

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Michael R. Merrill
S. S. No. xxx-xx-5525

M R Merrill Construction Inc.
Vinton, Virginia

Date of Appeal
to Commission: April 18, 2011

Date of Review: May 13, 2011

Place: RICHMOND, Virginia

Decision No.: 98337-C

Date of Mailing: May 20, 2011

Final Date to File Appeal
to Circuit Court: June 19, 2011

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This case came before the Commission on joint appeal by the claimant and employer from a Decision of Appeals Examiner (UI-1106570), mailed April 12, 2011.

ISSUES

Should the Commission grant the parties' joint request to submit additional evidence as provided in Section 60.2-622 of the Code of Virginia (1950), as amended, and 16 VAC 5-80-30(B) of the Virginia Administrative Code?

Was the claimant unemployed during the week or weeks for which he claimed benefits under Section 60.2-612 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant and employer filed a timely, joint appeal from the Appeals Examiner's decision, which affirmed the initial Deputy's determination, and found the claimant ineligible for unemployment compensation benefits during the period from January 30, 2011 through April 9, 2011. The Appeals

Examiner held that the claimant was not meeting the eligibility requirements of the Code during this period, specifically that he was employed and thus not entitled to benefits under Section 60.2-612 of the Code of Virginia.

The claimant's and employer's joint letter of appeal filed with the Commission on April 18, 2011, contains information that is not a part of the record of proceedings, and thus constitutes a request to present additional evidence.

In filing his claim for benefits, for "lack of work," effective September 5, 2010, the claimant listed his employer as M R Merrill Construction Inc. The claimant is also the sole owner of the corporation doing general building construction work or business as M R Merrill Construction Inc. The claimant has been self-employed, operating this construction business, for approximately 15 to 20 years, through the present day. He is also its sole general manager. The corporation has no other employees but the claimant, as it sub-contracts out any personal services or work the claimant cannot perform in his capacity as a general building contractor.

As of the date of the Appeals Examiner's hearing, the employer's corporation or business remains an active business entity with the claimant continuing to perform services on its behalf for wages, meaning all remuneration paid, for personal services.

As the sole owner and general manager of the employer's business, the claimant decides and chooses when and where he wants to work, for example, when to report for work to the employer's office or in the field, or what work contracts or assignments he will solicit, accept or otherwise undertake to perform on behalf of the employer's business. He also makes the business decisions, whenever necessary, about which subcontractors the employer's business will utilize to perform the contracts for work he has accepted and agreed to perform on behalf of his business. As general manager and owner, the claimant is responsible for soliciting work for the employer's business, managing the employer's other subcontractors, i.e., its work crew(s) and ensuring that all of the employer's necessary business operations are carried out.

Up until December 3, 2010, the claimant explained his construction business had work building homes. However, for the two months following December 3, 2010, he had not been getting

any new jobs or earning any wages from the corporation so he filed a claim for benefits. During this period the claimant has still been looking for work as a general contractor, but he has also been making application for regular, fulltime work with other employers.

The claimant explained he works out of his home, so he felt he had no business to actually close down or dissolve. He attributed his downturn in business to the downturn in the economy, particularly the construction industry, during this time period. The claimant also explained that he had paid his unemployment taxes for his years of self-employment and been paid as a regular employee with a W-2 issued by the employer's corporation for many years, during the period he has operated his corporation for his general contracting and construction business. Prior to his business downturn, the claimant earned an average of \$500 per week in paid wages from the corporation. He did not disclose any other remuneration paid or received by virtue of his ownership interests in the employer's corporation.

On his initial claim form, the Commission posed the following question to the claimant:

Do you own or operate your own business, are you an officer of a corporation, are you involved in setting up a business, or do you own or operate a farm?

The claimant answered, "Yes," which triggered a self-employment issue, i.e., the issue of whether he was truly "unemployed" or separated from the liable employer, regarding his claim for benefits.

In the claimant's subsequent answers to voice response questions for the weeks he claimed benefits, the Commission posed the following question to the claimant:

9. Did you do any work including self employment during the week ending [benefit week ending date]? The claimant consistently answered this question as "No."

The employer issued the claimant a regular paycheck for his wages and also issued him a wage and tax statement or "W-2" at the end of the year. His W-2s for the last several years indicate the following wages, tips and other compensation: 2006

(\$41,600); 2007 (\$41,600); 2008 (\$37,700); 2009 ((\$26,400); 2010 (\$26,000). The claimant has not proffered the employer's company's tax filings, or indicated how he took his ownership profits, if any, out of the company, or other "remuneration paid," that he may have received from the company.

The Appeals Examiner's telephonic hearing was scheduled for 10:00 a.m. on April 7, 2011. Written notice of the hearing was mailed to the parties' respective, correct address on March 10, 2011. The notice contains clear and unambiguous instructions relative to what the parties must do in order to participate in the telephone hearing including, e.g., registering a telephone number with First Level Appeals prior to the hearing, submitting and exchanging any documents they intended to rely upon in that hearing and making all necessary arrangements for any witnesses they wished to testify at the hearing. The hearing notice also apprised the parties of the importance of the hearing:

IMPORTANT - PLEASE READ

THIS MAY BE YOUR ONLY OPPORTUNITY TO PRESENT EVIDENCE AND TESTIMONY WITH RESPECT TO YOUR CLAIM. THEREFORE IT IS IMPORTANT THAT YOU PARTICIPATE IN THIS HEARING AND BE PREPARED TO PRESENT YOUR COMPLETE CASE.

The claimant participated in the Appeals Examiners' hearing on behalf of himself and the employer's corporation. He also had his tax preparer available and present for the hearing, although she did not testify.

The Commission has no competent, objective evidence, for example, proof of a State Corporation Commission filing, that the employer's corporation has been dissolved or is no longer an active, Virginia based business entity.

OPINION

The Commission must first address the parties' joint request to present additional evidence. Specifically, the claimant and employer have sought to proffer additional information concerning, e.g., the claimant's W-2 wage and tax statements for the past several years, as issued by the employer, and copies of several job applications or written interest in positions he has submitted for jobs with 3rd party employers, i.e., outside the realm of his self-employment with the employer's corporation. He proffers these documents in

support of his argument that he should not be deemed "self-employed," but rather simply an employee who has been laid off from work or suffered a lack of work situation. On appeal, he also argues he is no longer working for this company and is now seeking a new job.

Commission decisions usually are rendered based upon a review of the record established at the Appeals Examiner's hearing. Section 16 VAC 5-80-30(B) of the Virginia Administrative Code, the Regulations and General Rules Affecting Unemployment Compensation. Section 60.2-622 of the Code of Virginia (1950), as amended, authorizes the Commission to direct the taking of additional testimony and evidence in any case pending before it, or to take such additional testimony and evidence itself.

To ensure the fair and consistent exercise of this statutory authority, the Commission has established specific guidelines governing its acceptance of additional evidence. These authorize the Commission to take additional evidence only if the evidence: (i) is newly discovered or could not have been presented at the prior hearing through the exercise of due diligence; (ii) would tend to support a different result if it were in the record; and (iii) is not merely cumulative, corroborative or collateral. The Commission also may take additional evidence if the record of proceedings before the Appeals Examiner is insufficient to enable the Commission to make proper, accurate, or complete findings of fact and conclusions of law upon review. Section 16 VAC 5-80-30(B), Virginia Administrative Code.

The instructions contained in the Notice of Telephonic Hearing Before An Appeals Examiner, mailed February 17, 2011, informed the parties that the hearing before the Appeals Examiner may be their only chance to present evidence, and noted the importance of their participation in the hearing and presentation of their complete case at that time. The claimant and employer and his/its duly chosen potential witness, i.e., his and the corporation's bookkeeper or accountant, appeared for this hearing and had an opportunity to fully participate in it.

Nevertheless, the Commission is mindful that its regulations are designed so that one party does not get multiple bites at the evidentiary apple to the detriment of the other party. The Commission is mindful, too, due to these specific case circumstances, that the claimant and the employer

are the same individual. While, technically, the parties have not demonstrated why the additional information or evidence they now wish to present could not have been presented at the Appeals Examiner's hearing through the exercise of due diligence, the Commission may be somewhat looser with its interpretation of the language of its evidentiary regulation when, as here, there is truly a single party issue.

Thus, even though the record of proceedings is sufficient to enable the Commission to make proper, accurate and complete findings of fact and conclusions of law, the Commission has no objection to the parties' proffer of the additional evidence in this case and accepts it upon its own motion, as permitted by Section 60.2-622(A) of the Code and Regulation 16 VAC 5-80-30(B), as there is no detriment to the parties by its doing so. Therefore, the Commission decision will be based on the record of proceedings developed by the Appeals Examiner, as supplemented by the parties' additional evidence on appeal.

The Commission must next address the issue of the claimant's eligibility for benefits for the period before the Commission in this particular appeal. Section 60.2-612 of the Code of Virginia provides that an unemployed individual shall be eligible to receive benefits if certain eligibility criteria are met. Nothing in the statute authorizes the Commission to consider the enumerated eligibility criteria in making the underlying determination as to whether the claimant is unemployed; being unemployed is, rather, the threshold requirement for eligibility for the receipt of benefits under Section 60.2-226 of the Code, which provides in pertinent part that:

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, or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount.

The term "wages" is defined in Section 60.2-229, which states in pertinent part:

'Wages' means all remuneration paid, or which should have been paid, for personal services, including commissions, bonuses, tips, back pay, dismissal pay, severance pay, and any other payments made by an employer to an employee during his employment and thereafter and the cash value of

all remuneration payable in any medium other than cash. (emphasis added.)

In analogous situations, for example, when an employee had only an expectation of earning a commission, the Commission has found employment. In Rideout v. Franklin Concrete Product Corporation, Commission Decision 12597-C (November 1, 1979), aff'd Circuit Court for Isle of Wight County (October 6, 1980), the claimant was a commissioned insurance salesman. His job was to solicit business on the employer's behalf, selling only the employer's insurance products. He was able to set his own schedule and could devote as little or as much time to the business as he determined was necessary. In that case, the Commission stated:

In order to remain consistent with the primary purpose and intent of the Unemployment Compensation Act, that is, to pay benefits to those who are unemployed due to no fault of their own, the Commission must conclude that insurance sales persons who are employed under terms of self determination as to time and place of solicitation, the number of hours he shall devote thereto, the time he shall commence work, and whether or not he shall devote his entire time or only a portion thereof, such individual shall be deemed to be employed full-time and therefore not unemployed within the meaning of that term as used in the Virginia Unemployment Compensation Commission Act.

In Rideout, the Commission held that employment existed even in the face of what purported to be an independent contractor agreement, for a life insurance salesman. Thus, the Commission found the claimant in that case was not entitled to unemployment benefits during periods in which he remained attached to the employer, but he received no compensation by way of commission or otherwise.

Similarly, in Loving v. Provident Mutual Life Insurance, Appeals Examiner's Decision UI-76-5014 (February 28, 1975), employment continued when the claimant's compensation was changed to commission only. That is, solely because the claimant controlled his working hours, he was deemed to be engaged in

full-time work, and therefore could not be deemed "unemployed" pursuant to the second prong of Section 60.2-226. See also, Heldreth v. Southwest Virginia Enterprise, Commission Decision 25950-C (July 11, 1986), aff'd, Circuit Court of Wythe County, (March 4, 1991), wherein it was held that a an individual who is self-employed, working 20 hours per week but earns nothing, albeit in a start up weekly, newspaper advertising business, is not considered "unemployed."

The facts of the Rideout case are strikingly similar to the case now under review. In Rideout, the claimant was able to determine his own schedule, was able to determine the manner in which he wanted to solicit business, and had control of the amount of time he would devote to the business.

Here, the claimant had the same latitude. The record established that the claimant could determine how he wanted to solicit construction business, when he wanted to solicit that business, and how much time he wanted to devote to that business. Further, the claimant continued to perform some level of personal services for the employer's business, in which he held an ownership interest, throughout much of the period he initially claimed benefits. For example, he told the Deputy of the Commission, on February 17, 2011, that he was "still looking for work as a general contractor," but also, "putting in application for regular full time employment with other employers." (Exhibit 5, p. 1). Additionally, the Commission reasonably infers that due to the claimant's ownership interest in the employer's corporation, there may be additional "remuneration paid" him by the corporation, which would be included as wages. Therefore, based on the holding in Rideout, the Commission is of the opinion that the claimant is not "unemployed" as contemplated by Section 60.2-226 of the Code.

While the Commission has carefully considered the parties' joint arguments on appeal, it rejects them for the premise that the self-employed claimant is somehow entitled to benefits for unemployment during the period at issue. Additionally, while the Commission understands the parties' joint dissatisfaction over the ultimate case outcome regarding the claimant's ineligibility for benefits, the Commission does not attribute any improper intent or motive to the claimant's application for benefits for the period at issue. Rather, the Commission is simply of the opinion that the parties and their bookkeeper or accountant simply misunderstand the law relative to self-employment and the claimant's ineligibility for benefits under the controlling facts and law of the case.

Further, contrary to the parties' joint arguments, simply because the claimant has paid himself a salary or wages from the employer's corporation (in which he also holds the sole ownership interest), or because the liable employer has paid Federal Unemployment Tax Act ("FUTA") taxes for many years for the [claimant's] construction business at issue, or that the employer, and hence the claimant, have suffered a downturn in its/his business, such facts or arguments do not change the claimant's ineligibility for benefits based upon the pertinent case facts and applicable law.

Accordingly, for these reasons, as the Appeals Examiner correctly concluded, since the claimant was not "unemployed," he was not meeting the eligibility requirements of the Code from January 30, 2011 through May 8, 2011, the claim weeks before the Commission. Therefore, the Appeals Examiner's decision is affirmed.

Finally, if the claimant, the sole owner of the employer's business, has truly ceased the employer's business operations, sold his interest in the business, etc., such separation issues would generally be resolved under the voluntary or involuntary separation statutes of Section 60.2-618(1) or (2), with appropriate facts developed relative to the claimant's efforts to continue the business, i.e., market the company, generate more sales or contracts, obtain a loan or line of credit from his and the employer's financial institution, and whether involuntary bankruptcy or foreclosure is at issue in his and the employer's business operations. Depending on the totality of the circumstances, such factors could make a material difference in the ultimate resolution of such a case. The claimant is hereby advised to notify the Commission, through any of its field offices, if such factors apply to future weekly filings.

DECISION

The parties' joint request to present additional evidence is granted.

The decision of the Appeals Examiner is hereby affirmed. The claimant was not meeting the eligibility requirements of the Code from January 30, 2011 through May 8, 2011, the benefit claim weeks before the Commission.

The claimant shall remain ineligible for benefits until the Commission receives satisfactory proof that the circumstances that caused the ineligibility no longer exist or have materially changed.

A handwritten signature in black ink that reads "Lisa J. Rowley". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Lisa Rowley
Special Examiner

NOTICE TO CLAIMANT

IF THE DECISION STATES THAT YOU ARE DISQUALIFIED, YOU WILL BE REQUIRED TO REPAY ALL BENEFITS YOU MAY HAVE RECEIVED AFTER THE EFFECTIVE DATE OF THE DISQUALIFICATION. IF THE DECISION STATES THAT YOU ARE INELIGIBLE FOR A CERTAIN PERIOD, YOU WILL BE REQUIRED TO REPAY THOSE BENEFITS YOU HAVE RECEIVED WHICH WERE PAID FOR THE WEEK OR WEEKS YOU HAVE BEEN HELD INELIGIBLE. IF YOU THINK THE DISQUALIFICATION OR PERIOD OF INELIGIBILITY IS CONTRARY TO LAW, YOU SHOULD APPEAL THIS DECISION TO THE CIRCUIT COURT.