



**DEPARTMENT OF HUMAN RESOURCES
EMPLOYMENT SECURITY ADMINISTRATION**

**1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201**

STATE OF MARYLAND

**HARRY HUGHES
Governor**

**KALMAN R. HETTLEMAN
Secretary**

383-5032

- DECISION -

BOARD OF APPEALS

**JOHN J. KENT
Chairman**

**HENRY G. SPECTOR
HAZEL A. WARNICK
Associate Members**

**SEVERN E. LANIER
Appeals Counsel**

DECISION NO.: 1051-BH-81

DATE: 11-3-81

APPEAL NO.: 17205

SS.NO.:

CLAIMANT: Richard Nemerov

EMPLOYER: Ken & Ray's Service Center

L.O NO.: 1

APPELLANT: Ken & Ray's Service Center

ISSUE: Whether the Claimant is eligible for benefits pursuant to Section 3(b) of the Law; whether the Claimant was performing services in employment within the meaning of Section 20(E)(6) of the Law; whether all of the Claimant's remuneration was wages within the meaning of Section 20(n) of the Law.

NOTICE OF RIGHT OF APPEAL TO COURT

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

Dec. 3, 1981

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT

- APPEARANCES -

FOR THE CLAIMANT:

Richard Nemerov - Claimant

FOR THE EMPLOYER:

Kenneth Wittelberger -
President
Rudolph Tighe, Jr. -
Attorney

EVIDENCE CONSIDERED

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced into this case, as well as Employment Security Administration's documents in the appeal file.

FINDINGS OF FACT

The Claimant worked for Ken and Ray's Service Center from April of 1980 through June of 1980. He earned \$2,816.53 delivering typewriters for Ken and Ray's on a piecework basis.

The Claimant initially found this job by responding to an ad in the newspaper asking for a deliverer of office machines. According to the ad, this was a part-time job with a minimum guaranteed income of \$20.00 per day.

The Claimant worked under the direction of appellant delivering repaired office machines to their customers. The Claimant was given a list each day of customers. He had to make pick ups and deliveries at each of these addresses. The appellant prepared the list on the appellant's own stationary. The price for the delivery of each item was set by the appellant. The general route for the deliveries was set by the appellant, but the exact route followed was at the discretion of the Claimant. At the end of each day, the Claimant was required to bring back the machines requested and the receipts collected.

The Claimant did not give his own receipts for office machines picked up at the appellant's place of business. He did not collect money on his own behalf, nor did he sign receipts on his own behalf when he picked up the machines or delivered to customers' premises. When he did sign receipts, he signed them on behalf of Ken and Ray's Service Center, not on behalf of himself.

The delivery of repaired office machines is part of the business of the appellant. Delivery is an advertised service of the appellant.

The Claimant also performed some services for the appellant by calling overdue accounts in an attempt to obtain an agreement for collection of these accounts. He received no remuneration for this, unless the collection resulted in an additional delivery, for which he was paid the usual delivery pay.

The Claimant had delivered items for a Richmond, Virginia firm on a salaried basis in the past. Since his employment at Ken and Ray's Service Center, he has delivered items for other firms on an hourly basis. The Claimant has never held himself out to the public as a delivery service, nor has he ever, in fact, operated a delivery service for anyone.

The appellant did not complete tax forms, nor did it deduct taxes, social security or other deductible items from the Claimant's total remuneration. This was done in the belief that the Claimant was an independent contractor, not an employee. Of the total remuneration paid to the Claimant for services during this

period, a certain amount was attributable directly to gasoline expenses incurred by the Claimant in the course of his deliveries. The exact amount is unknown.

CONCLUSIONS OF LAW

The Claimant performed services in employment within the meaning of Section 20(g)(6) of the Maryland Unemployment Insurance Law.

Under that Section of the Law, services performed for an individual for wages or under any contract of hire shall be deemed employment, irrespective of whether the common law relationship of master and servant exists, unless all three of the following factors are found. First, the individual performing services must be free from.. control or direction on the part of the employer. Second, the service must be either outside the usual course of business for the employer, or it must be performed outside of all the places of business of the employer. Third, the individual must be customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the services in question. All three of these conditions must be met. Warren v. Board of Appeals, Maryland Department of Employment Security, 226 Md. 1 (1961); Blue Bird Cab v. Maryland Department of Employment Security, 251 Md. 458 (1968)

In this case, the appellant has failed to meet any one of these three tests. The appellant clearly had control or direction over the Claimant's activities. He was required to report at a certain time each day; he was required to deliver to certain addresses on each day; and remuneration was set by the appellant. In addition, the services performed by the Claimant were part of the usual course of business for the appellant. The fact that the service was performed outside of the place of business of the appellant is irrelevant here, since the service in question was a delivery service. Finally, there is no evidence whatsoever that the Claimant was customarily engaged in an independently established trade or occupation. The Claimant had never delivered for any other customers or employers on any other than an hourly basis.

The fact that the appellant considered the Claimant to be an independent contractor, and did not deduct the various taxes which should be deducted from an employees' remuneration, does not affect the outcome of this case.

The Board finds, however, that some of the remuneration received by the Claimant was for expenses incurred in the course of his employment. Under Section 20(n) of the Law, such expense remuneration is not wages within the meaning of the Maryland Unemployment Insurance Law. Therefore, the Board is remanding this case to the Claims Examiner for a determination of the amount of covered wages received by the Claimant during the period in question. In making this determination, the Claims Examiner should deduct any money paid to the Claimant' which is attributable solely to his gasoline expense. In making this calculation, the Claims Examiner should note that the burden of proof is upon the appellant to establish which part of that remuneration was solely due to gasoline expenses.

DECISION

The Claimant was employed by Ken and Ray's Service Center within the meaning of Sections 20(g) and 3(b) of the Maryland Unemployment Insurance Law. His wages should be considered covered wages and included in the calculation of his eligibility for unemployment insurance benefits.

The decision of the Appeals Referee is affirmed.

This case is remanded to the Claims Examiner for a calculation of the wages paid in covered employment. In making this calculation, the Claims Examiner should deduct from the total remuneration the amount which the appellant can show to be due solely to gasoline expense reimbursement.

Thomas W. Keech
Chairman

Gayle A. Warwick
Associate Member

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DATE OF HEARING: October 22, 1981

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