



STATE OF MARYLAND
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Governor

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Secretary

DEPARTMENT OF HUMAN RESOURCES

EMPLOYMENT SECURITY ADMINISTRATION
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BOARD OF APPEALS
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—DECISION—

	DECISION NO.:	550-BH-83
	DATE:	April 20, 1983
CLAIMANT: Donald Witt	APPEAL NO.:	12865
	S.S.NO.:	220-32-2650
—		
EMPLOYER:	LO. NO.:	3
	APPELLANT:	REMAND FROM COURT CLAIMANT APPEAL

ISSUE Whether the Claimant was unemployed within the meaning of Section 20(1) of the Law.

NOTICE OF RIGHT OF APPEAL TO COURT

YOU MAY FILE AN APPEAL FROM THIS DIVISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT May 20, 1983

— APPEARANCE —

FOR THE CLAIMANT:

FOR THE EMPLOYER:

Donald Witt - Present
Germane Getty, III - Attorney

EVIDENCE CONSIDERED

It is uncontested in this case that the Claimant received unemployment insurance checks during four periods of time. For the purpose of brevity, the periods will be subdivided into the following categories; period A is the time between January 7, 1978 and March 25, 1978; period B is the time between January 6, 1979 and April 21, 1979; period C is the time between December 1, 1979 and April 14, 1980; period D is the time between November 22, 1980 and December 6, 1980.

In 1973, the Claimant started a tire business known as Donnie Witt and Sons. There is no evidence that this firm is a corporation. At the time the business was started, the Claimant's two sons were 13 and 9 years old.

During period A, the Claimant's two sons were approximately 14 and 18 years old. The evidence shows that, during period A, the business had gross sales of \$12,315.33. During the entire calendar year of 1978, the business had \$113,139.53 in gross sales.

Period B constitutes approximately the first four months of 1979. During this period, the Claimant signed at least 89 checks, many of them obviously for the purposes of the business. During this period, the business grossed \$30,304.55.

Although the agency repeatedly requested that the Claimant produce various business and tax documents, the Claimant never produced any income tax returns, or any business records from 1980.

In making its findings of fact in this case, the Board will make what it considers reasonable inferences from the evidence in the case. The Board considers the evidence in the record sufficient to make adequate findings, at least concerning periods A and B, although a better practice by far would have been for the agency to subpoena before the Referee or the Board the income tax returns and business records which it was obviously interested in obtaining at the outset of the investigation.

The Board cannot believe the Claimant's testimony that the business is his sons' and that he performs no services in the business. At the ages of 13 and 9, his sons were quite young to be starting a tire business. The 1979 checks showed clearly that the Claimant was performing substantial services for the business during that period of time. Since it is obvious that the Claimant was running the business in 1973, since it was proven that he was performing services for the business in 1979, and since the structure and history of the business make it extremely unlikely that the Claimant has absented himself from performing services for the business for any significant period of time, the Board will find that the Claimant did perform such services during the periods in question.

Regarding remuneration for the services performed, the Board concludes that it is reasonable to infer that the Claimant earned at least \$89.00 for each of the weeks in question during period A. During the period in question, the business grossed \$12,315.33. Without any records to show what happened to these funds, without any payroll records, business records, or records that corporation existed, the evidence simply shows that the Claimant's business received \$12,315.33. In this situation, it is reasonable to place the burden on the Claimant of showing that none of these receipts have gone to reimburse himself for his personal services performed on behalf of the business. The Claimant has failed to meet this burden, and the Board will find such remuneration.

Using the same method, the Board finds it reasonable to infer that the Claimant earned an amount over his weekly benefit amount \$106.00 in period B (\$30,304.55 in gross sales).

Regarding periods C and D, there is insufficient evidence in the file to make a determination, since the Referee excluded agency exhibit number 7 from the record.

FINDINGS OF FACT

The Claimant filed claims for benefits and received unemployment compensation checks during periods A, B, C, and D, listed above.

The Claimant performed services for Donnie Witt and Sons during the periods that he was applying for unemployment insurance benefits in periods A, B, C, and D.

The Claimant received remuneration for the services in an amount greater than his weekly benefit amount during the entirety of periods A and B.

CONCLUSIONS OF LAW

The Claimant, since he was performing services for which remuneration was received, was not unemployed within the meaning §20(1) of the Maryland Unemployment Insurance Law for periods A and B, that is, for the time between January 7, 1978 and March 25, 1978, and the time between January 6, 1979 and April 21, 1979. He is disqualified from receiving benefits for any weeks during those periods.

Considering the lack of evidence for periods C and D, this case is further remanded to Appeals Referee Whitman to conduct an additional hearing and gather sufficient evidence to determine whether or not the Claimant was performing services for which wages were payable during periods C and D. At the further hearing, the agency, of course, can subpoena any and all material which it may find relevant. Page 7 of the investigator's report, which was specifically excluded from the evidence by the Appeals Referee, may be reintroduced with the proper foundation or may be bolstered by such other evidence as the agency has available in order to establish the facts concerning period C and D.

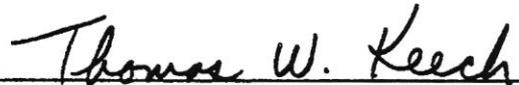
The Board does not construe the Referee's previous decision as barring all benefits to the Claimant indefinitely. On any claims presently filed, the Claimant has a right to a written determination from the agency. Following a receipt of such a determination, the Claimant has a right to file a further written appeal.

DECISION

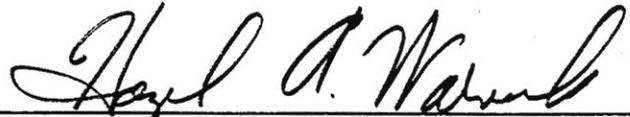
The Claimant was not unemployed within the meaning of §20(1) of the Maryland Unemployment Insurance Law for the periods between January 7, 1978 and March 25, 1978 and between January 6, 1979 and April 21, 1979. He is disqualified from receiving benefits for those periods of time.

Whether or not the Claimant was unemployed within the meaning of §20(1) of the Law for the periods between December 1, 1979 and April 19, 1980 and between November 22, 1980 and December 6, 1980 will be determined after a further hearing conducted by an Appeals Referee on remand.

Neither this decision of the Board nor the previous decision of the Appeals Referee in this case shall be interpreted to permanently bar the Claimant from receipt of unemployment insurance benefits. If the Claimant filed any claims for benefits after December 6, 1980, he is entitled to a written determination from the local office ruling on whether or not he was entitled to those benefits.



Chairman



Associate Member



Associate Member

K:W:D
gm

COPIES MAILED TO:

CLAIMANT

EMPLOYER

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CLAIMS INVESTIGATION - HAGERSTOWN

CLAIMS INVESTIGATION - BALTIMORE

UNEMPLOYMENT INSURANCE - CUMBERLAND



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 Associate Members

SEVERN E. LANIER
 Appeals Counsel

GARY SMITH
 Chief Hearings Officer

- DECISION -

CLAIMANT: Donald Witt

DATE: 3/20/81
 APPEAL NO.: 12865
 S. S. NO.: 220-32-2650

EMPLOYER:

L. O. NO.: 3

APPELLANT: Claimant

ISSUE: Whether the claimant was unemployed within the meaning of Section 20(1) of the Law.

NOTICE OF RIGHT TO PETITION FOR REVIEW

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A REVIEW AND SUCH PETITION FOR REVIEW MAY BE FILED IN ANY EMPLOYMENT SECURITY OFFICE, OR WITH THE APPEALS DIVISION, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A PETITION FOR REVIEW EXPIRES AT MIDNIGHT ON April 6, 1981

- APPEARANCES -

FOR THE CLAIMANT:

Claimant-Present
 Jeffery Witt-Witness
 Gary G. Leasure, Esquire

FOR THE EMPLOYER:

Representing
 the Employment
 Security Admin.
 Herbert W. GestL,
 Unemployment
 Insurance
 Investigator

FINDINGS OF FACT

The claimant received Maryland Unemployment Insurance Benefits for the claim weeks ending January 7, 1978, consecutively through the claim week ending March 25, 1978; for the claim week ending January 6, 1979, consecutively through the claim week.

acknowledge that the business transactions throughout the course of the business and up until the present have been reflected in his joint income tax returns which he has filed with his wife

The claimant's attorney makes the argument that in the practical world the claimant is not self employed and that the business actually belongs to his two sons. The sporadic and periodic activities which the claimant may have engaged in while filing for Unemployment Insurance Benefits in connection with the business do not, in the claimant's view nor the view of his attorney, constitute employment.

COMMENTS

Section 20(1) of the Unemployment Insurance Law is directed to the definitions of the word "unemployed". In defining the term unemployment the Law states: - An individual shall be deemed "unemployed" in any week during which he performs no services and with respect to which no wages are payable to him in any week of less than full-time work..."

In order to become unemployed therefore, the Law is setting forth two simultaneous criteria namely that the claimant should be rendering no service and with respect to which no wages should be payable to him. In this case it is clear that the claimant was not unemployed. He continuously rendered services of various nature to the business involved. He would transport items for the business; instruct his sons in how to conduct the business several hours a week; sign business checks; continue to keep licenses in his name; sign various tax returns and include the business as part of his own taxable income or loss. Clearly the claimant was performing services for the business during each of the claim weeks in question. There were other services which the claimant performed that are not enumerated herein.

The Maryland Code of Regulations governing the Employment Security Administration-Unemployment Insurance Division of the Department of Human Resources state, in defining persons who are eligible for Unemployment Insurance Benefits or who are not eligible addresses itself in Regulation 07.04.02.04 Sub Paragraph E. as follows: - Persons who are self employed or control their services and earnings. A person who is self employed on a full-time basis, or is regularly employed under conditions where his hours of work are uncontrolled by the employer or who is paid on a commission basis may not be eligible for benefits under this Regulation regardless of the amount of earnings or the number of hours worked by this person.

In examining this Regulation it is clear that the claimant was regularly employed under conditions where his hours of work are uncontrolled by the employer. The claimant, by his own testimony would render, at least two to four hours of the week, service to his sons in connection with the business in addition he did other tasks periodically and sporadically, which attach him to the business and which would be services which would be rendered by such a person who would have a interest in the business.

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ending April 21, 1979, for the claim week ending December 1, 1979, consecutively through the claim week ending April 19, 1980; and for the claim week ending November 22, 1980, consecutively through the claim week ending December 6, 1980. The claimant received weekly benefit amounts of Unemployment Insurance Benefits in 1978 in the amount of \$89; in 1979 his weekly benefit amount was \$106 and the same amount during 1980.

The claimant has worked for a number of years in the Construction Business in various jobs including a Construction Foreman.

For the last several years a business was located in the basement of the claimant's home engaged in the retail tire business and entitled "Donnie Witt & Sons". The claimant maintains that the business always belonged to his sons, but the licenses for the business were obtained a number of years ago when his sons were minors by the claimant and the licenses remained in the claimant's name.

The claimant does not dispute and in fact acknowledges receipt of the Unemployment Insurance checks throughout 1978, 1979, and 1980, but he maintains that he was unemployed through out this period of time.

The claimant maintains that he never received any salary or any other benefits from the business known as "Donnie Witt & Sons". He never was issued any merchandise or goods by the business and he never recognized any profit from the business in terms of actual monies coming to him. The claimant never performed the physical work for the business during the time that he received Unemployment Insurance Benefits and he made no sales calls on behalf of the business.

The Claims Investigator examined in a visit to the claimant's attorney's office in 1980, business checks issued on behalf of "Donnie Witt & Sons". He found that from December 30, 1978 until April 23, 1979, the claimant had signed 89 of the checks in question. The claimant does not dispute and in fact acknowledges this. A review of the sales taxes returns for 1978, and 1979, calendar year indicated that the claimant actually signed sales tax returns on behalf of the business for those two years. There is no evidence as to who may have signed the sales tax returns in 1980. The claimant acknowledges that he originated the business in an effort to assist his sons when they were in fact in Junior High School. His sons were in fact 8 and 12 years old at the time. Thereafter when his son Jeffery graduated from High School he became fully employed in the business and from time to time his younger son Dean became employed in the business. The claimant never became an employee and never received any salary from the business.

When the claimant became unemployed from his primary job he would assist three or four hours a week in the business as he puts it, "instruct his boys in how to take care of the business". He was primarily exercising emphasis on the safety factors of changing tires and in taking care of business matters. The claimant acknowledges that through out the years in question he would make deliveries to customers of "Donnie Witt & Sons" while unemployed from his primary job. The claimant acknowledges that he would pick up certain deliveries for the business during this period of time. The claimant likewise

The claimant is not unemployed within the meaning of Section 20(1) of the Law.

DECISION

The claimant was not unemployed within the meaning of Sections 4 and 20(1) of the Maryland Unemployment Insurance Law. He is disqualified from the receipt of Maryland Unemployment Insurance Benefits from January 1, 1978, and until he meets all of the eligibility requirements of the Maryland Unemployment Insurance Law.

The determination of the Claims Investigation Division of the Employment Security Administration is hereby affirmed.



J. Martin Whitman
Appeals Referee

Date of Hearing: 3/13/81
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(6666 A&B-6673A)-Gestl
Copies mailed to:

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Claims Investigation-Hagerstown
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