

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

MARIANO J. BELLINA
(Claimant)

Office of Appeals No. VN-27535

PRECEDENT
BENEFIT DECISION
No. P-B-429
Case No. 82-492

The claimant appealed from the decision of the administrative law judge which held the claimant was ineligible for benefits for two weeks under section 1252 of the Unemployment Insurance Code, that the claimant's benefits were subject to reduction under section 1279 of the code, and that the claimant was liable for an overpayment in the sum of \$237.

STATEMENT OF FACTS

The claimant is an actor who for the weeks ending October 11, October 25, and December 20 of 1980 filed continued claim forms certifying he had no work or earnings in each of those weeks.

In June of 1981 a television producer reported in response to a Department benefit audit that the claimant had earnings in each of those weeks in the amounts of \$159.20, \$79.60, and \$250, respectively. The earnings were in the form of use or residual fees paid for the later showing of a television commercial in which the claimant had previously performed services as an actor.

Due to the producer's response, the Department issued a Determination and Notice of Overpayment which held the claimant had been fully employed in the weeks ending October 11 and December 20, 1980, and was entitled to only partial benefits in the week ending October 25, 1980.

In conformity with the custom in the industry and the commercial contract in effect between the television producers and actors, the residual checks were mailed in the weeks in question by the producer to the claimant's talent agent. The talent agent deposited the checks, which were payable to the claimant, in its general account and then issued the claimant its own checks in amounts reduced by its commission for negotiating the work for the claimant.

This procedure has been developed as a recordkeeping device and to make certain actors are promptly paid for their work in television commercials. A similar procedure is contractually followed with respect to the handling of residuals paid for the later use of television programs and motion pictures shown on television. However, the residual fees in such cases are mailed or hand delivered to the Screen Actors Guild (the Guild) which records the payment and forwards the original check to the actor.

The Guild maintains a staff of 26 persons working on two shifts in an effort to process the checks as quickly as possible for its members. The checks are processed according to television program rather than individual actor and are processed without regard to the particular actor's employment status. The Guild handles over two million dollars in residual fees in an average three-week period.

Whether the producer sends the residual fees to the Guild or a talent agent, the actor is not notified that the commercial or program will be rerun or of the residual payment to his agent. In a few instances, the residual fee is paid directly to the actor or his personal business agent. However, in the vast majority of cases such fees are processed through the Guild and the various talent agents. In either case, there would be a record of when the check was mailed to the actor by the agent.

In the instant matter, the claimant first knew of the residual fees when he received them. Although he could not recall specifically when he received the fees, he testified that he always reported the residuals when he got them. The continued claim forms available at the hearing indicated that the claimant reported wages of \$250 and \$159.20 in the week ending October 18, 1980.

REASONS FOR DECISION

Section 1252 of the code, in pertinent part, provides:

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

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

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

* * *

"(c) For the purpose of this section only 'wages' includes any and all compensation for personal services whether performed as an employee or as an independent contractor"

Section 1279 of the code, in pertinent part, provides:

"(a) Each individual eligible under this chapter who is unemployed in any week shall be paid with respect to that week an unemployment compensation benefit in an amount equal to his or her weekly benefit amount less the smaller of the following:

"(1) The amount of wages in excess of twenty-five dollars (\$25) payable to him or her for services rendered during that week.

"(2) The amount of wages in excess of 25 percent of the amount of wages payable to him or her for services rendered during that week."

* * *

"(c) For the purpose of this section only 'wages' includes any and all compensation for personal services whether performed as an employee or as an independent contractor"

In Appeals Board Decision No. P-B-422, the Board held that use or residual fees are wages for unemployment insurance purposes since they are based on the employee's personal services. The Board also held that such wages are to be allocated to the week in which they are personally delivered to the claimant, 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.

In the instant case, the administrative law judge found that the residual fees were wages in the weeks they were mailed to the claimant's talent agent as his designated agent and, therefore, affirmed the Department's determination.

On appeal the claimant argues that the rule in Appeals Board Decision No. P-B-422 with respect to when residual fees are to be allocated and consequently reported is unreasonable. In light of the custom in the industry in processing such fees, we agree.

In this case, the claimant had no reason to believe, much less to report, that residual fees had been paid to his talent agent during the weeks ending October 11, October 25, and December 20 of 1980. The evidence shows that other actors in the same situation would be in no better position to know when such fees have been mailed or delivered to the Guild or their talent agents.

The evidence also shows that the accumulation of wage payments would be counterproductive to the purposes of the industry's established procedure for processing residual fees and, given the volume of such payments, unlikely to occur.

Under such circumstances, it is found that allocating residual fees as wages in the week they are actually received by the claimant is the more equitable and practical rule. Such a rule will place no unreasonable reporting requirements on the claimant and the mailing records of the claimant's agents provide the Department a benchmark for determining whether the payment has been timely reported. For these reasons, the portion of the Appeals Board Decision No. P-B-422 with respect to which week use or residual payments should be allocated is overruled.

In the instant case, the residual payments reportedly mailed by the producer during the weeks ending October 11, October 25, and December 20 of 1980 were not to be allocated until the week in which they were actually received by the claimant. It follows that the claimant had no earnings in these weeks and, since he also had no work, he was unemployed within the meaning of section 1252 of the code. Therefore, the claimant was not ineligible for benefits under section 1252 of the code for the weeks ending October 11 and December 20 of 1980, and benefits may not be reduced under section 1279 of the code for the week ending October 25, 1980.

It also follows that, since the claimant was unemployed in the weeks in question, he was entitled to the weekly unemployment insurance benefits he received and, therefore, there was no overpayment.

DECISION

The decision of the administrative law judge is reversed. The claimant is not ineligible for benefits under section 1252 of the code nor may the claimant's benefits be reduced under section 1279 of the code. The overpayment in the sum of \$237 is cancelled.

Sacramento, California, December 9, 1982.

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