In the

Supreme Court of the United States

INDIANA EMPLOYMENT SECURITY DIVISION ET AL.,

Appellants,

vs.

ESSIE D. BURNEY,

Appellee.

No. 71-1119

Washington, D. C.
December 7, 1972

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v.

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Washington, D.C.

Thursday, December 7, 1972

The above-entitled matter came on for argument at 10:53 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, Associate Justice
WILLIAM H. REHNQUIST, ASsociate Justice

APPEARANCES:

DARREL K. DIAMOND, ESQ., Deputy Attorney General of Indiana, Offices of the Attorney General, 219 State House, Indianapolis, Indiana 46204, for the Appellants

IVAN E. BODENSTEINER, ESQ., Valparaiso University School of Law, Valparaiso, Indiana 46383, for the Appellee

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: No. 71-1119, Indiana Employment Security Division against Essie D. Burney.

Mr. Diamond.

ORAL ARGUMENT OF DARREL K. DIAMOND, ESQ.,

ON BEHALF OF APPELLANTS

MR. DIAMOND: Mr. Chief Justice, and may it please the Court:

This appeal by the Indiana Employment Security Division presents the issue of the validity of certain practices used by the Division in determining the eligibility of claimants for unemployment compensation benefits. These practices, which are called for by the Indiana law, were held by a three-judge district court not to comply with requirements of the Social Security Act.

QUESTION: Mr. Diamond, before you go further, it would help me if you would clear up the situation, the facts of the situation. As I understand it, the appeal board reversed the Division officer's decision to terminate these benefits, so what is the posture of the benefits now? Are they allowed and are they being paid?

MR. DIAMOND: Are you referring here, Mr. Chief Justice, to Mrs. Burney's case or the general ruling? I am afraid I don't understand the question.

QUESTION: Well, somewhere in this mass of material

I got the impression that the Division officer in this case--

MR. DIAMOND: In this case?

QUESTION: Yes, had reversed, and it had been reversed by the appeal board, and that the benefits denied by the Division officer were then granted.

MR. DIAMOND: They had in fact been granted much earlier on the basis of the preliminary injunction and temporary restraining order issued by the district court.

The facts of Mrs. Burney's particular case were moot well before the district court entered its judgment. In fact, it became moot at the time that the referee, providing the type of hearing 2hich was required by the district court order, determined that she was not eligible for benefits.

In this case, the first determination by the deputy was that Mrs. Burney was not eligible for benefits and that she was unduly restricting the hours in which she was available for work.

The referee, after a full hearing, upheld that determination. The review board, after going over the case, hearing argument, determined that the restriction upon her hours of possible work was not so severe as to indicate that she was not available for work within the statutory meaning.

At that time her case was completed. There was no appeal to the Indiana Court of Appeals on this. So Mrs.

Burney's case was moot at this point, in the same way that the Java case, also an unemployment compensation case, was moot, never came before the courts for final decision.

This was a class action, although her particular claim was not designated as such. The district court clearly stated that it was ruling on behalf of Mrs. Burney and of a sub-class within the original case. In the original case, there were actually two questions, one being precisely identical to the Java issue, and the other, Mrs. Burney's case, so the district court divided this into two sub-classes. While Mrs. Burney's particular case was moot at a very early stage, this is a class action within the scope of the district court opinion.

QUESTION: Is she the only named plaintiff within this sub-class?

MR. DIAMOND: Yes, she was. She intervened in a case that was filed by a Mr. Hyatt.

QUESTION: And that was a class action and that had to do, I guess rather directly with the doctrine of the Java case that was decided and is not an issue before us. She was an individual intervenor in that case, was she not?

MR. DIAMOND: She was an individual intervenor within the scope of her case. However, the district court in its order spoke of its ruling as going to a sub-class within the initial order.

QUESTION: Were there named persons in that order?

MR. DIAMOND: No, your Honor.

QUESTION (inaudible)

MR. DIAMOND: I cannot give you the exact language, but it was all persons who had initially been determined eligible for benefits and then at a later time had been administratively determined no longer to be eligible.

QUESTION: Mrs. Burney was the only one of that class who was either an intervenor or a named plaintiff?

MR. DIAMOND: Thatis correct, your Honor.

QUESTION: And their case has now been terminated because she's receiving benefits?

MR. DIAMOND: In fact her benefit eligibility period ran out sometime ago, your Honor.

QUESTION: I see. So she's really out of the case?

MR. DIAMOND: Yes.

QUESTION: There is no named party here as of this moment?

MR. DIAMOND: There is none.

In considering the question of determination--

QUESTION: Under our cases, under the controlling cases, what is the situation then? Do we still have a live case here, when there is no named plaintiff in the case in controversy?

MR. DIAMOND: I cannot say definitely. We felt it would be better to see if we could get a determination because

this was a fair representation, and the fact that the district court order did not depend upon the facts of the individual case; the district court order was very general.

QUESTION: Would this be an advisory opinion?

MR. DIAMOND: This would not be an advisory opinion, your Honor. There is an injunction--

QUESTION: Who is the controversy between?

MR. DIAMOND: At this point the controversy would be between the Division and all persons within the sub-class as designated by the district court.

QUESTION: Is there any case you know of that we have held--

MR. DIAMOND: No, your Honor, I do not know of any such case.

QUESTION: And where do we get jurisdiction? Suppose the other side loses, who do you assess costs against--the claimant?

MR. DIAMOND: I cannot give a firm answer. This is an in forma pauperis appeal, of course, so the question of costs--

QUESTION: Who is the pauper? The class is a pauper. I don't understand where we have any jurisdiction over this at all, without a named party. I thought all class actions required one party that had the right to maintain the action in his own behalf. Period. Am I right or wrong?

MR. DIAMOND: I would have to agree with you.

QUESTION: And we don't have such party.

MR. DIAMUND: So far as I know, there is no such party in this case.

QUESTION: You would be satisfied, I suppose, wouldn't you, if the--or would you if the decision of the district court were vacated?

MR. DIAMOND: If the injunction were--

QUESTION: If the injunction were vacated?

MR. DIAMOND: Yes, as far as the Indiana procedure is concerned.

QUESTION: Decide it one way or the other, I suppose?

MR. DIAMOND: One way or the other because there are other cases which would have to be decided, presenting exactly the same issue.

QUESTION: What you are really saying then is, isn't it, that you would like an advisory opinion from the Court to cover future cases? Or strike "advisory." You would like an opinion from the Court governing the future cases?

MR. DIAMOND: Governing future cases and the cases by which we are now operating.

QUESTION: If this were dismissed and the district court judgment were held of no effect, then the initial effect would be exactly the same, unless of course a new action were brought? Could I ask you since the judgment in district court, has INdiana been following it or not?

MR. DIAMOND: Yes, your Honor, since that time when a deputy has made a dtermination of ineligibility, if the claimant files a notice of appeal, benefits are still paid until the referee hearing and referee decision.

QUESTION: This hearing covers no other persons of the class?

MR. DIAMOND: Within the present time. If this were vacated, it would then go back I assume to the prior practice. This would be a decision to be made by the Division, and not by our office, and then the class would come back into it. If the injunction were no longer in effect.

QUESTION: The fact is there is probably no other member of this class that could now intervene in the law suit, because you have made sure there isn't any other member of the class?

MR. DIAMOND: That is true, because we like to follow district court injunctions.

QUESTION: Well, if the district court injunction were vacated, you would soon have more people coming into that class?

MR. DIAMOND: I would assume so, because I would assume--the decision is not mine to make--but I assume that the Division then would go back to something like its prior practices.

If I may then deal briefly with the types of

determinations which are involved here, in determining a claim for benefits, there are basically three determinations to be made. Breaking this down into three is for purposes of analysis. As a matter of law, there are only two.

The first of these is a determination of insured status. This is merely whether the claimant has had enough work and has earned enough wage credits in a covered employment to be eligible for benefits, if he meets the eligibility requirements. This determination says nothing about whether the person is eligible or not eligible. In fact, a person can even request this determination when he is still employed.

The second determination is to eligibility and this I have broken down into two parts.

The first issue goes to the reason for termination of the prior employment. That is, basically whether the termination was attributable to the employer or to the employee.

The third issue which is involved in this case is a continuing question of the conduct of the claimant during the period of the unemployment. Each week the claimant is required to continue to be unemployed, to be able to work, to be available for work, making an independent effort to secure work, to not have refused an offer of a suitable job or not have refused instructions by the Division to apply for a job which would be suitable.

The determination is made each week by the Division, and it is on this basis that the determination of eligibility

for that week is made. There is never any determination by the Division which would have any effect for anything past the time of that week. This is like in a sense pay for looking for work, and you don't get paid until after you have done the job.

When a person comes in each week to present his claim, he is required to establish that he has met these criteria. This establishment may come about by his certification upon the voucher form that he has met these requirements. It may come by an interview type hearing with a claims deputy. This hearing would be basically similar to a hearing on an initial claim which was described by this Court in its opinion in the case of California Department of Human Resources Development versus Java. The claimant is called in, the question which raises the doubt is discussed. If there is anyone else who would have information, the deputy finds that information and he reaches a determination of whether or not the person was eligible for that particular week.

That decision is as much an initial decision in that sense as is the first week, the only difference being that in the normal situation, it is not necessary each week to determine the questions of why the previous employment was terminated.

In this case, Mrs. Burney was determined by the Division, by the Deputy not to be available for work and that she was unduly restricting the hours for which she was available

for work. In the other cases presenting the same issue, in the New York case of Torres, there was the plaintiff, Mr. Dinger, who was found by the Division not to be making an effort to secure work. In the Vermont case, Wheeler versus Vermont, there was a determination there that the claimant had refused to seek work when directed by the Division. In the California case, Mrs. Crow was determined to have refused an offer of suitable work.

Then these questions arose, it was necessary to make a determination of the prior week's conduct, because each of these questions is a condition precedent to eligibility for unemployment compensation benefits. This is a different type of system than the welfare system, in which there is an initial determination of status, such as a family has a child or children who are dependent within the definition of 42 U.S.C. Section 606 that it is a needy child living with a designated relative who is deprived of the parental support of at least one parent. Inthose cases, once a determination is made, it continues in effect and it is necessary to have a hearing because a prior determination having continuing effect is now being changed.

The welfare recipient has no such affirmative duties to go out and look for work, to be available for work and not to refuse work. So we have a completely different situation here. The welfare situation is not applicable to this case at all.

In looking to this Court's decision in Java last year, which was held by the district court to be disposative of the issue, I believe that the rule of law of the Java court actually supports the position of the Division in this case. In Java, you had an initial determination by the deputy in the California Department as to the eligibility of a particular claimant. After that determination had been made, one of the parties to that case filed a notice of appeal and that notice of appeal was sufficient in itself to call for a termination of benefits, even though in that case the Division had determined that the benefits were due, so you were allowing a party to upset the decision of the impartial agency.

In this case, we merely have the other party seeking to overturn the decision of the impartial agency that benefits are not due. This is merely two sides of the same coin.

I would emphasize in this respect that the Indiana Employment Security Division is an impartial arbiter in these cases. The State of Indiana and the Division have no interest in whether or not these payments are made, in the sense that the money used to pay these benefits comes from employers and not from the state treasury. The administrative expenses, so long as the plan is held to be in compliance with the federal law, are paid by the federal government. The interest of the state agency is merelyin having a workable system in which the authority of the impartial arbiter is upheld and

the duties placed upon claimants by the Social Security Act and the state unemployment compensation laws are met.

When Congress passed the provisions of the Social Security law dealing with the questions of unemployment compensation, they had before it a general outline of what an unemployment compensation plan would be like, and this included these issues.

The District of Columbia Unemployment Compensation Code, which was then passed by Congress, includes these same provisions.

So as a result, we have the determination by the agency that a party is not eligible for benefits. We have a claimant for whatever reason, in most cases probably because of a sincere question as to the fact, but as was pointed out in the Java case, possibly by an arbitrary desire or merely by a desire to have the short-run benefit, may file a frivolous appeal and there's no way to determine this until the referee decision has been made and in some cases on from there to the review board, and from there to the Indiana Court of Appeals.

The issue of due process has been presented in this case. I am not sure that it is an issue in this case except in the following way. The District Court did not rule on the due process issue presented under Goldberg versus Kelly. It did however require the Division to provide a prior due process hearing and did not explain what that hearing should

consist of. The Division filed a motion for amendment of judgment to show what that hearing would consist of, and the District Court refused thatmotion, being unable or unwilling to say what a due process hearing is, and I believe it is clear from the law that there is no such thing as a due process hearing in the sense of a specific set of requirements. Due process is a much more general phrase which would vary from period to period and from case to case. What is due process in one situation would not be due process in another, and what would be a denial of due process in one situation would provide due process in another situation.

Therefore, it is necessary to look at this question within the realm of the unemployment compensation and not in the question of welfare, even though both of these programs are under the Social Security Act, and determine whether the deputy determination would be a proper determination in this case; whether the deputy determination itself is a due process hearing within the scope of the District Court order. Since the District Court refused or was unable to clarify that order, the Division felt it was necessary to give it the strictest possible interpretation, because they didn't know what might put them in contempt of court.

Since the injunction was presented, there is the deputy determination which is basically the same question, the same procedure as was presented in the Java case; that is, the

deputy intervenes, the claimant interviews other persons having information about it.

Now in the disability cases, for example, frequently there will be no employer party, because the prior employer would haveno way of having knowledge as to the behavior of the claimant after this period.

After all this information is presented and in most of these cases, the information comes exclusively from the claimant himself, the deputy determines the facts and determines whether that brings a person within one of the limitations, whether in that situation the person is eligible. However, since the District Court injunction was entered, the deputy determination is made in the same way. However, the deputy determination of ineligibility is not given effect if the claimant expresses a desire to appeal to a referee, but rather benefits are paid, despite the fact that there's never been a determination of eligibility for that period, until a referee hearing, and the written formal referee opinion is handed down.

QUESTION: Would you again spell out just how that differed from what ocurred before the injunction? What did you do before the injunction?

MR. DIAMOND: Before the injunction when the deputy made the determination, if the deputy determined that the claimant was not eligible for benefits, benefits were not paid

for that week.

QUESTION: Then I gather if the claimant appealed andprevailed on the appeal, and benefits were resumed, would they be retroactive?

MR. DIAMOND: They would be retroactive.

QUESTION: And were you not constrained, as you believe you are by the injunction, to do what you are presently doing, I take it you would go back to that procedure, would you?

MR. DIAMOND: I believe that it would go back to that procedure. This is a ruling made by the Division, of course, not by our office.

QUESTION: Yes, but I gather then that the real problem here is whetherpending decision on the appeal by the referee benefits shall or shall not be terminated?

MR. DIAMOND: That is basically the question. However, I'd have to take issue with the statement you used in that there is no termination of benefits. There is one poind I'd like to emphasize most clearly.

QUESTION: They are simply not made?

MR. DIAMOND: Simply there's never been any determination that the claimant was eligible for any period other than past weeks and the question of what happened in past weeks does not control what happens in the week in question.

QUESTION: In other words, what you are saying is that

there is a burden of proof every week on the part of the claimant, and he must meet that burden of proof?

MR. DIAMOND: Yes, he must come in and certify that he has met these requirements. He must fill out the certification, or, if it is a time when there is an interview, at that time they will discuss what he has been doing during the time, what efforts he has made to secure work, what he has been doing. At that time also they might suggest other ways of finding work, perhaps looking in a slightly different field, checking to see if there is some other type of skill which the claimant has which would enable him to find work in a slightly different field.

This is not merely an attempt by the Division to do a person out of benefits; it is an attempt to find out whether the person meets the criteria and try to find a way to find him a job.

QUESTION: Mr. Diamond, it is probably of no consequence, but a while back, you said that the funds came from the employer. Is there no contributory aspect to this at all, nothing taken out of the employee's salary when he's working?

MR. DIAMOND: As I understand it, I believe it is unlawful for the employer to attempt to deduct any of this contribution from the employee's wages.

QUESTION: So in theory, it is non-contributory then?

MR. DIAMOND: It is not a contributory fund. This is

simply payment by the employer himself. No claimant's money is involved, no state money involved.

QUESTION: Mr. Diamond, is there a time limitation on the period within which an appeal may be made from the decision of the deputy to the referee?

MR. DIAMOND: Yes, there is.

QUESTION: What is that?

MR. DIAMOND: I believe it is ten days in the normal case. In certain cases, if you have an interstate claimant or the like, it may be 15 days. But ordinarily, the appeal must be presented within that period of time, and under Indiana law, that time limit is jurisdictional for consideration of the next highest level.

QUESTION: That is the time limit on the filing of the appeal. What is the experience in terms of how promptly a hearing may be had before the referee?

MR. DIAMOND: This varies according to the staffing of the department and according to the case loads at the time. At the time that Mrs. Burney's case arose, it was a long period of time, perhaps 10 to 15 weeks. At the present time, most, about half the cases or more are being decided by the referee within 30 days. This is because primarily of an increase in the staffing and partly because this is a little bit slacker time for claims. Not as many claims are being presented.

QUESTION: And what type of hearing is now afforded

a claimant before the referee? Is counsel provided or allowed? May witnesses be called?

MR. DIAMOND: Before the deputy? There were two questions unless I failed to understand all or both of them.

QUESTION: The question I asked was whether at the hearing before the referee, what elements of due process are now provided in light of the injunction of the district court? How do they compare with whatpreviously existed?

MR. DIAMOND: The injunction of the district court did not affect the referee hearing. This is an administrative hearing. The parties are given notice. They are told that they may bring witnesses. They may bring counsel or any other person to assist them in presenting their case. If a party is not represented, the referee is given the duty of helping them present their case, bringing out all the facts which might be relevant to it.

It is like a court hearing in a sense except that the referee has greater duties to make sure that the facts are presented than an impartial judge who merely sits back and decides what the case is like. It might be like a small claims court in many areas.

I don't think that there is any question but that the referee hearing would provide the due process elements under Goldberg.

QUESTION: This is true before the injunction?

MR. DIAMOND: This was true both before and after. The practices of the Division have not been changed by the injunction, except to the extent that the determination by the deputy of non-eligibility is no longer given effect. That is the only difference in the procedure at this time.

QUESTION: Inother words, benefits are paid pending decision of the appeal?

MR. DIAMOND: That is right, your Honor.

QUESTION: What is the maximum of weeks of benefits?

MR. DIAMOND: The benefits year can be up to 52 weeks. If there is a situation of substantial unemployment, then under a federal program there can be an extended benefit period beyond that.

QUESTION: Have you any idea what this payment of benefits pending decision of the referee has meant in terms of financial impact?

MR. DIAMOND: I do not have those figures for Indiana. I don't believe that those figures have been calculated. Indiana is also in this regard a small state.

QUESTION: California's amicus curiae brief indicates $50 million.

MR. DIAMOND: I believe the information I received from their office when last talking to them was that an affidavit in the Crow case in California indicated the total cost would be something like $167 million there. This was in extra employer

contributions and extra administrative expenses.

If the benefits are found to be paid erroneously, it is necessary to try to bring them back by either collecting the money or not paying for future weeks of eligibility. This requires extra administrative help. For example, the Indianapolis local claims office, before the injunction, had one worker spending about half of his time on recouping erroneous payments. Now this one office has two employees full time on this, and this is one local office only. So there is an extra administrative load,which expense falls on the United States Government and not upon the state government, but it's an extra administrative expense and extra administrative burden.

QUESTION: Do I infer from what you said that now that you are paying benefits pending the appeal, where the claimant loses, an effort is made to recoup either by getting the money back or perhaps against not paying future benefits?

MR. DIAMOND: Thatis correct.

QUESTION: How successful has that been?

MR. DIAMOND: I don't know that the figures are available for this latest period. Previously they were receiving repayment on, I think, about 60 to 70 percent. I'm not sure of the exact figure, but as I remember it, it is in that area.

QUESTION: May I ask you this. When there has been an initial determination of eligibility and then as you say,

there is a necessity of redetermination of eligibility, that redetermination is normally made, most often made just on the papers, just on a certification that is received?

MR. DIAMOND: Yes, your Honor, when the claimant comes into the office---

QUESTION: But he doesn't have to come in each week, does he?

MR. DIAMOND: Yes, he comes in each week.

QUESTION: You said not for benefits? He cannot do it by mail?

MR. DIAMOND: Only in exceptional cases where the agency will--

QUESTION: So he comes in each week and he fills out a blank for that week?

MR. DIAMOND: Yes, the voucher form which he fills out is a blank IBM card which will be punched later and includes the statement, "I hereby certify that I fulfill the registration for work requirements. During the compensable week covered by this voucher, I was unemployed, physically fit, available for and actively seeking work as except noted herein."

QUESTION: Now, every now and then on your initiative, there's an interview?

MR. DIAMOND: Yes, periodically.

QUESTION: Periodically. Now, is a determination of ineligibility after an initial determination of eligibility,

is a determination of ineligibility for some future week ever made without interview? Just on the paper? How about this case? Was there an interview?

MR. DIAMOND: There was an interview and it was at the interview that the information came out.

QUESTION: Right, but is it ever done just on certification?

MR. DIAMOND: Well, if the person refuses to sign a certification, then there can be no payment, because this voucher must be signed and sent in, and it is from this voucher that payment is made.

QUESTION: But if there is a question which arises, the claims taker will then refer that to a deputy for the full interview hearing type? Does it ever happen that he would refuse to sign the voucher?

MR. DIAMOND: I am sure it would be unusual but I was told everything happens, and it does happen sometimes.

QUESTION: If it happens, do they take action on it without asking him for an interview, having an interview?

MR. DIAMOND: If there is a question, ordinarily any time the claims taker sees any issue, this is to be referred to a deputy for full interview to find out what the situation is.

QUESTION: Thank you. I think you stated prior to the decision of the district court on appeal from the deputy to the referee, there were reversals in about 49 percent of the cases.

What has been the experience with respect to appeals since the district court injunction?

MR. DIAMOND: It has been about the same.

QUESTION: No change?

MR. DIAMOND: No significant change, your Honor. I would point out in relation to these statistics that I think I covered this in the reply brief, but I don't think these are really relevant to the case and in any event, these show a somewhat comparable reversal level at the review board of the referee.

In addition I would point out in the Java decision, when this Court spoke with an air of approval, it seems to me, of the Java procedure, it pointed out in a footnote in that case, Footnote 7 of the number of reversals from the deputy to the referee, and it was, just looking at it [illegible] roughly, somewhere in the 40 percent area, so in apparently-- I don't know to what extent it was covered in Java but this was before the court in Java and the court still spoke approvingly of it.

MR. CHIEF JUSTICE BURGER: Mr. Bodensteiner.

ORAL ARGUMENT OF IVAN E. BODENSTEINER, ESQ.

ON BEHALF OF APPELLEE

MR. BODENSTEINER: Mr. Chief Justice Burger, may it please the Court:

On the question of mootness, this case comes up

in exactly the same posture as Java did. It comes up in exactly the same posture as Goldberg did. In other words, in Goldberg, the welfare recipient had also resumed receiving benefits and had a hearing before the case reached this Court and before it was finally decided in the lower court. By the very nature of the problem that we are dealing with here--

QUESTION: Could you get in the same trouble again in both of those cases?

MR. BODENSTEINER: In Java and Goldberg ?

QUESTION: Yes.

MR. BODENSTEINER: It would be true very much in this case as it was in Java. In other words, in Java presumably Mrs. Java could sometime in the future have another claim. Here also Mrs. Burney could have another claim.

In the area of Goldberg, they could have another claim.

QUESTION: Got any other reason that says this is a good case in controversy?

MR. BODENSTEINER: Pardon?

QUESTION: Have you any other reason that says this is a case in controversy as of now?

MR. BODENSTEINER: Yes, I think we do.

QUESTION: Wouldn't it be much easier to intervene somebody?

MR. BODENSTEINER: Well, I think after the injunction

was issued, it did cover the entire class. In other words, the lower court defined the class as any recipients--

QUESTION: Could any member of that class intervene?

MR. BODENSTEINER: They could have, your Honor, except that after the injunction was issued, they were all receiving the benefits of the court order. In other words, the state was under an injunction not to terminate anyone in the state without a hearing.

QUESTION: Why couldn't they intervene to protect that?

MR. BODENSTEINER: There was one instance--

QUESTION: I understand the law of class action that any member of the class can intervene at any time. Am I right?

MR. BODENSTEINER: Yes.

QUESTION: Well, why did nobody intervene? Do you just want us to say that you don't have to insist on that?

MR. BODENSTEINER: No, your Honor, the reason no one intervened is because they were receiving the benefits of the order, and as long as their benefits were not being terminated without a hearing, they had no reason to intervene.

QUESTION: Who do you represent now?

MR. BODENSTEINER: I represent Mrs. Burney and all members of the class as defined by the lower court.

I think what's important here, because of the very nature of the problem we're dealing with, as the court was

dealing in Goldberg, the question is when do you get a hearing? After the hearing is granted, you know there is no permanent member, no permanent class representative. The problem continues as was indicated earlier that if the order is vacated, we'd probably be back in the same circumstances; it will be necessary to relitigate the matter. So in spite of the fact that Mrs. Burney has in fact received her hearing, has in fact received her benefits, the case is still, you know, ripe, and there is still a controversy.

Now this Court, in addition to Java and Goldberg, has ruled similarly in some earlier cases: in Motor Coach Employees versus Missouri in 1963, which involved a labor dispute and seizure of property by the Governor of Missouri. The property was released before the appeal reached the court, and this Court ruled on the question. Likewise in Carroll versus the Princess Anne College, where students were enjoined from rallying.

QUESTION: But in this case, she is no longer eligible for anything.

MR. BODENSTEINER: Not on this particular claim.

QUESTION: She is now not a member of the class. Am I right or wrong? In the first place, what is the class?

MR. BODENSTEINER: The class is defined as all present and future recipients of unemployment compensation benefits in the State of Indiana.

QUESTION: And she is no longer eligible?

MR. BODENSTEINER: She's not eligible on the basis of that particular claim.

QUESTION: Well, how is she a member of the class?

MR. BODENSTEINER: She'd be a member of the class--

QUESTION: My question is how is she a member of the class as of now?

MR. BODENSTEINER: To the extent that it covers future recipients of unemployment compensation benefits, she could be.

QUESTION: Well, that is everybody employed in the whole state is in that class?

MR. BODENSTEINER: Right.

QUESTION: Everyone is a potential recipient of future unemployment compensation?

MR. BODENSTEINER: Right.

QUESTION: Including the Deputy Attorney General?

MR. BODENSTEINER: Possibly.

All right, turning to the narrow issue presented in this appeal, the question is very simply whether unemployment compensation benefits of an unemployed worker who has been determined eligible for benefits, can be terminated without a prior evidentiary hearing. We claim there is a right to such a prior evidentiary hearing, under both the Social Security Act and the United States Constitution. The case can be decided

on statutory grounds without reaching the Constitutional issue.

QUESTION: In Java?

MR. BODENSTEINER: Exactly, your Honor, Java, Section 303(a)(1) and (3) of the Act.

QUESTION: Or do you mean Goldberg?

MR. BODENSTEINER: Goldberg on the Constitutional issue, your Honor. Goldberg reached the Constitutional issue involved in the welfare situation.

QUESTION: Do you say the eligibility factors are the same in this kind of case as in a welfare case under Social Security?

MR. BODENSTEINER: There are different eligibility criteria. They are both Social Security Act Programs. The Social Security Act welfare aspects were aimed at those pretty much unable to work: the blind, old, disabled, and children. In the area of unemployment compensation benefits, Congress was dealing with those who were working, suddenly out of work for a short-term period, and Congress was interested in taking care of their short-term need, and for this reason, we feel the case is even stronger on the Constitutional issue than Goldberg. We are dealing with more complex factual issues. The interests of the state are much less than the interests of the state that were explored in Goldberg.

QUESTION: Is it because it is from exclusively public funds?

MR. BODENSTEINER: That's one reason, your Honor, and another reason is the recoupment rate. As our brief indicates, the state recoups over 72 percent of any wrongful payments.

QUESTION: I wonder why that is. Do they recoup it by denying future benefits until--

MR. BODENSTEINER: That's one way, your Honor, and the other way is, we must remember that we are dealing with people who are working, as opposed to welfare where this Court recognized that there would in effect be no recoupment.

QUESTION: I take it then that one of your propositions is that the Indiana method of determining initial eligibility for compensation does not comply with Goldberg versus Kelly?

MR. BODENSTEINER: No, your Honor, we're not dealing, as the court below pointed out, we are not dealing here with claimants funds initially ineligible.

QUESTION: Well, then, I will ask you this: Do you think that the method for determining eligibility or ineligibility in Indiana comports with Goldberg against Kelly?

MR. BODENSTEINER: No, that comports with the procedure outlined in Java for determining--

QUESTION: So you don't think that the procedure outlined in Java for determining initial eligibility for unemployment compensation would pass muster under Goldberg against Kelly?

MR. BODENSTEINER: That is correct, your Honor.

QUESTION: So a fortiori, it wouldn't for a redetermination?

MR. BODENSTEINER: Well, when we are talking about a redetermination, in other words when we are talking about now taking that recipient off, that is correct. We are saying that the procedure does not comply with Goldberg.

QUESTION: Well, let's assume though that the Court disagreed with you, that the procedure outlined in Java for determining initial eligibility would pass muster under Goldberg against Kelly?

MR. BODENSTEINER: Would I agree with that?

QUESTION: No, let's assume that is what the court would hold. Then does that settle this case?

MR. BODENSTEINER: Well, if the Court were to hold that, I assume it would. However, we're saying that those procedures, Number 1, do not comply with Goldberg. Number 2, they are not sufficient even unto the Act because at this point we must remember what the program is all about. The program, as is pointed out in Java, is to give benefits to unemployed workers when they're unemployed, and not six months later when they're back to work, so one of the key factors here is that the program was designed to get these benefits to the unemployed as soon as possible after they lose their job.

QUESTION: Doesn't this program differ from Social

Security in that there is an affirmative burden on the unemployed worker to prove every week that he has complied with these standards?

MR. BODENSTEINER: The same burden rests on the welfare recipients, your Honor, as pointed out in Java.

QUESTION: Are they required to come in with new proof every week and sign a new certificate every week?

MR. BODENSTEINER: They're not required to come in with new proof to the extent that, you know, they have to demonstrate compliance with the rules and regulations. In other words, once found eligible for welfare, you continue eligible as long as you comply with the rules and regulations.

QUESTION: That is not true here, is it?

MR. BODENSTEINER: It is true, your Honor. Once found initially eligible for a set number of weeks. In Mrs. Burney's case, 22 weeks.

QUESTION: Provided a number of things are demonstrated each week?

MR. BODENSTEINER: That is correct, provided she--

QUESTION: It is a matter of semantics, but there is a real difference, is there not, between the unemployment and the welfare in that sense? He must come in and show every week that he has not refused any suitable employment, that he stands ready, able and willing to take it, and that he hasn't been able to get it, and perhaps several other things?

MR. BODENSTEINER: Similarly, your Honor, the welfare recipient must prove he or she is not working, must show that the children are still living in the home.

QUESTION: What kind of certificate does the welfare recipient sign every week?

MR. BODENSTEINER: The welfare system does not use the same procedure, in that there is not a signing. There is the affirmative duty to report any change. In addition there is the periodic interviews as there is in unemployment compensation.

QUESTION: Well, one is affirmative, it seems to me, and the other is negative?

MR. BODENSTEINER: Well, they are both affirmative to the extent that the obligation is on the recipient to in effect say, "I am still eligible."

The difference is that in one case the claimant comes to the office, in the other case the claimant is in many states mailed a check.

QUESTION: Well, in most places, the welfare check is mailed, is it not?

MR. BODENSTEINER: That is my understanding, your Honor.

QUESTION: And in any case is the unemployment mailed?

MR. BODENSTEINER: I think it is in some states, your Honor, and also some states, the check may be every two weeks

as opposed to every week.

QUESTION: How about in Indiana? Do you know whether it is mailed or requires personal appearance there?

MR. BODENSTEINER: As a general rule, in Indiana, it requires personal appearance each week. As was indicated earlier, in some cases the certification can be done by mail. The check itself is actually mailed to the recipient.

QUESTION: You don't get it when you come into the office for your appearance?

MR. BODENSTEINER: That is correct.

Now, in this case, Mrs. Burney was employed, involuntarily lost her last employment, and filed a claim for unemployment compensation benefits. As pointed out, she was found eligible for a period of 22 weeks, to receive these benefits for a period of 10 weeks. At that time she was advised by the deputy that she was no longer eligible and the benefits would be terminated and were in fact terminated at that point.

Now, Mrs. Burney's case points out the importance of a hearing in this context. The termination was based on alleged refusal to accept suitable work and an allegation that she was not making herself available for work. After this was made, she requested a hearing. Three months later this hearing was held. At this time she produced evidence that she did in fact have grounds for refusing this job, that

she was in fact available for work, and she also demonstrated that the reason she could not accept this job was because of the lack of proper transportation, the lack of baby sitting, the fact that the job was in the middle of the night, the fact she had never worked a night shift, the fact that she had no car, no public transportation, the job was too far away for her to walk to.

Now when the Division was forced to prove its assertion that she had in fact refused suitable work, they were unable to do so. As a result, the review board ultimately ruled in her favor.

QUESTION: Mrs. Burney was initially declared eligible, was she?

MR. BODENSTEINER: That is correct.

QUESTION: What would be your position if after the application of Goldberg, if the initial determination was of ineligibility?

MR. BODENSTEINER: That was a different situation under Goldberg.

QUESTION: What would be the situation?

MR. BODENSTEINER: I think a footnote in Goldberg specifically indicated they were not dealing with the initial application process.

QUESTION: I know we were not, of course, in Goldberg. I just wondered what would be your view of the application of

principles of Goldberg to a situation of the initial determination of ineligibility?

MR. BODENSTEINER: Whether there's a right to a hearing before a denial?

QUESTION: That's right. What kind of hearing would be required? She applies for benefits and there is a determination of ineligibility. Could she challenge the hearing under Goldberg in that situation?

MR. BODENSTEINER: No, it would only be a subsequent hearing in that case.

QUESTION: And then suppose you had taken an appeal from the initial determination of ineligibility. You took an appeal. Would the claimant be entitled to benefits pending decision on the appeal?

MR. BODENSTEINER: Not if initially determined ineligible.

QUESTION: Here, however, the situation was that Mrs. Burney was in fact initially declared eligible.

MR. BODENSTEINER: That is correct.

QUESTION: And determined to be ineligible for some subsequent week.

MR. BODENSTEINER: That is correct.

QUESTION: And it is in that connection that in your Goldberg frame she did not have an adequate hearing?

MR. BODENSTEINER: That is correct. She was (

determined eligible for a set number of weeks, 22 weeks in her instance, had received benefits for 10 weeks and then the determination.

QUESTION: Is your class limited to those who have been declared initially eligible?

MR. BODENSTEINER: That is correct, your Honor. Yes, the class was limited to present-future unemployment compensation recipients found initially eligible which as described in Java is the critical point in this whole procedure.

QUESTION: Why do you insist so on her eligibility for 22 weeks? Doesn't this depend on future developing facts? Or is that the limitation period, the longest coverage that she might have under any conceivable facts?

MR. BODENSTEINER: That is the initial determination of eligibility. In other words, these decisions concerning past employment are made. There was no misconduct in her leaving the job; she left involuntarily. At that point, under the federal law, Mrs. Burney and others are determined eligible for a number of weeks, and that eligibility continues so long as Mrs. Burney complies with the rules and regulations, just as--

QUESTION: By that you mean so long as she complies with the conditions of continuing eligibility?

MR. BODENSTEINER: That is correct.

QUESTION: Which must be redetermined every week? I take it you just disagree with the proposition that each week is

a new determination of eligibility?

MR. BODENSTEINER: Yes, we disagree with it.

QUESTION: To the extent that that is a defensible position, then you begin to get in trouble?

MR. BODENSTEINER: Yes, but I think it is clearly not a defensible position when we look at the program. As was pointed out in Java, in view of the nature of this program, to get benefits to the unemployed workers when they are unemployed, this is the critical point in the procedure, this initial determination and at that point, certain one-time decisions are made regarding the last employment. Was the claimant at fault in leaving that employment? Does the claimant have the required insured status? If the answer is yes, then they are determined eligible as I indicated, for a set number of weeks.

QUESTION: That just means that the second, third and fourth week he doesn't have to prove as many things as he did the first week?

From the second week on, he does not need to redemonstrate the nature of his severance from his employment?

MR. BODENSTEINER: That is correct, and in addition does not have to demonstrate the insured status, you know, and also in welfare, then the recipient remains eligible as long as the rules and regulations are complied with.

QUESTION: Isn't it an eligibility that merely means that he is part of a class of people covered by the statute,

not that he is entitled to something, but that he is part of the class which may be entitled to something if they can prove all these things they must prove each week?

MR. BODENSTEINER: That is one aspect. That is the insured status determination.

The second and most important determination is an individual determination. What are the circumstances surrounding the severance of last employment.

QUESTION: Mr. Bodensteiner, in the Indiana Code proceedings that are cited at the very end of the jurisdictional statement--they may be cited in your brief, too--Section 22(d), it says "In addition to the foregoing determination of insured status by the Division, the deputy shall throughout the benefit period determine the claimant's eligibility with respect to each week for which he claims waiting period, credit or benefit rights."

Now I take it that you are bound by the statutory description of what is happening?

MR. BODENSTEINER: Yes, I think this is simply a description of how unemployment compensation benefits are paid. In other words, they are in Indiana paid by the week, you know, they resemble weeks as closely as possible, and as indicated earlier, after this initial determination, so long as the recipient complies with the rules and regulations, there's the expediency that these benefits continue through that

definite period determined initially which is a number of weeks.

QUESTION: If our affirmance in Torres was correct, can you prevail here?

MR. BODENSTEINER: Well, I think in dealing with Torres, the first thing we have to discuss is the fact that the case is actually pending before this Court now on a petition for rehearing. To the extent that Torres raises the same issues as are present here, we disagree with the lower court decision in Torres.

QUESTION: You disagree with us in affirming it, I take it?

MR. BODENSTEINER: I think as I indicated, it's still pending on rehearing and to the extent that there is an affirmance on the identical issues raised by Plaintiff Dinger, we would disagree.

QUESTION: If that stands, Mr. Rehnquist's question is, how can you prevail?

MR. BODENSTEINER: Insofar as the Torres decision raises the same issues, and I must point out there are some distinctions, especially on Plaintiff Torres where it was a very unusual circumstance involving the initial determination, but insofar as the issue is exactly the same as raised by Plaintiff Dinger, we would disagree with that affirmance.

QUESTION: Suppose we let it stand? How do you stand

on it?

MR. BODENSTEINER: Well, I think we have to keep in mind also that that was a summary affirmance and the Court did not consider it--

QUESTION: Well, really doesn't this come back down to, then, without overruling Torres, you're in real difficulty, aren't you?

MR. BODENSTEINER: To the extent that the issues were exactly the same.

QUESTION: Well, of course I think I would know that without asking you that to the extent the issues are exactly the same, you would be in trouble. I mean to what extent are the issues not the same?

MR. BODENSTEINER: They are not the same to the extent that in that case, the Plaintiff Torres presented a very unusual circumstance to the Court. Plaintiff Torres was determined initially eligible for benefits, allegedly without the employer having any notice of the application, and therefore without being involved in the critical procedure which this Court described in Java, so to that extent, it is a very unusual circumstance which we clearly don't have here. Here the employer was involved in that initial determination of eligibility.

Now concerning the constitutional issue, in Goldberg this Court found that welfare benefits could not be summarily

terminated without according the recipient a prior evidentiary hearing, as pointed out earlier, this case is uniquely like Goldberg and in many respects, it is even stronger than Goldberg. For example, the factual determinations to be made in unemployment compensation are more complex than those to be made in the context of welfare. The interests of the state in a summary procedure are much less here than they were in Goldberg, because of the recoupment proceedings. As pointed out, the state recoups over 70 percent of any wrongful payments. In Goldberg, the Court recognized there was virtually no chance of recoupment.

QUESTION: Goldberg's argument only becomes really cutting if you are right in saying and in maintaining that this weekly determination is not a determination of initial eligibility.

MR. BODENSTEINER: Yes.

In addition here the determination of unemployment compensation benefits is a serious deprivation and a serious loss to the recipient, as was the welfare even though initial eligibility is not based on an individual means test, Java and earlier decisions of this Court recognized that Congress intended unemployment compensation to meet a short-term need. Just as welfare provides funds for the old, disabled, blind and children, unemployment compensation provides funds for unemployed workers during short-term unemployment.

Now as pointed out in legislative history, a means test was not used because there was an explicit effort to avoid the stigma of welfare and the welfare mentality; they didn't want workers to get into relying on welfare and therefore not look for jobs.

Now the need for a prior evidentiary hearing is very great here because of the complex factual issues. Once a person is in this continued claim status after the initial determination of eligibility, the issues that come up subsequently are usually, as in Mrs. Burney's case, issues of availability and issues of refusal of work.

Indiana courts have held that these questions involved questions of fact which depend on the circumstance in each case. For example, is the claimant restricting the hours of work? Is the claimant restricting herself to certain types of work? Is the claimant looking for work? Is the job suitable? Was there an actual offer of a job? Is the job safe? Is there transportation to the job? Is there baby sitting? What were the previous work habits? Is the person physically fit to work at this job? And we contend that reliance as to such questions can best be obtained at an evidentiary hearing, and I think the past experience of the Division with the near 50 percent reversal rate indicates that in the past there was not a reliable procedure.

As pointed out earlier, the interests of the state

here are much less than in the welfare situation. The one argument advanced by the state in the brief is the need to minimize expenses. This is not convincing because of the recoupment procedures. Indiana has been implementing this order for over a year now, and there is no apparent great increase in the cost. The issue, the numbers presented by the California decision, I think the decision there, the Crowe decision has been in effect for over a year, and I think those figures were actually rebutted by the opposition when that case came before this Court for an emergency certificate.

The other argument advanced by the state is that this is going to create administrative chaos. Well, the experience is that it simply has not. They have simply moved the referee hearing up in time and according to their own statistics, it is working very well, so there is absolutely no demonstration of either great cost or administrativd chaos here.

In conclusion, as Congress recognized, we are dealing here with a program that is of critical importance to unemployed workers, and our position is that only an evidentiary hearing prior to a determination of benefits can assure that the purposes of this program to give benefits to unemployed workers can adequately be met.

Thank you.

MR. CHIEF JUSTICE BURGER: The case is submitted.

(Whereupon, at 12:00 o'clock, noon, the case was submitted.)