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LIMITED AVAILABILITY FOR SHIFT EMPLOYMENT: A CRITERION OF ELIGIBILITY FOR UNEMPLOYMENT COMPENSATION

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THE PROBLEM

A 1942 decision of the Virginia Unemployment Compensation Commission dealt with the claim of a woman worker who had refused an offer of rotating shift work about 12 miles from her home. She had formerly been employed at rotating shift work but now, because of the necessary care of her month-old infant and her other children, she could no longer accept any night work. The Commissioner said: "In my opinion night shift work for a mother with an infant child, who is unable to arrange for the proper care of the child during her absence from home, would not be suitable work." Despite this finding the Commissioner concluded that the claimant was unavailable for work and therefore ineligible for unemployment benefits. She had, he said, removed herself from the current available labor market because she could no longer accept her usual type of job.¹

In Vermont an unemployment compensation referee, in 1942, made a similar ruling in the case of an unemployed woman worker who could not accept third-shift work at night, because she had no one to care for her 19-month-old baby during those hours. She was willing and able to accept work on the other two shifts but there were no openings for her. There was no other industry employing women in the area where she lived in which she would be qualified for employment.²

A 1943 decision of a Kansas Labor Department Appeals Referee concerned a claimant who had quit her job when she was transferred from the night shift to day work. At the time there were no day nurseries in her community and she could find no one to care for her two small children. Subsequently, day nurseries in the community

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This article also appears in (1944) 28 MINN. L. R. —.

¹ Unemployment Compensation Interpretation Service, 7892-Va. R, Benefit Series, Vol. 6, No. 4.

² U. C. I. S., 7711-Vt. A, Ben. Ser., Vol. 5, No. 12.

were equipped to answer her needs and she was ready to accept work on any shift. The referee held that she was unavailable for work and ineligible for unemployment benefits during the time she was unable to accept day work. He said: "To be available for full-time commercial employment one must be ready, willing and able to accept work on any of the regular shifts."³

Since the war began unemployment compensation has been faced with this bedrock question—limited availability. Every State unemployment compensation law contains, in one form or another, the requirement that claimants must be "available for work" in order to receive benefits. But what is "availability"? Is it complete and absolute readiness, willingness and ability to accept any and every job—total availability? Or is it something less? How much less? State unemployment compensation agencies have, ever since they started paying benefits, been required to answer these questions. The war, however, has phrased these questions for the State agencies in their most acute form. "Limited availability" cases involve instances where the employability of claimants is restricted as to the time, place, kind or other conditions of the work they are willing or able to accept. Limited availability questions have often arisen in wartime in the form of "shift employment" cases. These are cases where workers have either refused to accept night work or have designated certain work shifts as unacceptable to them. As might be expected, most of the workers who have so limited their employability have been women, usually mothers of young children. Beset by employer pressures on the one hand and by social considerations on the other, unemployment compensation tribunals and administrators have been forced to devote considerable time and thought to the general problem of limited availability.

It has been generally understood that "availability" is synonymous with "attachment to the labor force" or, as it is sometimes said, "attachment to the labor market." This understanding, however, has contributed little to specific interpretation of the term "availability."

Although the unemployment compensation statutes generally set forth a clear, positive requirement that a claimant must be "available for work," an examination of the provisions of the ordinary State unemployment compensation law shows that the legislature could not have intended to require total availability. For example, all State unemployment compensation laws disqualify claimants who refuse offers of work. The great majority of State laws, however, provide that, before a claimant can be disqualified for a work refusal, it must be shown that the work was suitable for him and that he had no good cause for refusing. The unemployment compensation laws ordinarily direct that

³ U. C. I. S., 8256-Kan. A, Ben. Ser., Vol. 6, No. 12.

in determining whether or not any work is suitable for an individual the State unemployment compensation agency shall consider the degree of risk involved to the individual's health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the offered work from his residence. Furthermore, in compliance with Section 1603(a)(5) of the Internal Revenue Code, as amended, all State unemployment compensation laws provide that benefits shall not be denied to any otherwise eligible individual for refusing to accept new work^{4*} under any of the following conditions: (a) if the position offered is vacant due directly to a strike, lockout, or other labor dispute; (b) if the remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

Thus, it seems obvious that availability for work must mean availability for *suitable* work.⁵ It follows that claimants are free to impose some restrictions upon their employability without impairing their "availability" for work.

SIGNIFICANCE OF VARIATIONS IN STATE LAWS

Although the standard provision as to availability in State unemployment compensation laws is that a worker must be "able to work and available for work," a substantial minority of the States vary from this pattern. Fourteen of the 51 jurisdictions require more than merely "available for work." These States are: Alabama, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, New York, Ohio, Rhode Island, Washington, West Virginia, Wisconsin.⁶

^{4*} As a matter of fact most State Employment Compensation Laws go beyond the Federal requirement and say that "no work shall be deemed suitable and benefits shall not be denied" to any otherwise eligible worker for refusing to accept new work which violates these standards.

⁵ *Stella v. Downyflake Restaurant*, 126 Conn. 441, 11 A. (2d) 848 (1940); U. C. I. S., Benefit Series: 7189-Ala. A, Vol. 5, No. 4; 6686-Calif. R, Vol. 4, No. 12; 7705-Calif. A, Vol. 5, No. 12; 7778-Del. R, Vol. 6, No. 2; 1467-Ind. A, Vol. 2, No. 5; 3575-Me. A, Vol. 3, No. 6; 6403-N. Y. A, Vol. 4, No. 9; 704-N. C. A, Vol. 1, No. 8; 6963-N. C. A, Vol. 5, No. 2; 3589 N. Dak. A, Vol. 3, No. 6; 4520-Okla. A, Vol. 3, No. 10; 2692-Ore. A, Vol. 3, No. 2; 6793-Wash. A, Vol. 4, No. 12; 6248-Ind. Ct. D, Vol. 4, No. 8.

⁶ ALA. CODE ANN. (Michie, 1940) tit. 26, §213(C); KY. REV. STAT. (1942) §341.350(3), (4); Me. Pub. Laws, 1935, c. 192 as amended; MASS. ANN. LAWS (Michie, 1932) c. 151A, §24(b); MICH. STAT. ANN. (Henderson, 1936) §17.530(C); MINN. STAT. (Mason, Supp. 1940) §4337-26(c); MO. STAT. ANN. (Supp. 1940) p. 4770, §13194-9(c); MONT. REV. CODES ANN. (Darlington, Supp. 1939) §3303.7(c); NEW YORK UNEMPLOYMENT INSURANCE LAW §§502(10), 503(1), 506(2); OHIO GEN. CODE ANN. (Page, 1937) §1345-6(1); R. I. GEN. LAWS ANN. (1938) C. 284, §7(2); WASH. REV. STAT. ANN. (Remington, Supp.

Summarizing these exceptional laws we find that three of them require that the claimant be "seeking work"—Minnesota, Missouri, and Washington. Three require the claimant to be "unable to obtain work in his usual occupation or in any other occupation for which he is reasonably fitted and trained"—Massachusetts, New York, and Ohio. Other exceptional concepts deal more directly with the question of limited availability. While Kentucky requires that a claimant be available for "suitable work," Washington demands availability for "any suitable work" (emphasis ours). Michigan and West Virginia deal with one aspect of limitations upon employability and require that the individual be available for "full-time work." Rhode Island requires availability for work "whenever duly called for work through the employment office." Alabama and Michigan deal with matters of locality and require that a claimant be available for work either in a place where he earned some of his base period wage credits or in a place where it may reasonably be expected (or the commission finds) that there is available work of the kind for which the claimant must hold himself available. The kind of work the Michigan or Alabama claimant is required to take is better understood by examining the favored type of availability clause among these exceptional 14 States. In addition to Alabama and Michigan there are four other States, Maine, Minnesota, Ohio, and West Virginia, which in one way or another require availability for work for which the claimant "is fitted by prior training and experience."^{7*} Michigan adds an entirely new element by requiring that the claimant be available not only for "work of a character which he is qualified to perform by past experience or training" but also that he be available for work of a character generally similar to work for which he has previously received wages.

What effect do these atypical provisions as to availability have upon cases involving a limitation by the worker upon the time of day or shift in which he will work? Certainly it cannot be said that "seeking work" has anything at all to do with our case. Conceivably, a requirement that a claimant be unable to obtain work in his usual occupation or a job which he is reasonably fitted to take may have a bearing. For

1940) §9998-104(c); W. VA. CODE ANN. (Michie, 1937) §2366(75); WIS. STAT. (1941) §108.04(1).

^{7*}The exact provisions vary. The requirement just mentioned is the West Virginia wording. Alabama requires that a claimant be available for "work of a character which he is qualified to perform by past experience or training." Maine requires that he be "available for work at his usual or customary trade, occupation, profession, or business as his prior experience shows him to be fitted or qualified." The Minnesota requirement is that he must be "available for work in his usual trade or occupation or in any other trade or occupation for which he demonstrates he is reasonably fitted." Ohio provides that he must be "available for work in his usual trade or occupation, or in any other trade or occupation for which he is reasonably fitted."

example, a worker to whom night work is available but who refuses to accept anything but day work may have difficulty in proving that he is unable to obtain work in his usual occupation or one for which he is reasonably fitted.^{8*} The applicability of the Washington requirement, that a claimant must be available for "any suitable work," to a worker's restrictions as to shift employment would seem to depend entirely upon whether or not work on the excluded shift was suitable *for that worker*. The Kentucky requirement that the claimant must be available for "suitable work" is nothing more than legislative codification of the ordinary rule that obtains in other States. The requirement, in Michigan and West Virginia, that the claimant must be available for "full-time work" does nothing more than has been achieved in other States by interpretation of the word "work." The usual meaning given the phrase "full-time work" has been in terms of a full work-week of 40 and sometimes 48 hours. Evidently this should have no relation to the question of availability for work on particular shifts. Obviously, too, a requirement that the claimant be available for work in a particular locality has no direct bearing on the matter of restriction of the claimant's employability to certain times of day. So also a requirement that the claimant be available for work for which he is fitted by prior training or experience or even for work similar to the work for which he has previously received wages apparently has no immediate connection with any restriction that may exist upon his employment on particular shifts. Despite the fact that these latter provisions—as to localities where the claimant must be available and as to the type of work for which he must be available—have no immediate bearing upon restrictions as to shift employment, nevertheless they do set a labor market pattern for the claimant. These requirements create for each claimant certain occupations for which he must be available or localities where he must be able to work. By so doing they set an industrial pattern which will sometimes determine whether or not the claimant's particular restriction as to the time of day in which he will work will actually take him out of the labor force.

None of these non-standard availability provisions can be said to require "total availability" in the sense of complete availability for *any* work during any and all hours. The most stringent provision—the Washington provision—requires availability for "any suitable work." Obviously that is something less than "any work" or "all work." "Full-time work," the Michigan-West Virginia requirement, certainly does not mean 24-hour-a-day; neither does it necessarily mean work at all

^{8*}The usual statutory criteria of suitable work may tend to take some of the harshness out of this kind of law. Thus, in the case suggested, if night work is unsafe for the worker's health, safety, or morals, for example, such work might be omitted as unsuitable work, from consideration as a test of his availability.

times during the 24-hour period. No American unemployment compensation statute has such a specific requirement. In fact, no American unemployment compensation law specified the time of day when a claimant must be available for work.

WARTIME RISE OF THE PROBLEM

We have said that the war has made the meaning of the availability provisions an acute question. Shift employment, relatively infrequent before the defense program, has assumed considerable proportions during the war. Some workers have refused to accept this change; many, because of health or domestic circumstances, are in no position to do so. Thus we find that some unemployment compensation claimants limit their employability to particular work shifts, usually the more favorable or day shifts. It is understandable that in wartime there should be a marked tendency to refuse to consider as eligible for benefits those workers who will not accept otherwise suitable work that is offered them during night hours. The pressure of public opinion, which finds it difficult to understand why unemployment benefits should be paid to an unemployed worker whose skills can be used at a time of day when he cannot or will not work, has strengthened this tendency. Often too, the fact that the unfavorable work shift was the only shift open to a worker in a particular establishment or in a particular industry—as the result of a custom of the industry, a rule of the employer, or a union contract—has persuaded the unemployment compensation agency to rule that the claimant who will not or cannot work on that shift has cut himself off from the market for his services.

Largely because of these considerations, there has been, in recent months, a wave of restrictive rulings in this field. In order to receive benefits, more and more unemployed workers have been required to hold themselves available for work at all hours of the day. There are important social as well as legal aspects to this limited availability problem. How much should the workers' freedom of choice be limited? Most administrative appealed decisions covering shift employment have dealt with the claims of married women who, because of the need to care for their children, specified particular shifts as the only time they could work. To say that these individuals cut themselves off from the active labor force is particularly unfair, since they, by the withholding of benefits, are under pressure to make the socially unwise choice of accepting work at such hours that they must neglect their children. These social issues, as well as the legal questions, are raised by the decisions set out below.

JUDSON MILLS v. THE S. C. UNEMPLOYMENT COMPENSATION COMMISSION AND SPEARS⁹

Spears, an unemployed cotton mill hand, limited his employability to the first shift. He could not work on the second shift because he had to look after his children while his wife worked; he could not work on the third shift because of his health. The claims examiner disqualified the claimant for a refusal of suitable work. On appeal to the Appeals Referee the determination was reversed, but Spears was held unavailable for work. Spears appealed to the Commission, which reversed the decision of the Appeals Referee and adopted the determination of the claims examiner. The employer then appealed to the Court of Common Pleas which reversed the Commission's decision and held that the claimant was not available for work.

The court in its opinion seemed to recognize properly the general principle involved, that the question of availability for work is essentially one of degree. It did not base its holding on this general principle, for it went on to state that refusal to accept suitable work *per se* results in unavailability. This statement seems inconsistent with a recognition of the question of availability as one of degree. The court also said: "To be able and available for work a claimant must be able and available for a majority of the average number of hours normally and customarily worked in his occupation each day with a further condition that there must be a minimum of eight hours per day within which the claimant could accept work if it be offered." It thus appears that the court itself was unable to state clearly the main characteristics of availability which are essential to a claimant's eligibility for benefits.

In attempts to determine the legal content of the availability requirement, it has usually been held that if a claimant is ready and willing to work and if his personal circumstances are such that he can accept work, he has fulfilled this requirement.¹⁰ Furthermore, the "work" which the claimant must be willing to accept is usually deemed to be suitable work.¹¹ With these concepts in mind let us examine further the court's opinion in the *Judson Mills* Case.

If we assume that the claimant in the instant case was actually willing to work, we must determine whether or not his personal circumstances rendered unsuitable work during the hours which he excluded. The claimant was unable to accept third-shift work because he had been told by his physician to discontinue night work which was injurious to his eyes. It would seem, therefore that under Section

⁹ Court of Common Pleas, Greenville County, S. C. (Dec. 9, 1942), C. C. H. S. C. Par. 8118; U. C. I. S., 7944-S. C. Ct. D, Ben. Ser., Vol. 6, No. 5.

¹⁰ SOCIAL SECURITY YEARBOOK (Social Security Board 1940) 35.

¹¹ See note 5, *supra*.

7035-82 (7035-85)(c)(1)¹² of the South Carolina law which provides in part that "in determining whether or not any work is suitable for an individual, the commission shall consider *the degree of risk involved to his health, . . .*" work on the third shift for this claimant was not suitable work within the meaning of the statute. (Italics provided.)

Spears could not accept second shift work because he had to care for his children during those hours. The language of the South Carolina law readily lends itself to two interpretations other than the one the court apparently adopted. (1) The provisions of Section 7035-82 (7035-85)(c)(1)¹³ (quoted above) should not be regarded as limiting the elements of suitability which the Commission may consider to those which the section specifies. So treated, the Commission, after considering the factors enumerated in (c)(1), would be free to take into account any other factors affecting the suitability of the work in question. It would be possible, therefore, for the Commission to decide that the claimant's personal circumstances were such as to render work on the second shift unsuitable for him. (2) Since there is nothing in the language of Section 7035-82 (7035-85)(c)(1)¹⁴ which covers the claimant's reason for his unwillingness to accept such work, it may be considered that second-shift work is suitable for the claimant. The necessity that the claimant be at home to look after the children, however, constitutes "good cause" for his refusal of the work. Thus, no disqualification for his refusal of suitable work would be in order.

A finding that the claimant was available for work is not inconsistent with either of these views. If the first view is the one adopted, the work would be unsuitable and as such would not affect the claimant's availability, since the general requirement is that a claimant need be available for suitable work only. On the other hand, if the second view is accepted, "availability" need be consonant only with such suitable work for which no good cause for refusal exists.

Even if the approach is taken that availability for suitable work is required, regardless of the sufficiency of the claimant's cause for refusing, it does not follow that Spears was unavailable for work. Let us accept the court's unspoken premise that second-shift work was suitable for Spears. Does it follow, merely from the fact that he would accept work on only one of the two shifts available for him, that he was detached from the active labor force? Conclusions as to attachment to the labor force can hardly be based solely on statutory construction. They depend upon economic facts, facts as to the claimant's skills, training and experience, facts as to the work for which the

¹² S. C. CODE ANN. (1942) §7035-84(c).

¹³ *Ibid.* ¹⁴ *Ibid.*

claimant is accessible, facts as to the industrial practices in the claimant's labor market area.

The court, however, undertook no such discussion of the problem. A worker, according to the court, "must be truly and actually able and available to accept any suitable work which may be offered to him. If his availability is materially limited or restricted it cannot then be said that he is in fact in the labor market or that actually he is out of work because no work can be had by him. . . . There is no reason to examine the causes occasioning the claimant's inability to work on the second and third shifts." It appears that the court not only disregarded the concept of "good cause" but it did not even discuss the suitability of the work for the claimant. Thus, on an *assumption* of suitability, it was found that the claimant imposed such an undue restriction on his availability for work as was tantamount to a withdrawal from the labor force.

Insofar as shift employment is concerned, this case holds that a claimant must be able and available for a majority of the average number of hours customarily worked each day in the industry.

JUDSON MILLS v. S. C. UNEMPLOYMENT COMPENSATION
COMMISSION AND GAINES¹⁵

Mrs. Gaines was employed on the third shift. A relative had looked after her children while she worked. The relative left and Mrs. Gaines, unable to secure anyone to care for her children, left her work to remain at home. She was offered work on the third shift on several occasions but refused on the ground that she was available for work only on the first or second shifts. A deputy's holding that she was unavailable for work was affirmed by the Appeals Referee. The claimant appealed to the Commission which reversed the Appeals Referee and held that she had left her work voluntarily with good cause and was available for work, since she was able and available for work on the first and second shifts. Employer then appealed to the Court of Common Pleas, which reversed the Commission and held the claimant unavailable for work.

The court's conclusion was "that in order to be entitled to benefits under the Act the unemployed individual must be able to and available for the work which he or she has been doing," on the shift that she has worked. The court's only support for this conclusion was an Ohio case, *Brown-Brockmeyer Company v. Board of Review*.^{16*}

An interpretation of the term "work," in the statutory phrase "avail-

¹⁵ Court of Common Pleas, Greenville County, S. C. (August 10, 1943), *aff'd*, 28 S. E. (2d) 535 (1944).

^{16*} 70 Ohio App. 370, 45 N. E. (2d) 152 (1942); U. C. I. S., 7912-Ohio Ct. D, Ben. Ser., Vol. 6, No. 4. Under the facts of the Ohio case it would appear to be questionable whether the claimant was physically able to work.

able for work," to mean the individual's last job seems without support in the South Carolina unemployment compensation law (or in any American unemployment compensation law).^{17*} In the disqualification provisions for voluntary leaving¹⁸ and misconduct¹⁹ the term "most recent work" is used. Thus, if it were intended by the legislature that availability should be confined to an individual's last employment, the legislature could have specifically imposed such a limitation.

Under the court's decision if a claimant were dismissed from a job under circumstances which would make the job unsuitable for him, such claimant would be ineligible for benefits if he were not available for this last job. Section 7035-82(c)(1)²⁰ provides in part that: "In determining whether or not any work is suitable for an individual, the commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training." In the light of this provision it is quite possible that an individual's last job would not constitute "suitable work." The legislature could hardly have intended the anomalous result of the court's ruling that an individual should be ineligible for benefits if he were not available for such unsuitable work. Provisions enacted by the legislature protect such individual from pressure to accept work if it is injurious in the respects specified. It appears that the legislative intent as expressed in the disqualification provisions and in the availability provision is reconcilable only on the theory that a claimant's availability is not dependent on his willingness to engage in his last employment.

The second question presented by the court's decision is whether a claimant who is available for work on two out of three shifts is available for work within the meaning of Section 7035-84(c).²¹ The two shifts for which the claimant was available included the hours from seven or eight in the morning until eleven or twelve at night, thus including more than the normal working hours of the public as a whole. On the basis of the view expressed in *Judson Mills v. S. C. Unemployment Compensation Commission and Spears*^{22*} discussed above, the claimant in the instant case would have been held available for work, since she was available "for a majority of the average number of hours normally and customarily worked in his (her) occupation each day." The court in the first *Judson Mills* Case stated further: "It should not

^{17*} See discussion under *Significance of Variations in State Laws, supra*.

¹⁸ S. C. CODE ANN. (1942) §7035-85(a).

¹⁹ S. C. CODE ANN. (1942) §7035-85(b).

²⁰ See note 12, *supra*.

²¹ *Ibid*.

^{22*} See note 9, *supra*.

It is interesting to note that the court in the *Gaines* Case said that it was the first case in which it was necessary to determine the content of the term "availability." The same court (with a different judge sitting) had said approximately the same thing when the decision was rendered in the *Spears* Case on December 9, 1942, only eight months before the decision in the *Gaines* Case.

be required, however, that the actual hours of the day in which the claimant could accept work be the identically same hours in which he was last employed unless he be available for no other kind of work and the hours in which he is available are not included in the work day of his industry." Mrs. Gaines obviously met the additional standard suggested in the first *Judson Mills* Case.

The court in the second *Judson Mills* Case was influenced by the theory that the experience rating provisions control the definition of involuntary unemployment.^{23*} In accordance with this theory the court considered the claimant's right to benefits in terms of employer responsibility for her unemployment. Since it was obvious that her employer was not the proximate cause of her unemployment, the court concluded that her unemployment was not involuntary in nature. The legislature in establishing experience rating expressly provides that "nothing in this section shall be construed to limit benefits payable pursuant to Section 1035-83."²⁴ It should be noted that even if an employer were to achieve complete employment stabilization, his tax rate would be .9 per cent of his pay roll. This fact indicates that the employer's fault in not attaining employment stabilization is not the sole basis for the imposition of the tax. Hence, the testing of the claimant's benefit rights in these terms has the effect of adding a new eligibility requirement. It might also be noted that there seems little or no relation between employer responsibility and the criteria set forth in Section 7035-82(c)(1)²⁵ as measuring-sticks of the suitability of offered work: degree of risk involved to health, safety and morals, physical fitness, prior training, etc.

It appears that the court's theory is fundamentally unsound in that it does not recognize that the underlying purpose of the South Carolina unemployment compensation law is to furnish compensation for those who are unemployed through no fault of their own. It does not follow that stabilization of employment is not an important subsidiary of the program. But it should be recognized that in a program of unemployment compensation the primary motive is to provide benefits, not to reduce tax rates. The concept of availability for work should have no relation to the presence of experience rating provisions. In fact, most State unemployment compensation laws as originally enacted, contained their present availability provisions and contained no experience rating.

With respect to shift employment this case stands for the proposition that a claimant, in order to meet the eligibility requirements of

^{23*} "Experience rating" is a device for unemployment compensation tax computation for employers upon the basis of their experience with respect to unemployment or other factors bearing a direct relation to unemployment risk.

²⁴ S. C. CODE ANN. (1942) §7035-87(c)(1).

²⁵ See note 12, *supra*.

the South Carolina law, must be available not only for the work which she has been doing, but also for the shift on which she has been working.

DINOVELLIS V. DANAHER, ADMINISTRATOR²⁰

Claimant refused to accept work on any but the day shift because she had someone to take care of her children during the day but she felt that she should be at home to supervise them in the evening. Although she made independent efforts to find work, she refused to accept a referral to a job on a swing shift. The agency denied benefits on the ground that she had placed such restrictions on her availability as to render her unavailable for work. The commissioner, however, found her available for work on the ground that she was ready, willing, and able to work. The court held that the claimant refused to accept employment for personal reasons not connected with the suitability of the work offered and, therefore, she was unavailable for work.

In the language of the court this case "presents the question whether in order that an individual otherwise qualified to be paid benefits under the Unemployment Compensation Act, to enforce his right to them, must be willing to accept employment at any hours of the day or whether for reasons of personal convenience he may refuse employment offered him without forfeiting his right to the benefit payments for which the Act provides, because the same does not fit into his personal circumstances even though he be physically and mentally fit to perform it and it is such as is reasonably adapted to his abilities and experience."

The court goes on to say that after an individual has been found initially eligible, there exists a duty "to apply for available, suitable work when directed to do so by the public employment bureau or the administrator' and 'to accept suitable work when offered him by the public employment bureau or by an employer.' . . ." Moreover, the court says, the conditions relevant to suitability of work as detailed in Section 1339(e)(b)(1) all relate to conditions of employment or economic factors. This is correct and the court further states correctly that none of these conditions describes an offered job as unsuitable because of the hours during which the work is to be performed. Section 1339(e)(b)(1) provides in part: "In determining whether or not any work or self-employment is suitable for an individual, the administrator *may* consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training and experience, his length of unemployment, his prospects for securing local work in his customary occupation and the distance of the available work from his residence." (Emphasis ours.)

²⁰ Docket No. 69078, Superior Court, Hartford County, Conn. (June 25, 1943).

Thus, by the terms of this provision, certain factors are enumerated which *may* be considered in reaching a determination as to the suitability of a particular job. The administrator, however, is not limited to a consideration of these factors alone in reaching his determination and, therefore, he is free to consider any additional factors which he deems relevant to the issue of suitability.

Moreover, the legislature in enacting Section 1339(e)(b)(1) clearly authorizes a consideration of factors personal to the claimant—i.e., the degree of risk involved to *his* health, *his* physical fitness, etc. Here is a plain statement that conditions which are personal to the claimant and beyond the control of the employer may be decisive in ascertaining the claimant's right to benefits. The court, therefore, as noted above, was correct in stating that Section 1339(e)(b)(1) described conditions relating to conditions of employment or economic factors. The court, however, did not go far enough. Some of these conditions of employment are to be considered in terms of factors personal to the claimant. Accordingly, a factory might have the best lighting equipment available for night work and yet night work under those circumstances might well be injurious to a particular worker. Such conditions of employment, the best developed by modern science, and although suitable for thousands of other individuals, would be insufficient to render the work suitable for a specified claimant. It is inevitable (as well as desirable), under the Connecticut statute, that personal factors should be considered in determining the suitability of work.

The closing paragraphs of the court's opinion are interesting because the influence of the experience rating provisions is clearly indicated.

"However, that may be, the fact cannot be overlooked that the legislation is social in character and the attainment of its objectives is made possible only by the imposition of a tax upon the pay rolls of all employers within its field of operation, which becomes a cost of operation of every business, enterprise or industry so affected. No question is raised as concerns the validity of the Act as a valid exercise of the police power, but if the moneys so raised by such taxation were to be made expendable to persons out of employment who might refuse to accept employment for no cause related to the reasonable suitability of it, but for other reasons wholly personal or appertaining only to their convenience, it would be obvious that the proceeds of such taxation would be spent to the extent that they were permitted, for purposes having no attachment to unemployment resulting from economic forces or related to any legitimate public concern. Legislation of that character would certainly be of very doubtful validity.²⁷ (Footnote supplied.)

"The conclusion is that the plaintiff is not 'available for work' within the meaning of the Act."

²⁷ Compare the language of the Georgia Board of Review, *infra*. See note 31, post.

The Connecticut statute, unlike the one in South Carolina, contains no provision that nothing in the section establishing experience rating shall be construed to limit the payment of benefits. It would seem, however, that even in the absence of such a provision, the propriety of denying benefits because the payment of benefits might increase the employer's cost of operation is questionable. Benefits should be granted or denied according to the merits of each case and without consideration of the effect of such grant or denial on the employer's experience rating.

According to the court, a claimant in order to be available for work must be willing to accept any suitable employment at any time on any shift. There is no discussion by the court as to whether or not the claimant had "good cause" for refusing the offered work.

CARANI V. DANAHER, ADMINISTRATOR²⁸

This decision represents an interesting and heartening deviation from the rule of the *Dinovellis* decision.

Mrs. Carani was a 40-year-old married woman and the mother of seven children, ranging in age from 6 to 19. In her last employment she had worked on the 4 p.m. to 12 p.m. shift. Upon the advice of her doctor, she quit the job because it was too heavy for her. She was disqualified not because of any unjustified refusal of suitable work but because a routine examination revealed that she was unwilling to accept work other than on the second shift. She put this restriction upon her availability because she wishes to take care of her children and prepare their meals during the earlier hours of the day. As a result of her independent effort to obtain second shift work, she was able, on June 4, 1943, to obtain a satisfactory job with an airplane company. She was unemployed from March until June, 1943.

The court's opinion points out that previous Connecticut decisions,²⁹ both judicial and administrative, have held that a claimant who was available for part-time work only and for work which was similar to that in which he had earned his wage credits was available for work. The court noted that British decisions also allowed claimants to select the hours of employment so long as there was a market for that kind of work. The court reached the conclusion that the appellant was "ready, eager, and anxious to accept employment; there is a market on the shift selected by her; and thus she is available for work in the same type of employment in which she earned her wage credits." Therefore, said the court, the claimant was available for work.

²⁸ Docket No. 69595, Superior Court, Hartford County, Conn. (Oct. 18, 1943), U. C. I. S., 8416-Conn. Ct. D, Ben. Ser., Vol. 7, No. 3.

²⁹ *Egan v. Great Atlantic & Pacific Tea Co.*, Docket No. 59738, Superior Court, Hartford County, Conn. (March 15, 1939); *Keller v. Brown-Thomson, Inc.*, Docket No. 59737, Superior Ct., Hartford County, Conn. (March 16, 1939); U. C. 866-A-41; U. C. 50-A-43.

A note of caution should be sounded concerning this decision. Because the court mentioned the claimant's availability for the kind of work in which she had earned her wage credits, this decision might be taken to mean that a claimant who is available for some other shift than the one on which he had earned his wage credits is not available for work. In this connection, it should be noted that the entire first portion of the decision (where there is reference to the claimant's availability for work similar to that in which she had earned her wage credits) has been taken almost bodily from the administrative decision rendered by the Commissioner. The following statements in the court opinion (apparently original with the court and not borrowed from the administrative decision) show no concern with the relationship between the work for which the claimant is now available and the work she had previously done.

"This claimant, ordinarily, would not be required to work. Realizing that she is required to try to earn money in order to support and take care of her family, she is endeavoring to do what she thinks is her duty to her family. She meets it in the way which is most consistent with her desire to earn her living and, at the same time, to comply with her duty as a mother of these children. In addition to this her occupation is such that it is of benefit to the war endeavor. Her difficulty arises out of her attempt to meet all of these obligations in a way consistent with normal effort. This seems to account for her desire to work on the particular shift on which she has elected to work. Such attitude ought to be encouraged. The record does not show that any inconvenience or harm comes to anyone by reason of her election."

Furthermore, an inference that the court intended to suggest that a claimant who is available for some shift other than the one on which he earned his wage credits is unavailable for work hardly seems warranted in view of all the facts in the case. Before her unemployment Mrs. Carani worked for the Hartford Machine Screw Company, doing bench work. She was forced to quit after she was transferred to machine operations. The work she ultimately obtained, after her unemployment, was a job as an inspector with the United Aircraft Corporation. These facts do not readily permit the conclusion that Mrs. Carani was available for exactly the same kind of work in which she earned her wage credits. Probably it was, in a general way, similar work for which she was available and it was on the same shift. Viewing the case as a whole and considering the authorities cited by the court, the most reasonable conclusion would seem to be that the court intended to state nothing more than this minimal rule: Where a claimant limits his availability to work of the same general type and on the same shift in which he earned his wage credits there can be no doubt of his availability, particularly when there is a reasonable explanation

for the limitation. As to other limitations—to other kinds of work on other shifts—no inference should be drawn from the court's words.

The opinion in this case represents a departure from the ruling in the *Dinovellis* Case discussed above. Although the same court (but with different judges sitting) decided both cases, there is no reference to the *Dinovellis* Case in the Carani decision. The two cases would appear to be irreconcilable, even after allowance has been made for the fact that the claimant in the latter case had actually demonstrated her availability by securing a job of the type to which she had restricted herself. Under the rule of the *Dinovellis* Case, a claimant in order to be available for work must be willing to accept any suitable employment at any time on any shift.

SHIFT EMPLOYMENT: SOCIAL CONSIDERATIONS

The mechanistic legal approach of the *Judson Mills* Cases and the *Dinovellis* decision becomes all the more striking when the social aspects of the subjects are considered. The decisions we have discussed are typical. Their facts have been repeated over and over in hundreds of administrative decisions concerning restrictions upon shift employment. Usually the claimants are women; usually they have young children; usually they cannot accept night work. These claimants and the claimants in the cases we have discussed are of importance to their State and their nation not only as potential workers but as parents and citizens as well. These decisions leave real doubts as to whether the litigants' briefs presented this "social" side of the picture to the courts.

Recently the Women's Bureau of United States Department of Labor made a survey of 137 plants in New Jersey devoting 50 percent or more of their production to war contract work. On the matter of shift employment the Bureau reported:³⁰

"In general, women who have worked on either the evening or the graveyard shift do not like it. The most frequent reason given concerns irregularity in sleeping and eating, resulting in fatigue and sleepiness during working hours on the one hand, and indigestion and loss of weight on the other. Young people complain that the evening shift interferes with recreation and social life. Married women object to being away from their families in the late afternoon and evening, and many perform their household tasks during the day and are tired when work-time comes. Of those who reported that they liked night work, the chief reason given was the fact that they had the daytime hours free in which to take care of their children and do their housework. Not infrequently their husbands were on the day shift and took over the children's care when the women left for work. Some women prefer the night shift because the noise and confusion are considerably reduced, and a few like it because it is cooler.

³⁰ Women Workers in Some Expanding Wartime Industries, New Jersey, 1942, *Bulletin of the Women's Bureau*, No. 197, pages 18 and 19.

"Married women, especially those with children, were somewhat more numerous than single women among those who preferred to work in the evening, that is, on the second shift. Thirty percent of the 696 women workers interviewed had children. Most of these mothers had more than one child, and in four-fifths of the cases at least one of the children was under 14 years old. A substantial proportion of the mothers had children under 6. Children in the younger groups require constant adult supervision and care. Those who are attending school should be in a responsible person's charge before and after school hours, yet of 167 mothers with children under 14 years, as many as 38, well over one-fifth, left their children to their own devices while at work. The children simply took care of themselves. More than half the workers left their children with husbands or other relatives and some had older children who took care of the younger. Few of the mothers employed help or patronized the day nursery. These data indicate a very real problem in view of the increasing number of housewives who are taking war jobs in industries."

On October 1, 1943, the Office of War Information released a report in which it discussed the recent increases in juvenile delinquency. Considering the effect of the war upon juvenile delinquency, this report states:

"The connection between war and delinquency is not spelled out in court statistics because juveniles are brought into court for the same specific offenses (stealing, sex offenses, acts of mischief) that they were before the war.

"The connection, however, is there. Father has gone to war; mother has gone to work. Homes are crowded. There is no place for the youngsters to play, no place for the older girls to entertain. The living room is a bedroom, youngsters are pushed into the street, may end up in a cheap hotel.

"It is true that many of these factors were present in peace time. But investigation reveals that war has accentuated old problems, woven them into a complex pattern for which there is no neat solution.

"There is evidence that the present employment of a large number of women in war industries is resulting in lack of supervision of younger children and lack of sympathy with older children.

"Officials who are giving attention to this problem point out that a democracy cannot put up barriers at the factory gate, forbidding women with small children to take employment; nor can it prohibit employers from hiring women with small children.

"The War Manpower Commission has issued a policy statement stressing the fact that the first responsibility of women with young children is to give suitable care in their own homes to their children, and that in order that family life may not be unnecessarily disrupted, special effort to secure the employment in industry of women with young children should be deferred until full use has been made of all other

sources of labor supply. It is further stated that when women with young children are employed, adequate facilities should be provided for the day care of those children."

However true it is that governmentally we cannot forbid women with small children to take employment or prohibit employers from hiring women with small children, nevertheless current unemployment compensation decisions point out that governmentally we are putting economic pressure on women with young children who want work to take employment at the most undesirable hours. We seldom find unemployment compensation tribunals adopting the approach taken by the Georgia Board of Review:

"When an employer establishes a business and employs a great number of women to work in that business, the employer necessarily knows that a great many of those women, if then unmarried, will in due course of time, become married, and that in all probability there will be children, and those women employees will owe a duty to those children which will, for the benefit of society as a whole, outweigh any and all consideration of duty that the employee might owe to the employer. It should also be remembered that employers have employed women generally in industrial and commercial types of work because they could get a greater amount of work out of the women for the money paid than they could get out of men. That being true, if occasionally an employer fails to get a reduction in the contributions to the Bureau on his payroll tax because some woman—the mother of children—has been paid benefits while off duty, taking her chance of collecting the benefits or going hungry rather than leave the children alone at night, that employer has no real, just cause for complaint.

"This is the age-old question as to the importance of the individual as compared with and to the dollar. Our social legislation recognizes that when it comes to weighing or balancing dollars against human beings, that the human being should outweigh the dollar, otherwise there would have been no social legislation.

"Keeping these things in mind, it occurs to the writer of this decision that the mother of children, who is able to work, willing to work, and available for work during the daytime, should not be disqualified from receiving benefits merely because she considers the welfare of her children of paramount importance and elects to spend the night with them rather than in the mill, when she cannot secure the services of someone else to be with the children at night."³¹

POSSIBLE RULES

The Superior Court of Barrow County, Georgia, attempted in *Carwood Mfg. Co. v. Huiet*³² to give an exact meaning to the word "available" as it is used in the Georgia statutes. The court said in part: "The

³¹ U. C. I. S., 8254-Ga. R. Ben. Ser., Vol. 6, No. 12.

³² U. C. I. S., 8417-Ga. Ct. D, Ben. Ser., Vol. 7, No. 3.

infinite variety of fact and circumstances which may present the question in the course of human experience would be difficult if not impossible to cover by exact language in one definition." Just as it is difficult to isolate the factors which comprise availability, so it is difficult to determine which of these factors may be modified or withdrawn (and this is essentially the problem of limited availability) and still leave substantial availability.^{33*} We are, therefore, presenting possible rules for determining the availability issue in cases which involve shift employment. Some of these rules have been enunciated by courts and administrative tribunals; others represent possible views which have not been so enunciated.

1. ALL SUITABLE WORK ON ALL SHIFTS

The Connecticut court in the *Dinovellis* Case held that a claimant in order to be available for work must be willing to accept *any* suitable work, all hours, any shift. The South Carolina court in the second *Judson Mills* Case was even more specific. The claimant not only must be available for any suitable work; he must definitely be available for the work which he had been doing on the same shift that he had worked previously.

It would be possible, of course, to limit the statement of the rule more than the above-mentioned cases have done. The rule with the "good cause" limitation could be so stated: In order to be available for work a claimant must be available for any suitable work which he has no "good cause" for refusing. The lack of available *suitable* work for a claimant or the good cause he may have for refusing otherwise suitable work will not, however, make available for work a claimant who in fact is detached from the labor force.

2. TWO OUT OF THREE SHIFTS

In accordance with the holding in the first *Judson Mills* Case, a claimant must be able and available for a majority of the average number of hours customarily worked each day in the industry. Thus, in an industry which worked three shifts a day, a claimant in order to be available for work would have to be available for work on two of the three shifts. If work on two of the three shifts were unsuitable for the claimant, it appears that the claimant should be required to be available only for the shift which is suitable in order that the requirement be consonant with the rule that a worker need be available only for suitable work.

^{33*} "Substantial availability" is not intended as a substitute concept for "availability" or "total availability." We use the phrase to denote a difference between a literal and a reasonable compliance with the statutory requirement.

It further appears that the rule could be stated in terms which would require the worker to be available for two out of three shifts, except that he could limit himself to work on one shift in the event that he would have good cause for refusing work on any other shift.³⁴

3. ONE SHIFT

Another possible rule with respect to what hours a claimant must be willing to work in order to meet the eligibility requirements is that a claimant must be available for only one shift. It would appear that the validity of such a rule and indeed of any other would depend on the particular conditions in the community. Apparently this rule would take full account of any claimant's circumstances by allowing him to select the shift on which he would be willing to work. There presumably would be a decided bias in favor of day shifts. Since, in many instances, due to union contracts, seniority provisions, etc., work might very well not be available to the claimant on the shift specified by him, it might be said that the claimant was not really available for work. In such an instance, however, it is believed that the claimant's availability should not be reckoned in terms of whether or not there was work available to him but solely on the basis of whether or not he was available for work. Thus, in a case³⁵ in which the claimant, mother of a small child, was available for day work only, which the employer was unable to give her, the Delaware Unemployment Compensation Commission held that she was available for work. The Commission said in part:

"Turning now to the instant case, we see a woman, a good worker who is unable to work on the night shift because she can find no one to care for her child. She is available for work during the day. Despite ever-increasing night work due to defense industry, the daytime is unquestionably the normal period of work in this community. We have no hesitation, therefore, in holding that claimant is available for work. We are the happier to arrive at this decision because a contrary finding would, in our opinion, render a real disservice to the social welfare of the many children of working parents in this city."

4. NO GENERAL RULE: FACTS OF EACH CASE CONTROLLING

It would be possible and we believe desirable to lay down no rule as to the hours which a claimant must be willing to work in order to be available for work. Thus, on a case by case basis, the deciding tribunal, whether administrative or judicial, would consider all the relevant facts in each case and decide accordingly. Domestic circumstances, social welfare, economic factors, working conditions in the

³⁴ See discussion under 1.

³⁵ U. C. I. S., 7778-Del. R, Ben. Ser., Vol. 6, No. 2.

community, etc., should all be weighed before arriving at a decision. Since the number of possible variants of these factors is tremendous, only on a case by case basis can equitable and accurate results be had in each instance.

SUGGESTED PRINCIPLES

Since even decision on a case by case basis requires some controlling principles, we would suggest the following broad propositions as guides. Although they are general and applicable to the entire limited availability field, they should be helpful in shift employment cases.

A. (1) There is a proper distinction between limitations upon employability which are voluntarily imposed (e.g., the claimant who won't accept night work simply because he "just doesn't like it") and those which are involuntarily incurred (e.g., the claimant whose sight deficiencies prohibit him from working nights). This distinction has a particular bearing in border-line cases of limited availability. In such cases, all other things being equal, more evidence is required as to the availability of a claimant who voluntarily limits his employability than is required in the case of a claimant who has involuntarily incurred such a limitation.^{36*}

(2) The bases of this distinction are: (a) the fundamental purpose of the unemployment compensation laws is the compensation of involuntary unemployment; (b) the essence of a claimant's availability is his willingness to work.

This does not mean that to be available for work a worker must abstain from voluntarily imposing *any* limitations upon his employability. Under certain conditions, a worker may, without destroying his availability, impose various limitations upon his employability with no better reason than his personal preference. What it does signify is this. If the limitation existing upon the worker's employability leaves no doubt that he is nevertheless attached to the active labor force and a candidate for work, the reason for the limitation makes no difference. If, on the other hand, it is clear that the limitation upon the worker's employability removes him from the active labor force, then the reason for the limitation will again have no effect upon the determination. In those cases, however, where doubt exists as to whether or not the limitation will serve to remove the worker from the active labor force, we may and properly should look to the reason for the limitation. In

^{36*} The term "voluntary" is used in this statement in a broader sense than "done with one's consent" or "intentional." As used here, it refers to "freedom of choice; self-impelled; unconstrained by interference." The woman who refuses to accept night work because she can find no one to care for her baby, the family man who refuses to accept work which would require him to move to a town where there was wholly inadequate housing—such workers do not voluntarily limit their employability.

such instances, limitations which are voluntarily imposed will more readily result in a ruling that the claimant is unavailable for work than if they are involuntarily incurred.

In any application of the foregoing proposition, it is essential to remember that a limitation may change in character from one involuntarily incurred to one that is actually voluntary. The one-company town which has been abandoned by the "company" furnishes a good illustration. A worker who is left there may be said at the outset to be suffering an involuntary limitation upon his availability. If he remains there, and insists upon staying, this limitation eventually becomes voluntary. This "bridge" concept of limited availability is closely related to the idea that unemployment compensation was designed to furnish a "bridge of benefits" between two periods of employment for workers.

B. Availability for work requires no more than availability for *suitable* work. It might reasonably be said, if qualified as we have suggested in Rule 1 above, that it requires no more than availability for suitable work which the claimant has no good cause for refusing.

C. The work for which a claimant must be available can be determined only in relation to that particular claimant. It is individualized. This is a corollary of (b) above. The suitability of work cannot be determined abstractly, it has often been said, without consideration of its appropriateness for a particular individual. This result is required by the statutes which specify that certain criteria must be applied in determining the suitability of work "for an individual."

D. The thesis that availability for work means attachment to the active labor force furnishes us with certain other fundamental propositions. The active labor force consists of the workers who are employed and the unemployed workers who are active candidates for jobs. Unemployment compensation, naturally is particularly concerned with the latter group. These workers have services to sell to employers. When they are unemployed, they are in the same position as merchants seeking buyers for their goods. The merchant is not required to sell or offer for sale all the goods he is equipped to handle or even all the goods he has in stock in order to retain his position in the market. All he has to do is be prepared to sell a significant amount of merchandise for which there is ordinarily a demand. Furthermore, the position of the merchant depends wholly upon the amount of economic activity existing in the business in which he wishes to engage. That economic activity must be gauged in terms of the "locality" the merchant is to serve. Thus, the would-be liquor store owner who seeks to do business in a "dry" county is certainly out of business.

This same reasoning should apply to the unemployed members of

the active labor force. They are merchants of services, selling their labor to employers. As such, whether or not they are in business depends to a considerable extent upon the industrial practices in their communities. This approach leads us to the following:

- (1) Availability for work does not require availability for *all* suitable work. All it requires is availability for a substantial amount of suitable work.
- (2) The determination of what is a substantial amount of suitable work depends largely upon the industrial practices in the labor market area in which the claimant is willing and able to work.
- (3) Availability for work does not require that a claimant be available for his customary or most recent work. If he satisfies the condition expressed in (1) above, i.e., if he is available for a substantial amount of suitable work, he has done all that is required of him.

E. We would suggest this "rule" as to the effect of limitations on employability. No limitation upon employability should be deemed to render a claimant unavailable for work unless the limitation is such as to show that the claimant is either unwilling or unable to accept a substantial amount of suitable work or unless it is such as to show that he is not substantially usable in the labor market which is available to him.

More important than any "proposition" or "rule" we could formulate is a clear understanding that unemployment compensation is a social program. It would appear highly desirable that wherever possible the results of this program should be entirely consistent with the broad social aims of the nation. Such consistency can never be attained if legalism, allowed to run rampant in behalf of employer interests, is permitted to distort a benefit-paying program into a "fund-protecting," tax-reducing system.