

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

RIVA PARTNERS  
Employer

Precedent Benefit  
Decision No. P-R-512

EMPLOYMENT DEVELOPMENT DEPARTMENT  
Appellant

(THOMAS W JOHNSON, Claimant)

DECISION

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

ROBERT DRESSER

ELLEN CORBETT

MICHAEL ALLEN

Pursuant to section 409 of the California Unemployment Insurance Code, AO-388135 (R) is hereby designated as Precedent Decision No. P-R-512.

Adopted as Precedent: October 25, 2016

**Case No.: AO-388135**  
**Petitioner: RIVA PARTNERS**  
**Claimant: THOMAS W JOHNSON**

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The Employment Department (EDD) appealed from the decision of the administrative law judge that held the employer's reserve account was relieved of benefit charges under Unemployment Insurance Code section 1032.5<sup>1</sup>

### ISSUE STATEMENT

For an employer's reserve account to be relieved of charges pursuant to section 1032.5, the claimant must be continuously rendering services, in less than full-time work, commencing in or prior to the beginning of the base period, and continuing through the filing for benefits.

The issues raised in this case are:

- 1) Was the claimant continuously rendering services in less than full-time work given that he had a period of seventeen consecutive days of no work in his base period?
- 2) Was the claimant rendering services in less than full-time work notwithstanding the fact he had excessive earnings during the benefit year?
- 3) Does the fact that the claimant had excessive earnings during any week of the benefit year defeat the employer's entitlement to relief of its reserve account from benefit charges during the remaining weeks of the benefit year?

### FINDINGS OF FACT

Since 2011, the claimant has worked for this employer as a waiter, most recently earning \$9 an hour plus tips. He filed a claim for unemployment insurance benefits with a benefit year beginning October 18, 2015. The base period for his claim was the four quarters beginning July 1, 2014 and ending June 30, 2015, with a weekly benefit amount of \$450.

For the week ending November 7, 2015, after filing his claim for benefits, the claimant worked 23.85 hours and had \$214 in hourly wages and \$551 in tips, for

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<sup>1</sup> Unless otherwise specified, all code references are to the California Unemployment Insurance Code.

total earnings of \$765. For the week ending November 14, 2015, the claimant worked 19.6 hours and had \$176 in hourly wages and tips of \$454, for total earnings of \$630.

On November 19, 2015, the EDD sent the employer, who was a base period employer, a form entitled Request for Information on Part-Time Employment Status. The EDD asked the employer to provide information as to whether there were periods of time during which the claimant had not worked, excluding absences for vacations and illness, and whether he had worked 40 or more hours or had earned more than \$600 in wages in any weeks since the beginning of his base period on July 1, 2014. The inquiry by the EDD as to whether the claimant had more than \$600 in weekly wages was based on the fact that \$600 is the maximum amount of weekly wages the claimant can earn before he is considered not to be unemployed under section 1252.

The employer responded in writing that the claimant had not worked from December 1, 2014 through December 18, 2014. The employer also indicated that the claimant had not worked 40 hours or more in any week.<sup>2</sup> During the weeks he did work, the claimant generally earned more than \$600 in wages and tips. There were seven weeks during the same period that he earned less than \$600.

On December 21, 2015, the EDD mailed the employer a ruling that stated in pertinent part:

We have considered all the available facts and concluded that your reserve account will be subject to charges. Even though the claimant is still employed by you less than full-time, a favorable ruling cannot be issued. The claimant either was not employed substantially in the same employment or had excessive earnings during his/her period of employment or the employment did not begin in, or prior to, the base period of the claim.

The employer appealed the ruling and a hearing was held on March 16, 2016. The administrative law judge reversed the ruling, finding that:

...the claimant was continuously rendering services. The claimant was rendered (sic) and was continuously rendering services in less than full-time work to the employer prior to and within the base period of the claim.

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<sup>2</sup> The employer typically employs some servers to work 40 hours a week during the summer months of July, August and September, but the claimant did not work such full-time hours during the summer months in his base period.

## REASONS FOR DECISION

Unemployment Insurance Code Section 1032.5 provides that EDD will relieve a base employer's reserve account of benefit charges for those weeks the claimant is unemployed under section 1252<sup>3</sup>, so long as the employer can show that the claimant is working for the employer on less than full-time basis and has been doing so commencing in or prior to the beginning of the base period of the claim through the date the claimant filed for benefits.

Unemployment Insurance Code Section 1032.5 states in relevant part:

“(a) Any base period employer may, within 15 days after mailing of a notice of computation under subdivision (a) of Section 1329, submit to the department facts within its possession disclosing that the individual claiming benefits is rendering services for that employer in less than full-time work and that the individual has continuously, commencing in or prior to the beginning of the base period, rendered services for that employer in such less than full-time work.”

(b) The department shall consider facts submitted under subdivision (a) of this section together with any information in its possession and promptly notify the employer of its ruling. If the department finds that an individual is, under Section 1252<sup>2</sup> unemployed in any week on the basis of his or her having less than full-time work, and that the employer submitting facts under this section is a base period employer for whom the individual has continuously, commencing in or prior to the beginning of the base period, rendered services in such less than full-time work, that employer's account shall not be charged... for benefits paid the individual in any week in which such wages are payable by that employer to the individual...”

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<sup>3</sup> Section 1252 states in relevant part:

“(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, if the wages payable to him or her with respect to the week, when reduced by twenty-five dollars (\$25) or 25 percent of the wages payable, whichever is greater, do not equal or exceed his or her weekly benefit amount.....”

The EDD's position is once the less than full-time work begins before or in the base period, if there are excessive earnings in any week through to the claim period, no favorable ruling will issue. In this case, EDD contends that the employer is not entitled to relief under section 1032.5 because claimant had excessive earnings (based on wages plus tips) under section 1252 for the first two weeks in November, during the benefit year. EDD contends that because the claimant had excessive earnings, he was no longer continuously rendering services to the employer in less than full time work. In fact, EDD argues that so long as the claimant is not "continuously unemployed," the employer is not entitled to relief. We disagree.

I. The claimant worked for the employer *continuously*, commencing in or prior to the base period through the filing of the claim

In the instant case, except for a period of seventeen days in December 2014, the claimant continuously worked for the employer on a less than full time basis during his base period through to the time of claiming benefits. In reaching its decision in Precedent Ruling P-R-122, the Board cited several authorities construing the meaning of "continuously," including *Jacobson v Mutual Benefit Health & Accident Association*, 296 N.W. 545, 70 N.D. 566, in which the court stated:

"...The word 'continuously' means regularly, protracted, enduring and without any substantial interruption of sequence, as contradistinguished from irregularly, spasmodically, intermittently, or occasionally, and does not necessarily mean constantly."

The Board in Precedent Ruling P-R-122 also cited *Lynch v U.S*, D.C.N.Y., 55 F.Supp. 538, 542 for the proposition that "'continuously' imports reasonable regularity under normal conditions..."

In Precedent Ruling P-R-122, the claimant worked less than 40 hours some weeks, and had two periods of non-work, one lasting six weeks and another two weeks. The Board found that the claimant in that case was working on an intermittent basis and concluded he did not meet the requirement of working continuously.

Unlike the claimant in Precedent Decision P-R-122, the claimant in the instant case did not work on a part-time intermittent basis, but was working continuously for the employer throughout the base period and through to the time of claiming benefits. The record does not reflect the reason for the claimant not working during the seventeen day period in December 2014, except that it was not for vacation or illness.

Whatever the reason for the claimant's seventeen day hiatus, it should be noted that it is not uncommon for any worker to have short breaks for vacation, illness or other personal reasons during the course of regular and continuous work for an employer. It is also not uncommon for an employer to have a short period of no work for its employees for various business reasons. Such isolated short breaks, do not, by themselves, render the worker's otherwise continuous work intermittent.

Thus, we find the seventeen consecutive days the claimant did not work in December was an isolated, non-work period rather than part of an intermittent pattern of work, and did not significantly interrupt the continuous nature of the claimant's work for the employer. Accordingly, we conclude this claimant worked continuously for the employer during the base period and through his filing of the claim for benefits.

II. The claimant worked for this employer on a "less than full-time work" basis prior to or commencing in the base period and through the filing of the claim.

The meaning of the terms "full-time work" or "less than full time work," for purposes of implementing 1032.5, is nowhere to be found in the Unemployment Insurance Code, the implementing regulations, this Board's precedent decisions or case law.

In another context, however, Labor Code section 515, defines "full-time employment" as "employment in which an employee is employed for 40 hours a week." This definition is used by the Industrial Welfare Commission to establish exemptions from law requiring overtime for work in excess of 40 hours in any one week. [(Labor Code sections 510, 515(c)].

Webster's Third New International Dictionary definition of 'full-time' as: 'Employed for or working the amount of time considered customary or standard.'

The EDD, in its internal guidelines, has further defined "full-time" as follows:

Full-time work in a week consists of the number of hours considered to be the standard or customary workweek for an occupation in a geographic or labor market area...."<sup>4</sup>

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<sup>4</sup> EDD Unemployment Insurance Benefit Determination Guide, Total and Partial Unemployment 5 (TPU5), B. Services Performed, 2. Full Time Work.

[http://www.edd.ca.gov/UIBDG/Total\\_and\\_Partial\\_Unemployment\\_TPU\\_5.htm#ServicesPerformed](http://www.edd.ca.gov/UIBDG/Total_and_Partial_Unemployment_TPU_5.htm#ServicesPerformed)

The EDD does not dispute the employer's contention that claimant was working in less than full time hours during the base period and through the filing of the claim; instead, the EDD points out that, while working less than full-time hours, the claimant nevertheless earned more than \$600 in wages for the two weeks ending November 14, 2015. Given that under code section 1252 the claimant would not be considered unemployed since he earned wages that, when reduced by 25 percent, exceeded his weekly benefit amount of \$450, EDD contends that based on the wages earned, the employer does not meet the criteria of showing the claimant was working less than full time. Both the language and history of the statute, however, illustrate that whether a claimant has worked "less than full time" for an employer is based solely on the hours worked and not on the wages earned.

First, section 1032.5(b) provides that if the department finds, during the benefit year, that the employer has met the criteria of subdivision (a) and the claimant is unemployed in any week, the employer's reserve account shall not be charged for any weeks in which the employer paid wages to the claimant. The reference to section 1252 in subdivision (b) is relevant only for purposes of determining the weeks during the benefit year that the claimant is unemployed; section 1252 is not mentioned in section 1032.5(a) for determining what is less than full-time work.

Second, the legislative history of the statute supports a finding that the focus is on hours and not wages for purposes of determining whether an employer meets its burden under section 1032.5(a) to show that the claimant continuously worked on a less than full time basis.

When 1032.5 was enacted in 1963, it read, in pertinent part:

"(a) Any base period employer may, within 15 days after mailing of a notice of computation under subdivision (a) of Section 1329, submit to the department facts within its possession disclosing that the individual claiming benefits is rendering services for that employer in less than full-time work *and is receiving wages less than his weekly benefit amount* and that the individual has continuously, commencing in or prior to the beginning of the base period, rendered services for that employer in such less than full-time work." (*Emphasis added*)

(b) The department shall consider facts submitted under subdivision (a) of this section together with any information in its possession and promptly notify

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This Board takes official notice of EDD's procedures pursuant to Title 22, California Code of Regs., section 5009(a).

the employer of its ruling. If the department finds that an individual is, under Section 1252, unemployed in any week on the basis of his or her having less than full-time work, and receiving wages less than his weekly benefit amount, and that the employer submitting facts under this section is a base period employer for whom the individual has continuously, commencing in or prior to the beginning of the base period, rendered services in such less than full-time work, that employer's account shall not be charged... for benefits paid the individual in any week in which such wages are payable by that employer to the individual..." (*Emphasis added*)

Notably, Precedent Ruling P-R-122 was issued in 1972, while the above statutory language was in effect. Thus, in determining whether the claimant was continuously working in less than full-time work, the Board relied solely on the number of hours the claimant worked. While there is *dicta* in P-R-122 that relief under 1032.5 is dependent on ..."an individual continuously rendering services ...in less than full time work, and for wages less than the weekly benefit amount," (*emphasis added*) that criteria no longer exists in the current version of the statute.

In 1979, the statute was amended to remove the references to "receiving wages less than the benefit amount" from both subdivisions (a) and (b) of the statute.

Neither does California Code of Regulations, title 22, section 1032.5-1, which defines the criteria for finding an employer entitled to the relief provided by that section, make any mention of wages. The regulation was filed on November 30, 1979 and was effective on January 1, 1980, just after the statute had been amended to remove the reference to the amount of wages earned.<sup>5</sup>

Thus, the inquiry for purposes of applying 1032.5 must be not on whether the claimant has wages in excess of the weekly benefit amount, but on whether the claimant is working less than the amount of time considered customary or standard for the claimant's occupation.

Given EDD's references in its Request for Information on Part-time Employment Status as to whether the claimant had worked 40 hours or more in any week, and the fact that the employer did not put forth any other standard for what constitutes full-time in their industry, we will use 40 hours per week as the

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<sup>5</sup> Section 1032.5-1 states that every request for a ruling under section 1032.5 must contain:

(4) Facts disclosing that the claimant is rendering services for the employer in less than full-time work, and that he or she has continuously, commencing in or prior to the beginning of the base period, rendered services for the employer in such less than full time work. (*emphasis added*)



standard for full-time work for purposes of our analysis here.

In this case, the employer answered EDD's question of whether the claimant worked 40 hours or more in any week and did not indicate in any way that a different number of hours was customary in the restaurant business or in that locale. The employer indicated that the claimant worked less than 40 hours a week during his base period through to the time of claiming benefits, even during the busy summer season when his co-workers worked 40 hours a week. The fact that the claimant had excessive earnings because of the amount of tips that he earned, something outside the control of the employer, does not negate the finding that he was working less than full time. Therefore, we find that the claimant worked for the employer continuously, on a less than full time basis.

III. The fact that a claimant, working continuously on a less than full-time basis, may have had excessive earnings in any particular week during the benefit year, does not negate the employer's entitlement to relief on a going forward basis during the benefit year.

The reference to section 1252 in section 1032.5(b) indicates the Legislature's intent to relieve the employer's reserve account of charges for any week the claimant is unemployed and eligible to receive benefits. During any week of excessive earnings, such that the claimant is not unemployed under code section 1252, the claimant will not receive benefits for the week and, for that reason, the employer's account will not be subject to charges based on that week. The net result is that the employer's reserve account is relieved of charges as long as the claimant is continuously working in less than full-time work as specified in the statute.

In this case, the claimant worked continuously on a less than full time basis for this employer during the base period and through to the time he filed for benefits. During the benefit year, the employer was entitled to have its reserve account relieved of charges for any weeks in which the claimant was unemployed under section 1252 and benefits were payable, as long as the employer continues to satisfy the requirements of section 1032.5 subdivision (a).

The EDD contends, in its written argument, that "If [the claimant] was not [sic] considered 'continuously unemployed' during the term of his work with his employer, his employer's reserve account must be subject to charges."

Nowhere in section 1032.5 do we find a reference to a requirement that the claimant be "continuously unemployed" Not even in section 1032.5, subdivision (b) is there an implication that if the claimant has excessive earnings at any time during the benefit year the employer automatically loses its 1032.5(b) relief

because the claimant is no longer “continuously unemployed.”

### DECISION

The decision of the administrative law judge is affirmed. The employer's account is not subject to benefit charges under code section 1032.5 in accordance with this decision.