

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

HELEN PUGATCH
(Claimant)

EMPLOYMENT DEVELOPMENT DEPARTMENT

PRECEDENT
BENEFIT DECISION
No. P-B-422
Case No. 80-5790

Office of Appeals Nos.
LA-5901-C and LA-5902-C

The Department appealed from the administrative law judge's decision holding the claimant was an unemployed individual under the provisions of section 1252 of the Unemployment Insurance Code and she was not liable for an assessed overpayment in the sum of \$1,402.

STATEMENT OF FACTS

The claimant regularly performs services as a player in television commercials. For the purposes of this case, the fees paid to her and the conditions under which she works are governed by the Screen Actors Guild 1979 Commercials Contract. The contract establishes pay for the initial filming of a commercial, known as a session fee, and fees for later use of the commercial known as use or residual fees. These fees are paid over a fixed period, usually a 13-week cycle under the contract.

Between December 12, 1978 and December 29, 1979, the claimant received periodic payments from employers or their agents pursuant to the 1979 Commercials Contract. There was no dispute between the parties that some of the payments the claimant received were designated as holding fees, which are defined in the contract as follows:

"B. Holding Fee--Defined--When Credited

"Upon the commencement of the first fixed cycle and upon the commencement of each consecutive fixed cycle thereafter throughout the maximum permissible period of use or any extension thereof, a player shall be paid a separate fee, herein called the holding fee, in an amount equal to a session fee, and payment of such holding fee to each player whose services are utilized in the commercial shall be a condition to Producer's right to continue the use of such commercial.

"Separate and individual holding fees shall be paid for each commercial made.

"The holding fee may be credited against the use fees incurred in a 13-week use cycle which commences during the fixed cycle for which the holding fee is paid."

Holding fees are credited against use or residual fees and adjustments regulated under the overpayment provisions of the commercials contract.

The Department has an established policy with respect to the reporting of use or residual fees generated by the replaying of television commercials. A copy of that policy is presented to each person who is engaged in the entertainment industry to guide them in reporting earnings. That policy provides in part:

"INSTRUCTIONS ON REPORTING REUSE, RERUN OR RESIDUAL PAYMENTS

- "1. Above payments are considered wages for unemployment insurance purposes and will be allocated to week in which:
 - "a. Check is mailed to you, your agent or business manager by employer, advertising agency, guild or union or;
 - "b. Notice is mailed to you, your agent or manager by employer, advertising agency, guild or union or;

"c. Check is given you or your agent or manager in person without any prior notice having been mailed to you."

In reporting her earnings for 1979, the claimant followed the foregoing policy and treated the holding fees she received as use or residual fees when filing claims for benefit payments. Players are not advised when television commercials are rerun, but their contract does require payment usually within 15 days of use. Furthermore, the contract provides that compensation for services shall be made by check payable to the player who may select an agent for receipt thereof.

When the Department learned that some of the payments the claimant received were designated holding fees, it reevaluated her benefit payments for 1979 on November 16, 1979, in the following manner:

Since it was the Department's belief that holding fees were not use or residual fees, but rather payments made to the claimant for not performing as a player in a commercial for a competing product during a 13-week cycle specified under the contract, it allocated each of the holding fees over the entire 13-week cycle. Holding fees, which the Department treats as wages, were allocated to weeks in which the claimant actually received no payments, but for which she had actually filed claims for unemployment insurance benefits. As a result of its calculations, the Department determined that the claimant was an employed individual during 14 weeks, and therefore she was not entitled to benefit payments. It issued a determination to that effect, together with a notice of overpayment in the sum of \$1,402. It is from those documents the claimant filed her appeal.

The issues to be resolved in this case are:

1. Whether use or residual fees are wages for unemployment insurance purposes;
2. Whether a holding fee is a use or residual fee; and
3. If so, to which weeks should such payments be allocated.

REASONS FOR DECISION

Section 926 of the Unemployment Insurance Code provides:

"Except as otherwise provided in this article 'wages' means all remuneration payable to an employee for personal services, whether by private agreement or consent or by force of statute, including commissions and bonuses, and the reasonable cash value of all remuneration payable to an employee in any medium other than cash."

We find that use or residual fees are remuneration payable to an employee for personal services. That remuneration starts, in this case, with the payment of a session fee and follows with the payment of fees for the use of a commercial. While a flat fee could have been paid for the initial performance, it was deemed more fair and equitable by the parties to base fees principally on the use of the commercial. The parties herein have not seriously contended that use or residual payments should not be considered wages for unemployment insurance purposes.

Division 1, Chapter 4, Article 2, of the Unemployment Insurance Code, provides for numerous exceptions to the aforementioned definition of wages. There is no exception for residual or use payments for filmed commercials. We conclude that such remuneration is wages for unemployment insurance purposes since it is based on the employee's personal services.

The portion of section 1252 of the Unemployment Insurance Code which is relevant here provides:

"(a) An individual is 'unemployed' in any week in which he meets any of the following conditions:

"(1) Any week during which he performs no services and with respect to which no wages are payable to him.

"(2) 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. . . ." ¹

The 1979 Commercials Contract contains specific provisions for the payment of use or residual fees. While it may be argued that use or residual fees are paid "with respect to" the week the commercial was originally filmed, rendering a claimant actually unemployed during a later week when payment is made, we are not so persuaded. We find that payment is required for use or residual fees at regular intervals and they are paid with respect to specific weeks as set forth in the 1979 Commercials Contract. Therefore, during any week the claimant was paid a use or residual fee, she was an employed individual.

A holding fee is actually nothing more than an advance use or residual fee and is the consideration for an employer's continued use of a commercial. Since holding fees are credited against use or residual payments at the end of a cycle, we make no distinction between such fees. Contrary to the Department's position, we find no connection between holding fees and the exclusivity clause in the 1979 Commercials Contract. For unemployment insurance purposes, residual, rerun, use, reuse and holding fees are the same; namely, fees generated by the use of a commercial, and are wages within the meaning of section 926 of the Code.

¹ Section 1252 of the Unemployment Insurance Code was amended in 1979 to provide in pertinent part as follows:

"(a) An individual is 'unemployed' in any week in which he or she meets any of the following conditions:"

* * *

"(2) Any week of less than full-time work."

If this case dealt with the claimant's wages in 1980 she would have been unemployed since she provided services on less than a full-time basis. Her benefit entitlement would have been governed by the monetary limits set forth in section 1279 of the Code.

The remaining issue is to determine how such use or residual fees are to be allocated for unemployment insurance purposes. A brief summary of the history of allocating residual payments is found in Appeals Board Decision No. P-B-22, wherein the Board noted that residual payments are allocable on the basis of fairness and equity.

Ideally, wages are allocable to the week services are performed. For many workers who are paid on Friday for the week's work, the general rule works admirably. If it were possible to determine when a commercial was played, the wage payable for such performance could be credited to that week. The weight of the evidence in this case demonstrates that none of the parties know with any degree of certainty when a commercial will be rerun. Tabulation, accounting, and payment all occur after the commercial has been rerun. It is, therefore, not feasible to allocate use or residual payments to the week in which a commercial is rerun.

Likewise, we deem it unfair to allocate a use or residual fee to the week it is actually received by the claimant. An obvious inequity occurs when a claimant is seeking work in a distant locality for several weeks and then returns to his or her place of residence to receive several weeks of use or residual fees at the same moment. Such a procedure is not an equitable method of determining when wages are paid because it sanctions the accumulation of wage payments.

Use or residual payments should be allocated in accordance with existing Department policy. That policy basically allocates such payments to the week a check for such services is mailed to the claimant or his or her designated agent. Additionally, that policy provides for allocating such payments to a week in which a notice is mailed to a claimant advising that a check is available to him or her. If payments are made to players pursuant to the 1979 Commercials Contract, and we have no evidence to suggest otherwise, the Department's policy is a fair and equitable method of allocating use or residual fees for unemployment insurance purposes.

In summary, we conclude that for unemployment insurance purposes, residual, rerun, use, reuse, and holding fees are wages received by a claimant when personally delivered, when a check is mailed by the employer to a claimant or a designated agent, or when a notice is mailed to the claimant or designated agent that a check is available for the claimant. It follows that when the claimant herein treated the holding fees she received as use or residual wages, she acted properly. There was no basis for allocating such fees over a 13-week cycle.

It is not clear from the evidence in the record whether any claims were filed by the claimant in any week when she was in receipt of use or residual wages. We deem it proper to remand that issue to the Department for its consideration.

DECISION

The decision of the administrative law judge is reversed. The claimant is an employed individual during each week she was mailed use or residual payments which exceeded her weekly benefit amount. The notice of overpayment is set aside and the claimant's liability, if any, pursuant to section 1375 of the Code, is remanded to the Department for its consideration in accordance with the foregoing.

Sacramento, California, August 25, 1981.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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