

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

LIGHT HOUSE AND MODERN ERA
LAMPS OF CALIFORNIA
(Petitioner)

PRECEDENT
TAX DECISION
No. P-T-331
Case No. T-74-55

DEPARTMENT OF BENEFIT PAYMENTS

Referee's Decision No. LA-T-6519

The petitioner appealed from that part of the referee's decision which denied the petition for reassessment with respect to Lukashevsky and Goldsby. The referee's decision also held that the petition for reassessment is granted in the amount of \$40.77 for the taxes paid on earnings of Vera D. Merkel. The Department did not appeal from that part of the decision with respect to Merkel.

As of November 19, 1973 the petitioner paid the assessment in the amount of \$798.49. Accordingly, under section 1179.5 of the Unemployment Insurance Code, such payment constituted the filing of a claim for refund deemed denied by the director, and the petition for reassessment automatically becomes a petition to review a denial of the claim for refund.

STATEMENT OF FACTS

Lukashevsky and Goldsby were engaged in 1958 or thereabout as commission salesman to sell the petitioner's line of lamps to retail furniture and lamp dealers. They represented only this one line and no others, except as hereinafter set forth.

Goldsby was assigned a territory of Fresno south to the middle of Los Angeles. Lukashevsky was assigned a territory from the middle of Los Angeles south to, but not including, San Diego County. In 1963 the company's representative in San Diego resigned. Lukashevsky and Goldsby with the approval of the petitioner agreed that both men would work in the San Diego area and split the commissions on any orders from that area. This arrangement continued until April 1969.

In March 1969 the two men approached the management and stated that it was impractical for them both to continue to represent the company in San Diego. They had decided that Lukashevsky would handle San Diego exclusively. To compensate Goldsby for the loss of commissions arising out of this change, Lukashevsky agreed to transfer certain of his accounts in territories contiguous to Goldsby's territory to Goldsby. This arrangement continued to the end of 1969.

In late 1969, Goldsby indicated to the company's president that he had been contacted about taking a new position. The president contacted Lukashevsky and told him that should Goldsby resign, territorial adjustments would have to be made. At that time Goldsby decided to remain with the petitioner, but he and Lukashevsky then entered into an agreement to split all commissions earned, and that each could service certain accounts in the territory which had formerly been exclusive to one or the other. Each continued to pay for his own expenses.

In January 1973, Lukashevsky and Goldsby had decided to leave the petitioner and handle a line representing Z & H Furniture Manufacturing Company. For the month of January 1973, Lukashevsky and Goldsby represented both the petitioner and Z & H, until approximately January 25, 1973, when they terminated with the petitioner. In January 1973, Lukashevsky and Goldsby allotted about equal time to both lines. Their earnings, however, were only \$58 from Z & H and about \$1,500 from the petitioner. The Z & H earnings were from credit for telephone orders received in December 1972, and the earnings from petitioner were for orders placed in 1972 which had been shipped. Commissions were also received from petitioner for the first six months of 1973 as orders previously placed were shipped.

The petitioner contends that Lukashevsky and Goldsby were a partnership by reason of the agreement they had entered into as previously described, and therefore were not employees under section 621(c)(1)(B).

REASONS FOR DECISION

Effective with the commencement of the calendar year 1972, the California Legislature added section 621 to the Unemployment Insurance Code. This section now provides a statutory definition of the term "employee" for unemployment insurance purposes, for the first time. As pertinent to the status of Lukashevsky and Goldsby the new section states that:

" 'Employee' means . . . :

* * *

"(b) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

"(c) (1) Any individual, . . . who performs services for remuneration for any employing unit if the contract of service contemplates that substantially all of such services are to be performed personally by such individual. . . :

* * *

"(B) As a traveling or city salesman . . . engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

"(2) An individual shall not be included in the term 'employee' under the provisions of this subdivision if such individual has a substantial investment in facilities used in connection with the performance of such services, other than in facilities for transportation, or if the services are in the nature of

a single transaction not part of a continuing relationship with the employing unit for whom the services are performed."

It is to be noted that paragraph (b) above continues to include as an "employee" for unemployment insurance purposes any person who is an employee under the usual rules of common law. However, it then goes on in paragraph (c) to extend the meaning of the term "employee" for unemployment insurance purposes to certain additional persons who are admittedly independent contractors under common-law principles. The question presented is whether Lukashevsky and Goldsby are properly includable in the group of salesmen to whom code section 621(c) now extends unemployment insurance coverage.

It is quite clear that in enacting code section 621, the California Legislature had certain provisions of the Federal Internal Revenue Code particularly in mind. The year before Congress had enacted Public Law 91-373 which is known as the Employment Security Amendments of 1970. That law broadens the Federal Unemployment Tax Act (FUTA) definition of an "employee" (26 U.S. Code section 3306(i)) so as to extend federal unemployment tax coverage to exactly the same individuals to whom the California Legislature extended coverage under code section 621.

In the case of the FUTA, Congress accomplished this extension of coverage by incorporating most of the Federal Insurance Contribution Act (FICA) definition of an "employee" (26 U.S. Code 3121(d)). In the case of the Unemployment Insurance Code, the California Legislature copied the provisions of the FICA definition verbatim into section 621. In either case the link between all of these laws is quite apparent and the legislative and administrative history of the two federal laws is most important to a proper understanding and interpretation of Unemployment Insurance Code section 621. (See Appeals Board Decision No. P-T-329 wherein we set forth that history at considerable length and upon which we rely.)

The Director adopted sections 621(b)-1 and 621(c)-1, Title 22, California Administrative Code, to implement section 621 of the Unemployment Insurance Code. It should be noted that these provisions are virtually verbatim with certain portions of Title 26, Code of Federal Regulations, section 31.3121(d)-1. This again emphasizes the link between the two federal laws and section 621 of the Unemployment Insurance Code.

In this case the petitioner had considered Lukashevsky and Goldsby as independent contractors, and no unemployment taxes had been due on their earnings. Effective with the enactment of section 621 of the Unemployment Insurance Code, the Department determined that they were employees under the statutory definition as enacted. There appears to be no controversy that Lukashevsky and Goldsby solicited orders on behalf of the petitioner as traveling or city salesmen as defined in the code. However, the petitioner now contends that Lukashevsky and Goldsby were partners, and hence not within the code provisions.

It appears to us that the petitioner is attempting to establish that Lukashevsky and Goldsby are independent contractors under the common law. However, the independent contractor salesman under the common law is the very person who is intended to be covered for unemployment insurance purposes under code section 621. Consequently, a determination as to whether Lukashevsky and Goldsby were partners is unnecessary to the resolution of the matter now before us. We hold that Lukashevsky and Goldsby are employees by definition under section 621(c)(1)(B) of the code.

We note, however, that during the month of January 1973 Lukashevsky and Goldsby were soliciting orders for the petitioner and Z & H Furniture Manufacturing Company. They were giving equal time to each company. Their earnings were approximately \$1,500 for the month from the petitioner, based on orders obtained and shipments made in 1972. Earnings of only approximately \$58 for January were received from telephone orders placed with Z & H Furniture Company in December 1972.

Section 621(c)-1(b)(2), Title 22, California Administrative Code, provides:

"(2) Traveling or city salesman. (A) This occupational group includes a city or traveling salesman who is engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for sideline sales activities on behalf of some other person or persons) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

An agent-driver or commission-driver is not within this occupational group. City or traveling salesmen who sell to retailers or to the others specified, operate off the premises of their principals, and are generally compensated on a commission basis, are within this occupational group. Such salesmen are generally not controlled as to the details of their services or the means by which they cover their territories, but in the ordinary case they are expected to call on regular customers with a fair degree of regularity.

"(B) In order for a city or traveling salesman to be included within this occupational group, his entire or principal business activity must be devoted to the solicitation of orders for one principal. Thus, the multiple-line salesman generally is not within this occupational group. However, if the salesman solicits orders primarily for one principal, he is not excluded from this occupational group solely because of sideline sales activities on behalf of one or more other persons. In such a case, the salesman is within this occupational group only with respect to the services performed for the person for whom he primarily solicits orders and not with respect to the services performed for such other persons. The following examples illustrate the application of the foregoing provisions:

* * *

"Example 2. Salesman B's principal business activity is the solicitation of orders from retail hardware stores on behalf of the R Tool Company and the S Cooking Utensil Company. B regularly solicits orders on behalf of both companies. B is not within this occupational group with respect to the services performed for either the R Company or the S Company."

Revenue Ruling 55-31, 1955-1 Cum. Bul. 476, on status of traveling or city salesmen for federal employment tax purposes states in part:

"(a) Full-time basis - A traveling or city salesman whose entire or principal business activity is the solicitation of orders primarily for one principal from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations. Generally, a traveling or

city salesman will be presumed to meet the 'principal business activity' test in any calendar quarter in which he devotes 80 percent or more of his working time and attention to the solicitation of orders for one principal from wholesalers and/or the other customers specified for merchandise for resale or supplies of the requisite character."

Lukashevsky and Goldsby were in the process of phasing out their work for the petitioner at the same time that they started to represent Z & H Furniture Manufacturing Company. In devoting equal time to two principals, both men became multiple-line salesmen, and thus beginning January 1, 1973, were no longer salesmen within the statutory definition.

DECISION

The decision of the referee is modified. The petition for review of the denial of the claim for refund with respect to Lukashevsky and Goldsby is denied for the period January 1, 1972 to December 31, 1972 and is granted for the period beginning January 1, 1973. The claim for refund with respect to Vera D. Merkel is granted.

Sacramento, California, October 19, 1976

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