

BEFORE THE  
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

RUBY J. PARKER  
(Claimant)

PRECEDENT  
BENEFIT DECISION  
No. P-B-439  
Case No. 84-6782

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. S-27124

The Department appealed from the decision of the administrative law judge which held that the claimant was ineligible for benefits under section 1255.3 of the Unemployment Insurance Code beginning April 1, 1984, and waived the repayment of \$707 in overpayments.

STATEMENT OF FACTS

The claimant established a benefit year effective October 30, 1983. The claimant had worked seasonally from June until October or November in the food processing industry for 35 years. At the time she filed her claim for benefits, she informed the Department that she was receiving social security benefits in the amount of \$287 per month. At her interview with the Department in November 1983, she was informed that her weekly benefit amount of \$166 in unemployment compensation benefits would not be reduced due to receipt of social security benefits because she had obtained fully insured status for social security benefits prior to her base period. The Department's position at that time was based on the court's decision in Rivera v. Patino (1982), 524 F.Supp. 136, which held that social security benefits attributable to nonbase-period employers were not to be offset against unemployment insurance benefits arising from employment with a base-period employer.

Meanwhile, an appeal had been lodged with the Ninth Circuit Court of Appeals requesting that that court reverse the decision of the District Court and hold that unemployment insurance benefits should be offset against social security payments. On April 21, 1983 the Department issued Field Office Directive 83-64 (herein FOD) which provided that claimants who were held eligible for benefits under the holding of the Federal District Court

in Rivera v. Patino (supra) were to be informed that an appeal to that decision had been filed and they may be required to repay benefits should it be reversed by a higher court.

Subsequently, on August 29, 1983, the Ninth Circuit Court of Appeals reversed the district court's decision in Rivera v. Becerra and Donovan (1983), 714 F.2d 887, and held that unemployment insurance benefits must be reduced if the claimant was receiving social security payments and the claimant's base-period employer made social security contributions on behalf of the claimant. That decision was stayed pending review by the United States Supreme Court. On March 19, 1984 the stay was lifted when the Supreme Court declined to hear the matter. As a consequence, the Department issued Field Office Directive 84-50 UI on April 11, 1984 which provided in pertinent part:

"On March 19, 1984, the United States Supreme Court declined to accept the appeal from the decision previously issued by the U.S. Court of Appeals for the Ninth Circuit in the Rivera case. The action of the Supreme Court means that social security benefits are deductible from UI benefits if any of the claimant's base period employers contributed to the Social Security Fund on the claimant's behalf. As per usual procedures, if social security benefits are deductible, only that portion of the employer's contribution, normally 50 percent, will be deducted.

"Effective immediately, field offices are to revert to the procedures which were in effect prior to the implementation of the Rivera case. Accordingly, the guidelines on deducting social security . . . are again applicable."

Pursuant to FOD No. 84-50 UI, the Department issued a determination on May 11, 1984 which held that the claimant was not entitled to unemployment insurance benefits under code section 1255.3 beginning October 30, 1984 [sic]. On May 18, 1984, the claimant was mailed a Notice of Overpayment in the amount of \$707, covering an overpayment in the amount of \$33 per week for the weeks ending November 19, 1983 through December 31, 1983, and \$34 per week for the weeks ending January 7, 1984 through April 7, 1984. The claimant filed a timely appeal from the determination and Notice of Overpayment.

The record reflects that the Department did not notify the claimant that there was any uncertainty regarding her entitlement to full benefits or that she might be required to repay them based on pending litigation at the time unemployment benefits were paid to her. The claimant objected to being required to repay and appealed to an administrative law judge. At the hearing the claimant advised the administrative law judge, ". . . I resent paying it because I wasn't told."

The administrative law judge resolved the matter in the claimant's favor but on the ground that the payment of benefits to the claimant by the Department constituted a determination of eligibility in November of 1983. The administrative law judge concluded that under section 1332 of the Unemployment Insurance Code, the Department lacked authority to reconsider its "silent" determination as it had not done so in a timely manner. Accordingly, the administrative law judge held that the claimant's benefits were not subject to reduction.

### REASONS FOR DECISION

The initial issue presented for our consideration is whether the Department had authority in May of 1984 to issue a determination that the claimant's unemployment benefits were subject to reduction under section 1255.3 of the Unemployment Insurance Code beginning October 30, 1983.

Code section 1332 (a) provides, in pertinent part, that the Department may for good cause reconsider any determination within 15 days after an appeal to an administrative law judge is filed or, if no appeal is filed, within 20 days after mailing or personal service of the notice of determination.

The Board addressed the import of that section in Appeals Board Precedent Decision No. P-B-128. There, it was held that section 1332(a) applies only where a written determination has been issued. No such limitation is applicable to an unwritten determination (commonly referred to as a "silent" determination) which is evidenced by the payment of benefits.

The determination of May 11, 1984 was the first written determination issued by the Department in this case. We have carefully examined the rationale of Appeals Board Decision No. P-B-128 and find no reason to alter it. Accordingly, we find that the Department acted within its authority in issuing the determination of May 11, 1984.

Code section 1255.3 provides for the reduction of unemployment insurance benefits of social security payments which reflect the employer's contribution to the Social Security Fund on the claimant's behalf (customarily 50 percent). In Rivera v. Becerra & Donovan (supra), the Court of Appeals held that this was so if the base-period employer contributed to social security in behalf of the claimant.

In this case the claimant and the claimant's base-period employer each contributed to the Social Security Fund. Thus, the claimant's unemployment compensation is subject to offset by one-half of her social security benefits.

Accordingly, we hold that the claimant is ineligible for full weekly benefits under section 1255.3 of the Unemployment Insurance Code beginning October 30, 1983.

The remaining issue is whether the claimant is liable for repayment of the overpayment.

Section 1375 of the California Unemployment Insurance Code provides that a claimant who is overpaid benefits is liable for this amount unless the overpayment was not due to fraud, misrepresentation, or wilful nondisclosure on his part, was received without fault on his part, and its recovery would be against equity and good conscience.

It is apparent that overpayment in this case is not due to misrepresentation, wilful nondisclosure, or fraud on the part of the claimant. Hence, the issue is whether recovery of the overpayment would be against equity and good conscience.

In Appeals Board Decision No. P-B-438 this Board considered a virtually identical case in which the Department had issued a Field Office Directive directing its personnel to advise claimants that an appeal had been taken in the Rivera case and that in the event of a reversal the claimants may have to repay any benefits that had been received. Subsequently, Rivera was reversed by a higher court. As the Department had failed to follow its own directive with respect to forewarning the claimant of a prospective overpayment, this Board held that it would be against equity and good conscience to require recoupment. Accordingly, we found that the Department was proscribed from requiring repayment of the overpayment.

Here, the Department also failed to advise the claimant at the time benefits were paid that she could be required to repay benefits in the event of an adverse court decision. Accordingly, we conclude that waiver of the overpayment is required.

DECISION

The decision of the administrative law judge is modified. The Department had the authority to issue the determination dated May 11, 1984 pursuant to section 1332(a). The claimant is ineligible for full weekly benefits under section 1255.3 of the code beginning October 30, 1983. The \$707 overpayment is waived.

Sacramento, California, January 29, 1985.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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