

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

HAL T. LEONARD
(Claimant)

Office of Appeals No. LA-D-19625(A)

PRECEDENT
DISABILITY DECISION
No. P-D-402
Case No. D-78-209

Pursuant to section 412 of the Unemployment Insurance Code, the Appeals Board assumed jurisdiction over this case prior to the issuance of the decision of the administrative law judge.

STATEMENT OF FACTS

The claimant appealed to an administrative law judge from a determination of the Department holding him ineligible for disability insurance benefits beginning November 16, 1977 under section 140.5 of the Unemployment Insurance Code. The claimant also appealed from a notice of overpayment of disability insurance benefits in the amount of \$425.

A hearing on the appeal was scheduled for May 30, 1978. A Department representative appeared but the claimant did not appear. Since the claimant was the appellant in the matter, his appeal was dismissed by written decision issued on June 2, 1978. The claimant had already written a letter to the Office of Appeals, under date of May 31, 1978 explaining his failure to appear.

A new hearing was scheduled for July 18, 1978 at which, in addition to the original issues, the issue of the claimant's reason for nonappearance on May 30, 1978 was to be considered. The claimant and a Department representative appeared and testified.

With respect to the reason for not appearing for the hearing on May 30, 1978, the claimant explained that he had informed the Office of Appeals that he would be away on an extended business trip prior to the receipt of the hearing notice. He had not received the notice before he went abroad.

His trip took him to Italy, Holland, and Malta. He arrived back home the day after the hearing had been scheduled to take place. Upon finding such notice, he immediately telephoned the Office of Appeals and wrote the letter referred to above. He further testified that there was no one at his residence during his absence who could have taken any action with respect to the hearing notice.

The hearing transcript discloses that the administrative law judge, by oral decision during the hearing, found good cause under Title 22, section 5045(d), of the California Administrative Code for the claimant's nonappearance and heard the case on the merits. We agree, and hereby vacate the dismissal and consider the appeal upon the merits. We now turn to the essential facts of the case.

The claimant is a man 30 years of age who is a professional tennis player and instructor. He was employed for several months as an instructor by The Racquet Club of Irvine, in Irvine, California. He voluntarily left that employment in July 1977 to become a self-employed professional tennis player.

The claimant filed his claim for disability insurance benefits on or about December 11, 1977. The doctor's certificate attached thereto indicates that the claimant had surgery for repair of a right inguinal hernia and was hospitalized from November 14 to November 17, 1977. The indicated prognosis was that the claimant would be disabled until February 2, 1978. The existence of a bona fide medical problem and the necessity for such treatment are not disputed. It is the employment status of the claimant that has given rise to the legal issues involved.

The printed Department claim form which the claimant submitted and signed has various questions seeking pertinent information, some of which are answered by writing appropriate data in spaces provided. Other questions are answered by merely checking either a box marked "YES" or one marked "NO."

The claimant stated thereon that the last date he "worked before this disability" was November 3, 1977 and the first day he "was too sick to work" was the following day, November 4.

In response to the question reading "Were you an employer or self-employed individual?" he checked the box marked "YES." He wrote the name of the Racquet Club as the "employer," together with its address. However, in the margin adjacent to this last data he also added, in block letters, "FORMER."

The claim was processed in the usual manner by the Department, and the claimant was paid benefits at the rate of \$119 per week from November 16, 1977 through December 10, 1977 (a total of \$425). Payments were halted, and the claimant was declared ineligible for benefits by the Department, when it received back from The Racquet Club of Irvine a form it had sent on which the former employer stated the claimant had last worked there in "July 1977."

The Department's contention in this case is that the claimant was not eligible for disability insurance benefits because he had withdrawn from the labor market prior to the date he became disabled in order to enter self-employment. It therefore asserts that he did not sustain any loss of wages from an employment relationship when he became disabled.

According to the Department witness, the Department may have been remiss in failing to recognize from the claim documents submitted that the claimant was a self-employed person. However, the Department witness also asserted that the claimant was at fault in not clearly delineating his employment status when filing his claim.

The claimant did not maintain disability insurance coverage as a self-employed individual.

The claimant testified that he answered the questions on the claim form as best he could without any intention to mislead the Department.

The claimant does not believe that it would be fair, in view of the overall circumstances involved, to compel him to repay the \$425 if it is found that he was not legally entitled to such benefits. However, he concedes that he is financially able to repay, since his earnings as a professional tennis player are substantial.

REASONS FOR DECISION

Section 2625 of the Unemployment Insurance Code states:

"Unemployment compensation disability benefits are payable from the Disability Fund to individuals who are eligible to receive such benefit payments under this part."

Section 140.5 of the Unemployment Insurance Code states:

" 'Unemployment compensation disability benefits' or 'disability benefits' refers to money payments payable under Part 2 of this division to an eligible unemployed individual with respect to his wage losses due to unemployment as a result of illness or other disability resulting in such individual being unavailable or unable to work due to such illness or disability."

Title 22, section 2601-1(q), of the California Administrative Code states:

"For the purposes of Section 140.5 of the code no individual shall be deemed eligible for disability benefits for any week of unemployment unless such unemployment is due to a disability. If an individual has been neither employed nor registered for work at a public employment office or other place approved by the Director for more than three months immediately preceding the beginning of a period of disability, he or she is not eligible for benefits unless the department finds that the unemployment for which he or she claims benefits is due to a disability and is not due to his or her previous withdrawal from the labor market."

Leaving employment in order to enter a self-employment venture normally constitutes effective withdrawal from the active labor market. In this case there is no dispute that the claimant voluntarily terminated his last employment in July 1977. He did so in order to become self-employed as a professional tennis player, not because of any disability. His disability occurred the following November. Thus the clear weight of evidence is that the claimant completely withdrew from the labor market to begin self-employment some four months before he became disabled.

Any loss of income occasioned by his inability to participate in professional tennis matches must be characterized as a loss of profits, rather than that of wages, In this posture it is apparent that no benefits were payable as the claimant did not suffer a loss of wages occasioned by his disability.

It necessarily follows that the \$425 in benefits which he received should not have been paid, and constituted an overpayment. The remaining question is whether the claimant is liable for the repayment of such overpayment. The answer turns on whether the claimant's actions reach the magnitude of misrepresentation or fault, and if not, whether equity and good conscience require recoupment within the meaning of section 2735 of the Unemployment Insurance Code. That section provides:

"Any person who is overpaid any amount as benefits under this part is liable for the amount overpaid unless:

"(a) The overpayment was not due to fraud, misrepresentation or wilful nondisclosure on the part of the recipient, and

"(b) The overpayment was received without fault on the part of the recipient, and its recovery would be against equity and good conscience."

In Appeals Board Decision No. P-B-377 this Board considered the case of a claimant who was overpaid unemployment insurance benefits solely because of Department error and without any fraud or fault on his part. The only question involved was whether requiring the claimant to repay would be "against equity and good conscience." It was found that the claimant could repay without any undue hardship and, that under such circumstances and in accordance with the general philosophy of pertinent court decisions, repayment ought not to be waived.

In the instant case, we find that there was no fraud or wilful misrepresentation on the part of the claimant, for he did in fact state he was self-employed. Additionally, though his manner of responding to the relevant questions led the Department to believe he was still working for the former employer when disabled, it is apparent that the claimant was answering the questions in a straightforward manner, and to the best of his ability. In these circumstances we find no fault (Appeals Board Decisions Nos. P-B-392 and P-B-396).

In Gilles v. Department of Human Resources Development, 11 Cal. 3d 313, 113 Cal. Rptr. 374, the California Supreme Court held that a decision on whether the recovery of an overpayment is against equity and good conscience must be based not merely on the prior notice by the Department to the claimant that he may be required to repay the benefits, but consideration must also be given to the cause of the overpayment, whether the claimant received only normal unemployment benefits or some extra duplicative benefits, whether the claimant changed his position in reliance upon the receipt of the benefits, and whether the recovery of the overpayment by imposing extraordinary hardship on the claimant would tend to defeat the objectives of the unemployment insurance code.

There being no fraud, wilful misrepresentation, or fault attributable to the claimant, we must now consider whether it would be against equity and good conscience to require recoupment of the overpayment. Applying the criteria enunciated in Gilles and the previously cited precedent decisions of this Board, it is clear that the recovery of the overpayment would not impose extraordinary hardship on the claimant and would not tend to defeat the objectives of the Unemployment Insurance Code. The claimant would incur no financial hardship in repaying the benefits to which he was never entitled. We conclude that repayment is not waived.

DECISION

The determination and notice of overpayment are affirmed. Benefits are denied. The claimant is liable for the overpayment of \$425.

Sacramento, California, February 20, 1979.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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