

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

MERCEDES W CALDERA  
Claimant

Precedent Benefit  
Decision No. P-B-507

EMPLOYMENT DEVELOPMENT DEPARTMENT  
Appellant

DECISION

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

ROBERT DRESSER

MICHAEL ALLEN

ELLEN CORBETT

Pursuant to section 409 of the California Unemployment Insurance Code, AO-359822 is hereby designated as Precedent Decision No. P-B-507.

Adopted as Precedent: October 13, 2015

**Case No.:** AO-359822  
**Claimant:** MERCEDES W CALDERA

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The Employment Development Department (EDD) appealed from the decision of an administrative law judge that held the claimant's earnings from services as an In-Home Supportive Services (IHSS) worker caring for her son were wages that supported the claimant's unemployment insurance benefit claim notwithstanding the provisions of section 631 of the Unemployment Insurance Code.

### ISSUE STATEMENT

The issue presented in this case is whether the wages earned by the claimant as an IHSS worker caring for her son can be used to support the claimant's benefit claim.

### FINDINGS OF FACT

The claimant opened an unemployment insurance benefit claim effective April 6, 2014. The base period for that benefit claim consists of the four consecutive calendar quarters ending December 31, 2013. During that base period the claimant earned \$19,000 as an IHSS worker caring for her son. EDD determined that those wages could not be used to support the claimant's benefit claim because they were derived from service performed by the claimant in the employ of her son.

The claimant resides in Imperial County. We take official notice of the fact that Imperial County has established the Imperial County In-Home Supportive Services Public Authority for the purpose of assisting in the delivery of IHSS services.

We also take official notice of the following documents that have been served on the parties:

1. December 3, 2014 comment from EDD concerning the possible adoption of the decision issued in Case No. AO-336919 as a precedent decision.
2. December 3, 2014 comment from the Department of Social Services concerning the possible adoption of the decision issued in Case No. AO-336919 as a precedent decision.

Those documents are entered into the record of this case with the following comments that are accepted as written argument and have also been served on the parties:

1. March 11, 2015 comment from SEIU-ULTCW.
2. March 12, 2015 comment from Legal Services of Northern California.
3. March 12, 2015 comment from The Legal Aid Society-Employment Law Center.
4. March 12, 2015 comment from Imperial County IHSS Public Authority.
5. March 9, 2015 comment from San Francisco IHSS Public Authority.

### REASONS FOR DECISION

The issue presented by this case is an issue that has concerned the Appeals Board for some time and we acknowledge that, over time, inconsistent decisions have been issued by the Appeals Board on this topic. While we sympathize with the plight of individuals in situations similar to those of this claimant and we have carefully considered the rationale that has been proposed for reaching the result reached by the administrative law judge in this case, we have concluded that the plain language of code section 631 requires a reversal of the administrative law judge's decision.

In defining services that are excluded from the unemployment insurance program, code section 631 (enacted in 1953 and amended in 1971) provides as follows:

“Employment” does not include service performed by a child under the age of 18 years in the employ of his father or mother, or service performed by an individual in the employ of his son, daughter, or spouse, except to the extent that the employer and the employee have, pursuant to Section 702.5, elected to make contributions to the Unemployment Compensation Disability Fund.

A separate provision, code section 683 (enacted in 1978), sets forth a statutory definition of “employer” that applies to caregivers working through the IHSS program. That statute provides as follows:

“Employer” also means any employing unit which employs individuals to perform domestic service comprising in-home supportive services under Article 7 (commencing with Section 12300), Chapter 3, Part 3, Division 9 of the Welfare and Institutions Code and pays wages in cash of one thousand dollars (\$1,000) or more for such service during any calendar quarter in the calendar year or the preceding calendar year, and is one of the following:

- (a) The recipient of such services, if the state or county makes or provides for direct payment to a provider chosen by the recipient or to the recipient of such services for the purchase of services, subject to the provisions of Section 12302.2 of the Welfare and Institutions Code.
- (b) The individual or entity with whom a county contracts to provide in-home supportive services.
- (c) Any county which hires and directs in-home supportive personnel in accordance with established county civil service requirements or merit system requirements for those counties not having civil service systems.

Neither code section 631 nor code section 683 is vague or ambiguous. The pertinent portion of code section 631 in plain language provides that employment “does not include...service by an individual in the employ of [her] son” and the pertinent portion of code section 683 in plain language provides that, for claimants who perform work under the IHSS program, the term “employer” also means the “recipient of such services.” Read in conjunction, these two statutes clearly confirm that IHSS caregivers who care for their own children are employed by that care recipient with the consequence that the wages earned in that work cannot be used to support a claim for unemployment insurance benefits. Thus, whether or not some entity other than the claimant’s son might possibly represent an additional employer of the claimant does not alter the fact that the claimant’s son is still one of her employers. Since the claimant was undeniably working “in the employ” of her son, pursuant to code section 631 the wages that the claimant received for that work cannot be used to support the claimant’s unemployment insurance benefit claim. The administrative law judge’s decision must therefore be reversed.

Having explained our decision, we feel obliged to address the rationale that has typically been advanced for reaching an opposite result on this topic inasmuch as that theory was apparently utilized to reach the decision issued by the administrative law judge. Our review of this issue has led us to ultimately conclude that such rationale is not viable.

The rationale proposed for effectively cancelling the unequivocal exclusion set forth in code section 631 rests on the theory that the state, the county, or the county’s IHSS public authority occupies the role of an additional, “joint employer” of the claimant separate and apart from the claimant’s son, daughter or spouse. Under this theory, the wages from the IHSS services provided by the claimant to the claimant’s son, daughter, or spouse are no longer excluded from the claimant’s unemployment benefit claim because those wages are also derived from this additional employer.

As proposed, that rationale often relies, at least in part, upon decisions affirming the joint employment of IHSS workers in other legal venues. It is then asserted that the concept of joint employment of IHSS workers should also be introduced into the unemployment insurance program for the purpose of effectively invalidating code section 631. Such is the instance in the case at hand with the administrative law judge citing the decision in *Guerrero v. Superior Court of Sonoma* (2013) 213 Cal. App. 4<sup>th</sup> 912 as authority for the proposition that the claimant's wages should not be disallowed under code section 631. The decisions issued in *In-home Supportive Services v. Workers' Compensation Appeals Board* (1984) 152 Cal. App.3d 720 ) ("*IHSS v. WCAB*"), and *Bonnette v. California Health and Welfare Agency* 704 F.2d 1465 ( 9<sup>th</sup> Cir. 1983) have also been cited in similar cases as supporting the contention that an IHSS worker claiming unemployment insurance benefits may have joint employers.

We do not think that the decisions in *Guerrero*, *Bonnette* and *IHSS v. WCAB* can be reasonably considered to support that contention. The *Guerrero* and *Bonnette* decisions addressed the question of whether it is possible for an IHSS worker to have joint employers for purposes of the Fair Labor Standards Act (29 U.S.C. section 201 et seq.) and the *IHSS v. WCAB* decision held that an IHSS provider was a dual employee of both the IHSS recipient and the state for purposes of workers' compensation coverage. Each of those decisions concerns a statutory scheme very different from the unemployment insurance statutes and relies upon a definition of "employer" that differs from the definition used in the unemployment insurance law. Moreover, neither of those statutory schemes contains any exclusion similar to that set forth in code section 631. Since those decisions concern entirely different programs and do not address or relate to the unemployment insurance program, we do not find those decisions to be apposite to the issue before us.

Under the "joint employer" rationale, code section 683 essentially carves out an exception to code section 631 by providing authorization for an IHSS public authority to serve as a joint employer of the claimant. Section 12301.6 of the Welfare and Institutions Code authorizes counties to create public authorities, corporate public entities separate from the county, for the purpose of facilitating the delivery of IHSS services. That provision provides a public authority with substantial control over the training, referral, background investigation of qualifications, pay and benefits of an IHSS worker, but also confirms that the recipients of the IHSS services retain the right to hire and discharge the IHSS worker as well as supervise the work performed by that worker.

It has been argued that, in cases such as this, the IHSS public authority is a joint employer of the claimant with the consequence that the wages received from that joint employer can be used to support the claimant's unemployment insurance

benefit claim notwithstanding the fact that those earnings were also derived from work “in the employ” of her son. For the following reasons, we do not find that argument to be persuasive.

First, the plain language of code section 631 is clear and unambiguous in specifically excluding from the definition of “employment” all services performed by a claimant in the employ of his or her son, daughter or spouse. There is thus no justification for interpreting or parsing that statutory language in a fashion that would reach a different result. On the subject of statutory interpretation the California Supreme Court described the role of judicial review as follows:

As in any case involving statutory interpretation, our fundamental task is to determine the Legislature’s intent so as to effectuate the law’s purpose. Statutory interpretation begins with an analysis of the statutory language. If the statute’s text evinces an unmistakable plain meaning, we need go no further. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal. 4<sup>th</sup> 1142, 1147 [internal quotes and citations omitted].)

Second, code section 683 does not reference code section 631, cannot reasonably be read to invalidate code section 631, and otherwise exhibits no hint of a legislative intent to nullify code section 631 either fully or in part. Indeed, code section 683 can easily be read to harmonize with code section 631 and therefore must be interpreted in that fashion. Section 1858 of the Code of Civil Procedure provides as follows:

In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Code section 683 does not in any way address family-member employment and it therefore cannot be viewed as narrowing the reach of the statute that specifically addresses such employment. Since code sections 631 and 683 can obviously be interpreted in a fashion that will “give effect” to both provisions, those statutes must be interpreted in that manner and not in a way that would have one statute cancel the other.

Third, code section 631 already includes one express exception and under the accepted rules of statutory interpretation another exception therefore cannot be presumed. Code section 631 provides an exception that allows the child or spouse and claimant to opt into the state disability program by electing to make contributions to the Unemployment Compensation Disability Fund. Code section

631, however, does not include an exception that would allow a claimant's IHSS services for a son, daughter or spouse to be deemed employment for purposes of the unemployment insurance program. Legislative silence on this point must therefore be regarded as intentional omission. "Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal. 4<sup>th</sup> 1215, 1230.)

Fourth, while the courts have not specifically addressed the question of whether an IHSS worker can have more than one employer for purposes of the unemployment insurance law, an opinion of the California Attorney General concluded that there is no joint employment of IHSS workers in the context of the unemployment insurance law. (68 *Ops. Cal. Atty. Gen.* 194 (1985).) That opinion observed that "the concept of dual employments is not to be found in the area of unemployment insurance coverage" and concluded that IHSS workers were "the employees of only the IHSS aid recipient for purpose of unemployment insurance coverage."

Fifth, we also think that there are significant questions as to whether an IHSS public authority truly represents an "entity with whom a county contracts to provide in-home supportive services" within the meaning of code section 683(b). While a public authority is established by a county board of supervisors to provide for the delivery of IHSS services pursuant to a county enabling ordinance and an interagency agreement, it is unclear to us as to whether such a public authority contracts to itself provide IHSS services to recipients. We believe that such questions as to the status and reach of a public authority would have to be more definitively addressed before a public authority could be held to be an employer of an IHSS worker for purposes of code section 683(b).

Sixth, even assuming a public authority was deemed to be an employer under code section 683(b), the joint employer theory would yield inconsistent results. Specifically, only those IHSS providers whose services were rendered for their excluded family members in counties that administer their IHSS program through a public authority would be eligible for benefits, whereas IHSS providers whose services are rendered in counties that administer their program through county departments would be excluded with no rational basis for the distinction or legislative history to support it.

Finally, we note that Precedent Decision P-B-111 has been cited as supporting the supposition that an IHSS worker has joint employers for purposes of code section 631. In P-B-111, however, the claimant did not work for several employers. The claimant in that case worked for only a single employer, a

partnership between the claimant's father and a corporation owned by an uncle. That decision rested on the following language of section 631-1(e), title 22, California Code of Regulations:

Services performed in the employ of a partnership by a spouse, father, mother, or child under the age of 21 of a partner are excluded when such services would be excluded if performed for each partner individually.

Since one of the partners was a corporation, and not one of the claimant's relatives, the claimant's wages were not excluded under code section 631. Inasmuch as the claimant in Precedent Decision P-B-111 only had one employer and that employer was a partnership specifically covered by a regulation, we do not consider that decision to be applicable to the case before us or supportive of the contention that an IHSS caregiver has joint employers insofar as the unemployment insurance law is concerned. It has not been alleged in this case, nor do the facts support a finding, that a partnership existed between the claimant's son and the public authority. We therefore do not consider Precedent Decision P-B-111 to have a bearing on this matter.

For all the reasons set forth above, we hold that the claimant's wages as an IHSS worker caring for her son cannot be used to support her unemployment insurance benefit claim under code section 631. We recognize that a trend now appears to exist for concluding that IHSS workers have joint employers for the purpose of obtaining benefits or protection under various social welfare programs. We also acknowledge that cogent arguments have been advanced for reaching a similar conclusion with regard to the unemployment insurance program. Given the clear and unambiguous provisions of code section 631, however, we do not believe that acceptance of the joint employer argument would warrant a result different from the one we have reached in this matter.

We recognize that interesting public policy arguments have been made for allowing IHSS workers who care for their children or their spouse to be eligible for unemployment insurance benefits as a result of that work. It has been contended that the workers in this low wage field who are struggling to "put food on the table and keep a roof overhead" would be greatly assisted in those efforts by the receipt of unemployment insurance benefits when they are out of work. As it presently stands, however, the law does not permit that result and the decision as to whether that law should be changed rests with the Legislature and not with this board.



## DECISION

The decision of the administrative law judge is reversed. The claimant's wages as an IHSS worker caring for her son cannot be used to support the claimant's unemployment insurance claim because code section 631 excludes from the definition of "employment" services performed by an individual in the employ of her son. Whether or not those services might also be deemed to have been in the employ of another employer is immaterial to the operation of the exclusion under code section 631.