of the unemployment insurance program to deny her a decision on the merits. Therefore, we hold good cause has been shown for the untimely filing of her appeal and remand this matter for a decision on the merits.

DECISION

The decision of the administrative law judge is set aside and the matter is remanded to the administrative law judge for a further hearing if necessary and a decision on the merits.

Sacramento, California, February 11, 1981.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

HERBERT RHODES

LORETTA A. WALKER

RAFAEL A. ARREOLA

DISSENTING - Written Opinion Attached:

MARILYN H. GRACE

DISSENTING OPINION

I dissent.

The majority Board members dwell on judicial interpretations of the concepts of mistake, inadvertence, surprise and excusable neglect with respect to CCP 473, and then state that they provide only "some guidance" in interpreting those same concepts with respect to untimely situations arising under section 1328 of the Unemployment Insurance Code, and that we are not dealing primarily with persons trained in the law as is generally the case in situations arising under CCP 473.

I agree with the majority that the concepts of mistake, inadvertence, surprise and excusable neglect under the Unemployment Insurance Code must be viewed in light of the purposes of the unemployment insurance program and the fact that we are dealing primarily with lay persons untrained in the law. I also agree with the majority that the concepts set forth in Appeals Board Decision No. P-B-348 are controlling in the instant case, especially when I read their statement that

"It would be inappropriate to attempt to define what inadvertence, surprise or excusable neglect constitutes 'good cause' in all instances, as that determination must of necessity be made on a case-by-case basis (Appeals Board Decision No. P-B-348)."

Because of this, I discern no useful purpose in reviewing various Appellate Court decisions with respect to defaults under CCP 473, which have limited application to cases arising under the provisions of section 1328 of the Unemployment Insurance Code, and essentially concluding that in untimely situations the general guidelines previously set forth in Appeals Board Decision No. P-B-348 should be considered. In my opinion, the instant precedent decision is, therefore, unnecessary and does not further clarify or change the previous guidelines which we require our field administrative law judges to follow; it is merely a restatement of Appeals Board Decision No. P-B-348.

Turning now to the instant case, I cannot my agree with my colleagues that the claimant's actions were "excusable negligence" or "inadvertence."

One fact which is clear from the record, which is ignored by the majority, is that the claimant signed her appeal on March 12, 1980. Thus, in chronological order, we have:

March 11 - claimant leaves area for Lancaster court appearance;

March 12 - claimant's friend calls Department to notify them that claimant is out of town and cannot attend March 13 interview;

March 12 - claimant executes appeal;

March 17 - claimant files appeal in person.

I cannot agree that the record does not show whether or not the claimant acted like a reasonable person (as appears to be the test under the cases under CCP 473 which the majority cite). The claimant was well aware of the appeal date, executed the appeal prior to that date, while out of town, but did not file it timely. She further gives no reason for not having filed her appeal timely. She does not make any contention that she was unaware that she could mail her appeal; nor does she claim that she thought by having her friend call the department that her appeal would not be considered untimely.

It appears to me that as long as the time period of delay is minimal (apparently the amount of time for mail delivery), the majority is saying that for the claimant who chooses to file an appeal in person, the appeal period is extended by the amount of time it would have taken to transmit the appeal by mail.

I agree that the length of delay and prejudice or lack of prejudice to other parties are considerations. However, I cannot find good cause based solely on these factors unless I find some action on the part of the claimant which is that which a reasonable person would have done.

I therefore would affirm the decision of the administrative law judge.

MARILYN H. GRACE