

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT
DECISION NO. 6718 AS A PRECEDENT
DECISION PURSUANT TO SECTION
409 OF THE UNEMPLOYMENT
INSURANCE CODE.

In the Matter of:

EDWARD ARMEN
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-201

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| FORMERLY BENEFIT DECISION No. 6718 |
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The claimant appealed to a referee from a determination of the Department of Employment that the claimant was ineligible for benefits beginning March 17, 1963 under section 1252 of the Unemployment Insurance Code. Subsequent to the issuance of Referee's Decision No. OAK-3731, we set aside the decision of the referee and assumed jurisdiction of the matter under section 1336 of the code.

STATEMENT OF FACTS

The claimant's usual full-time occupation is that of a garment cutter. The claimant had worked as a garment cutter for the same San Francisco employer for seventeen years. As was the usual yearly custom with the claimant's employer, the claimant was placed on seasonal layoff on March 15, 1963, and recalled to work on April 10, 1963.

The claimant's usual hours of work as a garment cutter were from 8 a.m. until 3:40 p.m. His rate of pay was \$4.05 an hour and during the year 1962 the claimant had earned \$9,925 as a garment cutter. Beginning in September 1959, the claimant worked in his spare time as a real estate salesman on a commission basis for an Oakland realty and investment company. The claimant had no earnings as a real estate salesman until the year 1961 when he earned \$600. During the year 1962, the claimant earned \$1,300 from his real estate work, "but the claimant had had no earnings from that work during 1963 up to the date of the hearing before the referee on May 1, 1963.

During the period of his seasonal layoff, the claimant worked as many as five hour's a day as a real estate salesman, but his hours and days of work were irregular. The claimant testified that he had no intention of devoting his entire working time to work as a real estate salesman because he did not feel he could make a living in that work. The average earnings of the real estate salesmen in his office were from \$2,000 to \$3,000 a year, which the claimant definitely considered inadequate.

The claimant filed a claim for unemployment insurance benefits with a potential effective date of March 17, 1963. He informed the department that he was working part time as a real estate salesman. The department denied the claim on the ground that the claimant was fully employed because he could work as many or as few hours as he wished as a salesman.

REASONS FOR DECISION

Section 1252 of the Unemployment Insurance Code provides as follows:

"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. 5460, we held that a business opportunity salesman working on a commission basis under an arrangement where he was master of his own time was not "unemployed" without regard to whether he was or was not self-employed, and even though he earned no commissions and worked only part time a few days a week. In that decision we stated:

". . . It is our opinion that as a general rule a salesman who is master of his own time may and should be deemed fully occupied and hence not in that 'unemployed' status which is contemplated by the Act as a prerequisite to the payment of

benefits. The circumstance that such salesman may choose, as did the claimant herein, to work less than a full work week at selling, may earn less than his weekly benefit amount, and may be willing to give up selling on commission if more desirable work at a wage or salary comes his way, does not alter our conclusion. That the claimant did not work full time was a matter of his own choice. A commission salesman may, by consummating one sale, earn considerably more than his weekly benefit amount by working one hour in a given week, yet, should the next week pass without a sale, he might, under the rule opposite to that we herein adopt, qualify for benefits by refraining from work in such week for one hour less than a full time work week. In the absence of an express legislative declaration to the contrary, the allowance of benefits for such subsequent week would not in our opinion be consonant with the intent of the Act to pay benefits only to persons involuntarily without work."

In Benefit Decision No. 5622, we held that a self-employed real estate saleswoman was not performing "services" and therefore was "unemployed" during a period when she attempted without success to sell a piece of property for a friend on a commission basis. We overruled Benefit Decision No. 5460 to the extent that it was inconsistent. In Benefit Decision No. 5622, and in our subsequent decisions, we have followed the California Attorney General's Opinion No. 50/76 (15 Ops. Cal. Atty. Gen. 311) which concluded that self-employed persons and independent contractors are "unemployed" insofar as they are not performing "services" but that the net income of a self-employed person constituted "wages". So long as the "wages" of a self-employed individual are less than his weekly benefit amount, he is "unemployed" (Benefit Decisions Nos. 5633, 5903, 6177, 6231, 6669, 6679 and 6707).

In Benefit Decision No. 6679, where the claimant normally worked full time in his self-employment but had elected coverage under section 708(a) of the code, we held that he could not file a claim as a "partially unemployed individual" when business conditions were slack and he reduced his working hours from 48 to 26 a week because he did not perform services as an employee. However, we held that he was "unemployed" because his "wages" consisting of his net income were less than his weekly benefit amount.

In contrast to our decisions involving the self-employed, we have held that employee commission salesmen may not claim benefits as "partially

unemployed individuals" when their "wages" are less than their weekly benefit amount, not because they are not employees but because their lack of income during a particular week is due to the speculative and fluctuating nature of their work rather than by reason of any involuntary reduction of their customary full-time hours of work (Benefit Decision No. 5791). Also, the mere performance of services by employees constitutes employment which may be sufficient to render them not "unemployed" even though they receive no "wages" or "wages" less than their weekly benefit amount, and even though such work may be exempt employment not covered for contribution purposes under the code (section 650 of the code; Benefit Decision No. 6477). Because of their fluctuating hours of work and frequently delayed receipt of income (Benefit Decision No. 6585), the most simple rule to apply to employee commission salesmen would be that set forth in Benefit Decision No. 5460 that they are fully occupied without regard to the number of hours they work or their income and cannot file valid claims for benefits because not "unemployed." However, such a rule might well result in arbitrary unequal treatment of commission salesmen employees and the self-employed under substantially similar circumstances, and might well penalize those attempting to supplement other earnings as employees or those attempting to provide some means of support during prolonged periods of unemployment during which they have "been unable to obtain suitable work in their usual occupational field (Benefit Decision No. 6696).

It is our opinion that a more realistic rule in view of the economic problems of our culture, our line of decisions involving the self-employed, and the basic purposes of the unemployment insurance legislation is to consider the claimant's normal pattern of earning a living in determining whether he is or is not fully employed during a week when he may perform some services as a salesman on a commission basis. Accordingly, we disapprove the "general rule" set forth in Benefit Decision No. 5460, and our short-form Benefit Decision No. 62-3769 which set forth that "general rule."

If an individual normally makes his living in one occupational field such as the garment industry and merely supplements his income by spare time efforts as a commission salesman as in the present case, it is our opinion that he is "unemployed" when he is temporarily laid off from his work in his usual full-time occupation even though he continues to devote some of his time to his usual spare-time work. His primary occupation is his normal full-time work, and it is the loss of this work and the desire to obtain more of such or similar work which causes him to claim unemployment benefits; and it is this work in which he has built up wage credits to entitle him to file a valid claim.

On the other hand, if the individual's normal pattern of earning a living is to devote his entire working time each week to work as an employee

commission salesman, he is fully employed without regard to his "wages" whether during a particular week he works 80 hours or 20 hours. "Part-time" work may well be a claimant's usual and customary work (Benefit Decision No. 6169).

If an individual, during a period of unemployment, becomes an employee commission salesman in an attempt to secure some funds until he is able to obtain work in his usual occupational field which is other than commission sales, it is our opinion that whether he is or is not "unemployed" depends not so much on whether he devotes 20 hours or 80 hours in this field of fluctuating hours and income but on whether he may realistically be considered as still "unemployed" insofar as his usual occupational field is concerned or be considered as having changed his normal work pattern to the new occupational field of commission sales. Because of the myriad variations in patterns of employment, each situation must be considered separately to determine as a practical matter what is the claimant's primary occupation; has he remained unemployed insofar as that or similar occupations are concerned, or has he obtained temporary or permanent substitute work with which he fills all of his normal working hours considering the nature of the work.

DECISION

The determination of the department is reversed. The claimant was "unemployed" within the meaning of section 1252 of the code and entitled to file a valid claim for benefits effective March 17, 1963. Benefits are payable provided the claimant is otherwise eligible.

Sacramento, California, August 9, 1963.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

GERALD P. MAHER, Chairman

LOWELL NELSON

NORMAN J. GATZERT

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 6718 is hereby designated as Precedent Decision No. P-B-201.

Sacramento, California, January 29, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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