

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
P O Box 944275
SACRAMENTO CA 94244-2750

ROBERT A MCGINNESS
Claimant-Appellant

Precedent Benefit Decision No. P-B-491
OA Decision No.: 845403

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

CYNTHIA K. THORNTON

MILLER MEDEARIS

JACK D. COX

DON L. NOVEY

VIRGINIA STROM-MARTIN

This is a final decision by the Appeals Board. The Appeals Board has no authority to reconsider this decision. If you disagree with the decision, you must seek relief in court by filing a Petition for Writ of Mandate with the California Superior Court located in your county no later than six months from the "Date Mailed" shown below.

(See "Further Appeal Information" sheet attached to Board decision.)

Date Mailed: September 15, 2003

Case No.: AO-66433
Claimant: ROBERT A McGINNESS

The claimant appealed from that portion of the decision of an administrative law judge that held the claimant was ineligible for unemployment insurance benefits under section 1253(a) of the Unemployment Insurance Code for the two-week period beginning April 14, 2002, based upon a finding that the claimant did not have good cause to backdate his claim, and therefore, had not complied with the timely filing requirements of the Employment Development Department's (EDD) regulations.

STATEMENT OF FACTS

The claimant was most recently employed as a film producer until April 12, 2002, at which time he was laid off. The claimant did not file for unemployment insurance benefits at that time. He filed a claim with an effective date of July 28, 2002, after learning he might be eligible for benefits. The claimant had never previously filed for unemployment insurance benefits. On August 21, 2002, the claimant requested that his claim be backdated to April 14, 2002 through the effective date of his claim.

The claimant generally worked as a freelance film producer and did not belong to a union. As a freelance film producer the claimant normally worked as an independent contractor and when a job was over, he found another contract. During his last assignment, he was placed on a long-term film project where he worked as an employee. He was laid off when the project was over. He then proceeded to look for other job contracts as was his custom.

Approximately three and a half months after being laid off, the claimant spoke with the director of operations of the payroll company for the employer, who informed him he was entitled to unemployment insurance benefits. The claimant was shocked as, although he knew he was designated as an employee, the possibility of receiving benefits never crossed his mind. With the exception of working for one company for seven years, the claimant had always been a freelance producer.

When the claimant asked why he was not advised sooner of his right to file for unemployment insurance benefits, the director of operations said it was not their responsibility as they are a payroll company and only issue checks on behalf of the employer.

The employer never provided the claimant with a pamphlet from the EDD which informs employees of the Department's unemployment and disability insurance programs. Nor did the employer post any notification regarding employee rights to benefits in a break room or in the claimant's office.

The pertinent pamphlet is entitled, *For Your Benefit, California's Programs for the Unemployed* (DE 2320, dated 8-00). Relevant information in the pamphlet that could have alerted the claimant to file a claim includes at page 5, "Unemployment Insurance (UI) is an insurance program that is paid for by your employer. It provides you with an income when you are out of work through no fault of your own". It further specifies those workers not covered by unemployment insurance, specifically stating at page 12, "The following groups of workers are not normally covered by Unemployment Insurance:

- Minor children employed by their parents
- Parents employed by their children
- Husbands and wives employed by each other
- Certain state-licensed salespersons paid only commissions
- Caddies and jockeys
- Persons enrolled and regularly attending classes at the school or educational institution where employed.
- A student's spouse who is working for an educational institution in an employment program provided for the purpose of financially aiding the student.

If you do not know whether you are covered, do not waive your rights. Call EDD." (Emphasis added.) Film producers are not among the groups of excluded workers.

The EDD denied the claimant's request to backdate his initial claim for benefits and issued a determination finding him ineligible for benefits for the period of April 14, 2002 and ending April 27, 2002. It is unknown why the determination does not cover the period April 28, 2002 through July 27, 2002 as well.

It is found that the delay resulted, in part, from the employer's failure to provide the claimant with notice of his unemployment benefit rights.

REASONS FOR DECISION

The present case presents the question whether good cause for the delay in filing for unemployment benefits under code section 1253(a) can be based, at least in part, on the employer's failure to advise the claimant of his unemployment benefit rights.

Unemployment Insurance Code section 1253(a) provides that an unemployed individual is eligible for unemployment compensation benefits with respect to any week only if the individual files a claim for that week in accordance with authorized regulations.

We begin by examining Unemployment Insurance Code Section 1253(a) in light of the overriding legislative objective as set forth in Unemployment Insurance Code Section 100 of establishing "a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum."

The provisions of the Unemployment Insurance Code must be liberally construed to further the legislative objective of reducing the hardship of unemployment and that the procedures for obtaining benefits are geared to informality. (*Gibson v. Unemployment Ins. Appeals Bd.*, (1973) 9 Cal.3d 494, 509 P.2d 945; *California Emp. Com. v. Kovacevich* (1946) 27 Cal.2d 546, 549; 165 P.2d 917; *Flores v. Unemployment Ins. Appeals Bd.* (1973) 30 Cal.App.3d 681, 684; 106 Cal.Rptr. 543; *Cal. Portland Cement Co. v. Cal Unemp. Ins. Appeals Board* (1960) 178 CalApp.2d 263, 270.)

The authorized regulations referred to in section 1253(a) of the Code are set forth in the California Code of Regulations, title 22.

A new claim means an application for the establishment of a benefit year and a computation of the maximum benefits payable and the weekly rate. (Cal. Code Regs., tit. 22, §1326-2, subd. (a).)

A new, additional or reopened claim is effective on the Sunday preceding the day on which it was filed. (Cal. Code Regs., tit. 22, §1253-2.)

The period for filing a new, additional, reopened, continued, or partial claim may be extended if good cause exists for the delay in filing. (Cal. Code Regs., tit. 22, §1326-10, subd. (a).)

Good cause includes mistake, inadvertence, surprise, or excusable neglect. However, "good cause" does not include negligence, carelessness, or procrastination, in the absence of circumstances excusing these causes for delay. (Cal. Code Regs., tit. 22, §1326-10 subd. (a)(7).)

Excusable neglect, as used in a similar statute, has been defined as that neglect which might have been the act of a reasonably prudent person under the same circumstances (*Gillio v. Campbell* (1953) 114 Cal.App.2d Supp. 853), and does not embrace carelessness and negligence (*Doyle v. Rice Ranch Oil Co.* (1938) 28 Cal.App.2d 18).

The relevant regulation provides that good cause "include[s], but [is] not limited to" the examples illustrated herein. (Cal. Codes Regs., tit. 22, §1326-10, subd. (a).)

The concept of good cause calls for a factual exposition of a reasonable ground for the sought order. Good cause may be equated to a good reason for a party's failure to perform that specific requirement from which the party seeks to be excused. (*United States Postal Service v. Unemployment Ins. Appeals Bd.* (1976) 63 Cal.App.3d 506, 134 Cal.Rptr. 19; *County of Santa Clara v. Beverlee Myers* (1983) 148 Cal.App.3d 684; 196 Cal.Rptr. 230; *Waters v. Superior Court* (1962) 58 Cal.2d 885, 893; 27 Cal.Rptr. 153, 377 P.2d 265).

The question is whether good cause existed for the claimant's three-and-a-half month delay in filing his initial unemployment insurance claim.

Unemployment Insurance Code section 1089 provides:

"Each employer shall post and maintain in places readily accessible to individuals in his service such printed statements concerning benefit rights and other matters as may be prescribed by authorized regulations. Each employer shall, pursuant to authorized regulations, supply each individual at the time he becomes unemployed with copies of printed statement or materials relating to claims for benefits. Each employer shall immediately notify each employee of any change in his relationship with said employer. Failure to comply with this section by an employer shall constitute a misdemeanor. Such printed statements shall be supplied by the director to each employer without cost to him."

California Code of Regulations, title 22, section 1089-1, subdivision (c), specifies the pertinent requirements that each employer shall maintain in places readily accessible to all employees relevant forms pertaining to the unemployment insurance and disability programs.

California Code of Regulations, title 22, section 1089-1, subdivisions (d)(1) and (2) state in relevant part:

"(d) When an employer discharges, lays off, or places an employee on leave of absence, the employer shall give to the employee the following notices:

- (1) Written notice of his or her unemployment insurance benefit rights by providing the pamphlet identified in subdivision (b)(3) of this section. The notice of unemployment insurance benefit rights shall be given no later than the effective date of the action;
- (2) Written notice regarding the change in the employee's status. The notice of change of status shall be given no later than the effective date of the action and shall contain at a minimum:
 - (A) The name of the employer;
 - (B) The name of the employee;
 - (C) The social security account number of the employee;
 - (D) Whether the action was a discharge, a layoff, a leave of absence, or a change in status from employee to independent contractor; and
 - (E) The date of the action." (Emphasis added.)

The above regulations became operative on November 8, 1993 after the issuance of *Wang v. Unemployment Insurance Appeals Board* (1990) 225 Cal.App.3d 412, 275 Cal.Rptr. 237. In *Wang*, the court held that the employer's failure to advise the discharged employee regarding the right to file for unemployment benefits did not provide good cause for permitting the discharged employee to backdate a claim for benefits.

The court's conclusion was based, in part, on the fact that the EDD had not adopted any regulations implementing Unemployment Insurance Code Section 1089. However, the decision also construed the effect of an existing regulation, California Code of Regulations, title 22, section 1326-10. The court stated at page 419:

"Although California Code of Regulations [sic], title 22, section 1326-10, subsection (a), broadly defines good cause for delay, and an employee's unawareness of his or her benefit rights may support good cause for a *reasonable* delay in filing an initial claim, good cause cannot be based on a employer's failure to discharge a nonexistent duty to advise an employee in this regard...." (Emphasis in original.)

After the court decided the *Wang* case in 1990, the EDD, as stated above, issued the relevant regulations (Cal. Code Regs., tit. 22 §1089-1 et seq.).

Because the EDD issued regulations in 1993 we find the conclusion reached in the *Wang* case, in regard to the effect of the failure of an employer to provide information pursuant to Unemployment Insurance Code Section 1089, is no longer controlling. However, in conclusion the Court of Appeals stated at page 419, that "An unemployed individual's lack of awareness of the right to file for unemployment benefits, for any number of reasons, may provide good cause for allowing a delayed claim for benefits. (Cal. Code Regs., tit. 22, §1326-10, subd. (a).)"

Since 1993, employers have been under a mandatory duty to inform an employee, following a discharge, layoff, or employer-mandated leave of absence, of his or her unemployment insurance benefit rights. The employer must give the employee the appropriate EDD pamphlet not later than the effective date of action.

Although an employer may fail to provide the mandated pamphlet we believe this fact alone would not provide a claimant with good cause to backdate a claim, particularly where a claimant has filed for benefits in the past or is otherwise familiar with the unemployment insurance program. However, the employer's failure to comply with the statutory duty should be among the factors to be considered in analyzing a case involving the backdating of a claim.

In the present case the employer did not comply with its statutory duty to post material for its employees, relating to rights and benefits available through the EDD, nor did it give the claimant the mandatory pamphlet at the time he was laid off. If the claimant had received the pamphlet he would have been on notice that a producer is not listed in the category of excluded workers ineligible for benefits. This would have alerted him to the fact he could be entitled to benefits.

We find the claimant's delay in filing his initial claim for benefits was not unreasonable, as his failure to file promptly was due to excusable neglect. Thus we conclude the claimant has established good cause for the delay. We base our conclusion on the following facts: that the claimant had never previously filed for unemployment insurance benefits; he had not typically worked as an employee; he had a reasonable mistaken belief that a producer was an excluded worker; he did not receive the mandated pamphlet which contained information that could have clarified his mistaken belief; the employer failed to post required notices; and he did not significantly delay in requesting the backdating of his claim once he discovered his rights. Hence, we are persuaded these factors provided the claimant with good cause to backdate his initial claim for benefits.

DECISION

The appealed portion of the decision of the administrative law judge is reversed under Code section 1253(a). The claimant is not ineligible for unemployment insurance benefits from April 14, 2002 through April 27, 2002, provided he is otherwise eligible. The issue of whether the claimant had good cause for the delay in filing his claim under section 1253(a) from April 28, 2002 through July 27, 2002, is referred back to the EDD for a determination consistent with this decision.