BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER
BENEFIT DECISION NO. 6707 AS A PRECEDENT
DECISION PURSUANT TO SECTION
409 OF THE UNEMPLOYMENT
INSURANCE CODE.

In the Matter of:

DENVER D. DAVIS (Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-176

FORMERLY
BENEFIT DECISION
No. 6707

The claimant appealed to a referee from a determination issued by the Department of Employment which held him ineligible for unemployment benefits for an indefinite period commencing September 23, 1962 under section 1253(c) of the Unemployment Insurance Code on the ground that he was not available for work. The determination also held him ineligible for benefits for the period September 23, 1962 through October 13, 1962 under section 1253(e) of the code on the ground that he failed to conduct a search for suitable work in accordance with the instructions given him by the Redding office of the Department of Employment. On January 18, 1963, subsequent to the issuance of Referee's Decision No. S-29389, we set aside the referee's decision under section 1336 of the Unemployment Insurance Code.

STATEMENT OF FACTS

The claimant had for a period of time earned a livelihood as a carpenter obtaining employment through the Carpenters' Union. However, for at least the last ten years he has been licensed by the State of California as a contractor. Under this license he contracts to build swimming pools and contracts other jobs requiring cement or guniting work. As a contractor, he frequently obtains contracts which require him to employ other persons. Prior to the period involved in this matter, the Department of Employment approved the claimant's application for elective coverage under section 708 of the code and, insofar as the record shows, the claimant has met all of the requirements of elective coverage. He has not worked as an employee for any other individual for at least the past two years.

Effective September 23, 1962, the claimant filed a claim for unemployment benefits in the Redding office of the Department of Employment. When he filed his claim for benefits he indicated to the department that he was self-employed as a contractor and was interested in abandoning this pursuit only if he obtained permanent, full-time work paying a wage of at least $4 per hour.

The department classified the claimant occupationally as a construction superintendent and instructed him to search for work by applying ". . . to employers who hire people with your experience, training or skill . . .” and to contact former employers and make applications for employment in person rather than through telephone calls.

The claimant maintains an advertisement in the local telephone book and periodically places advertisements in the local newspaper. In addition, he maintains a telephone answering service. He also obtains leads through personal contacts and through friends. All of these actions are directed towards obtaining further contracts either to build swimming pools or to do cement or guniting work. During the month of October 1962 he had some 69 telephone contacts through the answering service in regard to future contracts. On October 10, 1962 he consummated a contract, and on or about October 29, 1962, commenced to build a swimming pool on the basis of this contract. The claimant filed claims for benefits through October 27, 1962.

The departmental representative testified that practically all of the employment for cement workers or gunite workers in the Redding area is obtained either through the Laborers' Union or the Cement Masons' Union, and the claimant had been advised by the department that the normal method of obtaining such work was by registering with either or both of these unions. Insofar as the records show, the claimant has not registered with either of these unions, nor has he made any effort to obtain work as an employee.

REASONS FOR DECISION

Section 708(a) of the Unemployment Insurance Code provides as follows:

> "708. (a) any individual who is an employer under this division or any two or more individuals who have so qualified may file with the director a written election that their services shall be deemed to be services performed by individuals in

employment. Upon the approval of the election by the director the services of such individuals shall be deemed to constitute employment. Regardless of their actual earnings, for the purposes of computing benefit rights and contributions, they shall be deemed to have received remuneration for each calendar quarter in the highest of the maximum amounts stated in column A of Section 1280 or column A of Section 2655 or provided by Section 2655.5."

Section 1252 of the code provides:

"1252. An individual is 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to that week are less than his weekly benefit amount. Authorized regulations shall be prescribed making such distinctions as may be necessary in the procedures applicable to unemployed individuals as to total unemployment, part-total employment, partial unemployment of individuals attached to their regular jobs, and other forms of short-time work. For the purpose of this section only the term 'wages' includes any and all compensation for personal services whether performed as an employee or as an independent contractor."

In Benefit Decision No. 6669 the claimant was a licensed electrician and licensed electrical contractor. His application for elective coverage as an employer under section 708 of the code had been approved. At the time he filed his claim for benefits he was performing no services and had no wages, either as a contractor or as an employee. We held that the claimant was "unemployed" within the meaning of section 1252 of the code. We also referred to the Department of Employment for determination the issue of the claimant's availability for work since the record did not contain sufficient evidence to decide this issue.

In Benefit Decision No. 6679 the claimant was a partner in a boat business. The partnership had been granted elective coverage. The claimant normally worked full time in the business, but during a slack period he reduced the number of hours he spent in the shop to 26 per week. He reported some income during the period in which he claimed benefits as a partially unemployed individual. We held that the claimant could not claim benefits as a partially unemployed individual, but that he was "unemployed"

within the meaning of section 1252 of the code. We also held that the claimant was not available for work within the meaning of section 1253(c) of the code because he was not interested in obtaining other work.

In accordance with Benefit Decisions Nos. 6669 and 6679, we hold that the claimant herein was "unemployed" when he filed his claim for benefits on September 23, 1962. However, the department's denial of benefits in this case was predicated upon the failure of the claimant to meet the eligibility requirements of sub-sections 1253(c) and (e) of the Unemployment Insurance Code. These sub-sections provide as follows:

> "1253. An unemployed individual is eligible to receive unemployment compensation benefits with respect to any week only if the director finds that:
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> * * *
>
> (c) He was able to work and available for work for that week.
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> * * *
>
> (e) He conducted a search for suitable work in accordance with specific and reasonable instructions of a public employment office."

We have consistently held that in order to be available for work the claimant must be offering his services in a labor market where there is a reasonable demand for his services and without unreasonable restrictions or limitations on acceptable work, either self-imposed or created by force of circumstances, so that it may be found that the claimant is genuinely in that labor market, ready, willing and able to accept suitable employment (Benefit Decision No. 5015).

Because of the provisions of section 708(a) of the code, the services the claimant performed as a contractor constitute employment within the meaning of the code. Likewise, under section 1252, his compensation for such services constitutes "wages." Under these circumstances, in determining whether the claimant met the eligibility requirements of sub-sections 1253(c) and (e) of the code, we must apply the same principles of law that are applicable to claimants who have earned their qualifying wages in an employer-employee relationship.

In Loews, Inc. v. California Employment Stabilization Commission (1946), 76 Cal. App. 2d 231, 172 P. 2d 938, the California District Court of Appeal stated as follows:

> ". . . The mere fact that a claimant, at the time of filing his application, seeks work only in his usual occupation does not of itself establish that he is not available for work. A claimant, who had had full time employment in an occupation in which he is particularly trained and skilled, but who was unemployed at the time of filing his claim through no fault of his own, may be held to be available for work even if at the time of filing his claim he refuses to accept employment in any other trade than that which is his usual occupation, provided it is established that good prospects exist for obtaining employment in his usual occupation on a full-time basis within a reasonable time. . ."

In conformity with this principle, we have consistently held that a claimant may restrict availability to one occupational field for a reasonable period of time as long as good prospects exist for obtaining employment in that field (Benefit Decisions Nos. 5500, 6336, 6414 and 6443).

On the basis of the claimant's past work experience, it is our opinion that the claimant's usual occupation is as a contractor in the construction of swimming pools. It is our further opinion that the claimant's restriction to work in his usual occupation at the time he filed his claim for benefits was not unreasonable since it appears from the evidence that good prospects existed for obtaining such work within a reasonable period of time. Therefore, we hold that the claimant was available for work during the period involved in this appeal. We also hold that the claimant's efforts to seek work, considering the customary methods of obtaining work in his usual occupation, were reasonably designed to result in his prompt re-employment in suitable work. Although such efforts were not in compliance with instructions of the Department of Employment, it is our opinion that such instructions were not reasonable since they were based upon the assumption that the claimant was obligated to seek work as an employee in a work classification other than his usual occupation.

In a number of prior decisions we have held that the availability of a claimant for self-employment does not make the claimant "available for work" within the meaning of section 1253(c) of the code (see, for example, Benefit Decision No. 5633). Our decisions were premised on the conclusions that the term "work" is synonymous with the term "performed services"; that a self-

employed individual does not perform "services" within the meaning of the Unemployment Insurance Code and that, therefore, self-employment does not constitute "work." However, in those cases, the claimants had not been granted elective coverage under the code, whereas in the case before us, the claimant having been granted elective coverage, the services he performed as a contractor constituted employment under the code, and in accordance with our prior reasoning would also constitute "work" within the meaning of section 1253(c) of the code. Therefore, our prior decisions relating to the availability of self-employed individuals who have not elected coverage under the code are not in conflict with the conclusions we have reached in this case.

There is a question, however, as to whether our decision in Benefit Decision No. 6679 hereinbefore discussed, is in conflict with this decision. In Benefit Decision No. 6679 we held that the claimant was not available for work because he was not interested in obtaining other work and had made no search for work. In accordance with our present decision, we should have concluded that the claimant's usual occupation was as an operator of a boat repair and boat equipment sales shop. He was entitled to restrict to that occupation, and more particularly to the operation of his own business, for a reasonable period of time provided his business offered reasonable prospects of full-time employment. In this respect, the evidence showed that the business was seasonal in nature and that, during the period involved in the appeal, which was the start of the normal winter seasonal reduction in business, a further reduction in business occurred because the drought had reduced the water level in the lakes so that boats could not be operated. The claimant testified that because of these conditions he really was not needed at the shop at all. Under these circumstances, we believe it was proper for us to conclude that the claimant should have been willing to make himself available for other work, and that by his failure to do so he was not available.

DECISION

The determination of the department is reversed. The claimant was available for work and was actively seeking work as required by the code. Benefits are payable provided he was otherwise eligible.

Sacramento, California, January 6, 1976

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHG

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

HARRY K. GRAFE

DISSENTING OPINION

I dissent for the reasons set forth in my dissenting opinion in Appeals Board Decision No. P-B-168.

Further, this 13-year-old case, when tested in the light of today's facts, seems to display the faulty legal reasoning that the boat business is seasonal, but swimming pool contracting is not. I can only ponder whether the creation of this new precedent will result in the Department denying elective coverage to avoid the rule laid down by the majority.

Finally, this is one more decision adopted by the majority without allowing any discussion of the merits, in disregard of the basic concepts of due process of law.

HARRY K. GRAFE