APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

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MS GENERAL

MS 5.00 GENERAL.

INCLUDES CASES WHICH CONTAIN POINTS NOT COVERED BY ANY OTHER LINE IN THE MISCELLANEOUS DIVISION OR BY ANY OTHER DIVISION OF THE CODE.

Appeal No. 89-03198-10-032089. The Appeal Tribunal had modified the original claim determination to apply the child support deduction provision of Section 207.093 of the Act from the date of the claimant's initial claim. HELD: The Commission interpreted Section 207.093 as requiring that the withholding provision be applied only prospectively from the date notice of the claimant's child support obligation is properly served upon the Commission, not the date of the claimant's initial claim.

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MS 30.00

MS GOOD CAUSE TO REOPEN UNDER COMMISSION RULE 16

MS 30.00 GOOD CAUSE TO REOPEN UNDER COMMISSION RULE 16.

INCLUDES CASES WHICH DISCUSS GOOD CAUSE FOR REOPENING UNDER COMMISSION RULE 16(5)(B), 40 TAC § 815.16(5)(B).

Case No. 504981. The claimant was unable to participate in the first Appeal Tribunal because, after calling in as instructed in the 30 minutes before the hearing began, the Hearing Officer was unable to get through when returning the call. The claimant had called from a phone at a friend's house and, unknown to the claimant, the phone he was calling from had a call block feature that prevented it from receiving unidentified incoming calls. The Commission finds this constitutes good cause for nonappearance because the claimant made a good faith effort to participate.

Case No. 377319. The claimant did not participate in an appeal hearing because it was the second day of her new job and she did not feel she should ask her employer for time off. The claimant preadvised the Hearing Officer of her inability to participate in the hearing. HELD: The claimant established good cause for her failure to participate in the previous appeal hearing. Although the claimant did not ask her new employer for time off to participate in the hearing, we find that it was not unreasonable that the claimant was unwilling to risk any adverse consequences to her job of two days by asking for time off to participate in the hearing. Under these circumstances, where the claimant has only been working in a new job for a short period of time, the claimant has established good cause for her nonappearance within the meaning of Commission Rule 16, 40 TAC Section 815.16.

Case No. 201718. The employer selected its office manager to be its primary representative for the Appeal Tribunal hearing. The office manager did not have firsthand knowledge of the issues to be discussed at the Appeal Tribunal hearing. The employer did not appear at the hearing when a medical emergency of the office manager's husband prevented her participation in the hearing. HELD: A party is entitled to be represented by an individual of its own choosing, irregardless of whether that individual has firsthand knowledge of the issues to be discussed at the hearing. Since the chosen representative for the employer in this case was unavailable due to an unforeseen medical emergency of a family member, the Commission concluded that the employer had established good cause for its failure to appear at the first hearing. Accordingly, the employer's petition for a new hearing was granted.

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Case No. 109882. The claimant failed to appear for a hearing in this case because of the unavailability of her legal counsel. The claimant had retained an attorney, forwarded her documentation to the attorney, and intended to appear and have her attorney with her. Two days prior to the hearing, the attorney learned that he had a job interview. The interview conflicted with the hearing and could not be rescheduled. The claimant contacted the hearing officer on the day before the hearing. She was advised that if she were to appear for the hearing she would be unable to petition for a new hearing. HELD: The Commission concluded that parties have the right to be represented by counsel. When a party has secured counsel, and counsel is unavailable for the hearing, the Commission will carefully examine the reason for counsel's unavailability in determining whether unavailability of counsel constitutes good cause for not appearing under the specific circumstances. In this case, the claimant had secured an attorney who was unavailable due to an important appointment, which could not be rescheduled. The claimant notified the hearing officer prior to the date of the hearing and was advised the hearing could not be postponed but the possibility of a new hearing was available to her. If the claimant had gone forth with the scheduled hearing, she would have done so unrepresented and without the documentation that was relied on in the hearing. Given these circumstances, the Commission concluded that the claimant had shown good cause for her failure to appear at the hearing. Accordingly, the claimant's petition for a new hearing was granted.

Appeal No. 96-005851-10GC-051396. The Appeal Tribunal's hearing notice advised the parties of the 9:15 a.m. hearing and of their obligation to call in for the hearing during the 30 minute period of time prior to the hearing. The claimant called at 9:19 a.m. and was not permitted to participate in the hearing. HELD: The claimant did not telephone in for the hearing in a timely manner as instructed by the hearing notice nor did he establish by credible and persuasive evidence that he was prevented from doing so by circumstances beyond his control. Accordingly, the claimant did not have good cause for his nonappearance within the meaning of Commission Rule 16(5)(B), 40 TAC § 815.16.

Appeal No. 94-010532-10*-071294. The claimant-appellant did not appear at the first Appeal Tribunal hearing and received a decision affirming her disqualification. She filed a timely petition to reopen under Commission Rule 16(5)(B), alleging that she did not receive the written notice for the first Appeal Tribunal hearing. HELD: The claimant's uncontradicted testimony that she did not receive the hearing notice, taken in conjunction with her status as appellant and timely filing of her request to reopen wherein she alleged nonreceipt of the hearing notice, elevates her testimony to the level of "credible and persuasive" required by Commission Rule 32(b), 40 TAC § 815.32(b), and is sufficient to rebut the presumption of receipt. Accordingly, the claimant had good cause for her nonappearance within the meaning of Commission Rule 16(5)(B), 40 TAC § 815.16(5)(B). (Also digested under PR 430.30.)

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Appeal No. 93-017238-10*-121593. The claimant did not appear at the first Appeal Tribunal hearing because, at the time of the hearing, he was attending a job search and assertiveness seminar for which arrangements had been made prior to the scheduling of the Appeal Tribunal hearing. Prior to the hearing, the claimant wrote a letter to the hearing officer advising the latter that he would be unable to participate in the hearing at the scheduled time. HELD: Engaging in activities that place a priority on job hunting should be encouraged. As conducting an effective job search was the subject of the seminar and as the seminar had been arranged prior to the scheduling of the Appeal Tribunal hearing, the claimant had good cause for his nonappearance within the meaning of Commission Rule 16(5)(B), 40 TAC § 815.16.

Appeal No. 93-014606-10*-101993. The claimant-petitioner's telephone hearing was scheduled for 1:15 p.m. Central Time. However, the claimant, a resident of Washington State, called in for the hearing at 1:15 p.m. Pacific Time which was two hours late. HELD: If a party to a telephone hearing resides in a different time zone than that of the assigned hearing officer and the party calls in to participate in the hearing at the correct numerical time in their own time zone but because of the time zone difference, such call is untimely, such mistake will be good cause for nonappearance within the meaning of Commission Rule 16, 40 TAC § 815.16.

Appeal No. 95-004107-10*-032796. The claimant-petitioner's telephone hearing was scheduled for 11:15 a.m. Although the claimant received the Notice of Hearing, she mistakenly recorded the starting time for the hearing as 11:45 a.m. and called in at that time. The hearing had already been concluded. HELD: Incorrectly recording the date or time of a scheduled hearing on a personal calendar does not provide a party with good cause for failing to participate in the hearing on the date and time shown on the hearing notice. Accordingly, the Appeal Tribunal's granting of the claimant's petition to reopen under Commission Rule 16(5)(B), 40 TAC § 815.16(5)(B), was reversed.

Appeal No. 93-012042-10*-082093. The employer missed the first Appeal Tribunal hearing because she reported to the building in which the hearing officer's office was located, rather than the local office where the hearing was to be conducted. After realizing her mistake, the employer drove to the correct location but she was too late to participate in the hearing. HELD: The Appeal Tribunal's denial of reopening under Commission Rule 16(5)(B), 40 TAC § 815.16(5)(B) was reversed, the Commissioners holding the earlier precedent in Appeal No. 89-08533-10-081189 (see below) to be inapplicable. The Commission held that if a party's misreading of a hearing notice is a reasonable error and the party makes a good faith effort to participate after discovering the error, the party will have good cause to reopen under Commission Rule 16.

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Appeal No. 89-08533-10-081189. The employer representative failed to call in to participate in a telephone hearing because he misread the notice of hearing and assumed that the hearing officer would call him when it was time for him to participate in the hearing. HELD: The Appeal Tribunal's denial of reopening under Commission Rule 16(5)(B), 40 TAC § 815.16(5)(B), is affirmed as misreading a notice of hearing does not provide a party with good cause for failing to participate in a hearing.

Appeal No. 89-08868-10-081089. Although the claimant had received and read the notice of hearing prior to the date of the hearing, she missed the hearing because she went to the wrong local office. That is, she appeared at the office where she customarily filed her claims rather than the office in which the hearing had been scheduled. Upon realizing her error, the claimant telephoned the hearing location and was advised by Commission representatives there that she should immediately travel to the proper location. However, upon arrival there, the claimant learned that the hearing had already concluded. HELD: After having filed all of her claims in a particular office, the claimant made a reasonable mistake in traveling to that office for her hearing. Furthermore, the claimant's actions in immediately notifying Commission representatives of her mistake and traveling to the proper hearing location reflected a good faith attempt to attend the hearing. Accordingly, good cause to reopen is found within the meaning of Commission Rule 16(5)(B), 40 TAC § 815.16(5)(B).

Appeal No. 89-08445-10-080789. When a claimant fails to appear at an Appeal Tribunal hearing because the claimant's copy of the hearing notice is returned as undeliverable by the postal service and it is established that after the hearing notice was mailed, but before the hearing was convened, the claimant filed a change of address with a Commission local office which erroneously advised the claimant that a hearing had not yet been scheduled, the claimant has good cause for his or her non-appearance within the meaning of Commission Rule 16(5)(B), 40 TAC § 815.16(5)(B).

Appeal No. 89-08766-10-081589. The employer's only firsthand witness did not attend the hearing because, prior to receiving the notice of hearing, he had purchased non-refundable airline tickets for a vacation coinciding with the hearing date. HELD: As the employer's only firsthand witness was unable to appear because he had purchased non-refundable airline tickets for a vacation coinciding with the hearing date, good cause for the employer's nonappearance has been established within the meaning of Commission Rule 16(5)(B), 40 TAC § 815.16(5)(B).

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MS BENEFIT COMPUTATION FACTORS

MS 60.00 BENEFIT COMPUTATION FACTORS.

INCLUDES CASES WHICH DISCUSS A CLAIMANT'S BASE PERIOD, BENEFIT YEAR, DISQUALIFICATION PERIOD, DURATION OF BENEFITS, DURATION OF UNEMPLOYMENT, OR WAITING PERIOD, AS A FACTOR IN DETERMINING BENEFIT AMOUNT OR DISQUALIFICATION FOR BENEFITS.

60.05 BENEFIT COMPUTATION FACTORS: GENERAL.

INCLUDES (1) A GENERAL DISCUSSION OF BENEFIT COMPUTATION FACTORS, (2) POINTS NOT COVERED BY ANY OTHER SUBLINE UNDER LINE 60, OR (3) POINTS COVERED BY THREE OR MORE SUBLINES.

Appeal No. 85-01920-10-101785. Effective August 26, 1985, Section 207.004(c) of the Act was amended to define "benefit wage credits" as meaning "wages" as defined in 207.081 of the Act, removing the earlier limitation based on the maximum amount of wages as defined in the Federal Insurance Contributions Act. In the present case, the Commission held that with respect to all initial claims filed on or after August 26, 1985, a claimant's benefits wage credits shall reflect all wages received by the claimant during his or her base period regardless of whether or not such wages were required to be reported by the claimant's employer(s) at the time of their receipt.

Appeal No. 83-10723-10-0983. The claimant filed an initial claim on June 21, 1982. Shortly thereafter, he was paid vacation wages which had been earned before the inception of his benefit year and thus were attributable to that earlier period. On or about May 27, 1983, he performed carpentry services in self-employment for an individual. He performed no other personal services for remuneration during his first benefit year. He filed a subsequent initial claim on June 21, 1983, thereby establishing a new benefit year. The issues presented by this case were whether the requalifying earnings proviso in Section Section 207.021(a)(6) of the Act may be satisfied by (1) wages earned in self-employment, and (2) vacation wages attributable to a period prior to the claimant's earlier benefit year. HELD: (1) The requalifying wages proviso in Section

MS BENEFIT COMPUTATION FACTORS

Appeal No. 83-10723-10-0983. (Cont'd)

207.021(a)(6) of the Act does not require such "wages" to have been earned in "employment." Rather, any form of remuneration for personal services, including compensation as an independent contractor, shall constitute "wages" within the meaning of this provision of Section 207.021(a)(6). (2) On the other hand, vacation wages earned prior to the earlier benefit year may not be used to meet the aforementioned requirement in Section 207.021(a)(6). Such wages must be earned through actual work during the earlier benefit year in order to satisfy Section 207.021(a)(6)'s requirement, regardless of when such wages were received, because Section 3304(a)(7) of the Federal Unemployment Tax Act imposes such a condition on state law. Thus, the words "earned wages" in Section 207.021(a)(6) should be interpreted to include a requirement that the individual have had work which resulted in the earning of wages and that this work have occurred after the date of the original initial claim. (Emphasis added) Note: This decision is also digested under TPU 460.75.

Appeal No. 1621-CA-73. Section 207.004(c) of the Act provides that if an employer fails to report wages which were paid to a claimant during a base period when requested by the Commission, the Commission may establish wage credits for such claimant for such base period on the basis of the best information which has been obtained by the Commission.

60.10 BENEFIT COMPUTATION FACTORS: BASE PERIOD.

Appeal No. 95-015087-70-103195. The prohibition in Section 207.004(b) of the Act should not be applied to a claimant seeking to qualify under the alternate base period provision in Section 201.011(1)(B) of the Act where the claimant received no unemployment insurance benefits during the relevant prior benefit year because the claimant was unable to work due to illness or injury during that benefit year.

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MS 60.15 - 60.20

MS BENEFIT COMPUTATION FACTORS

MS 60.15 BENEFIT COMPUTATION FACTORS: BENEFIT YEAR.

Appeal No. 38723-AT-66 (Affirmed by 1388-CA-66). The benefit year begins at 12:01 a.m. on the effective date of the initial claim.

Appeal Nos. 69119-AT-59 and 69200-AT-59 (Affirmed by 6893-CA-59). An initial claim is invalid under Section 201.011(13) and Section 208.001(a) of the Act if the claimant worked a regular full-time shift on the same date. Consequently, such a claimant does not establish a benefit year. (Also digested under MS 75.00. Note: The holding in this case is applicable to the date on which the claimant actually filed the initial claim not the effective date of the claim.)

60.20 BENEFIT COMPUTATION FACTORS: DISQUALIFICATION PERIOD.

Appeal No. 741-CA-66. Disqualification for job refusal assessed to start with first day of benefit period in which job refusal occurred and not first day of benefit period in which claimant was referred to work. (Full digest cross-referenced at SW 5.00).

Also see Appeal No. 384-CA-64 under PR 275.

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MS BENEFIT COMPUTATION FACTORS

MS 60.35 BENEFIT COMPUTATION FACTORS: WAITING PERIOD.

Appeal No. 3280-CA-76. The claimant filed an initial claim on July 16. On August 25th, the claimant was paid for her waiting period claim since she had by then received benefits amounting to four times her weekly benefit amount. However, because the issuance of the four benefit warrants failed to fully take account of the claimant's part-time earnings, she was incorrectly paid full weekly benefits on those four claims. HELD: Because the claimant was not entitled to benefits equaling four times her weekly benefit amount, it necessarily followed that she was not entitled to payment of her waiting period claim.

(NOTE: Effective January 1, 1978, Section 4(f)(7) (such amendment is now codified as Section 207.021(c)) was amended to provide that an unemployed individual will be eligible to receive payments on his waiting period claim when he has been paid benefits in his current benefit year equal to three times his weekly benefit amount.)

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MS REQUALIFICATION

MS 65.00 REQUALIFICATION.

INCLUDES CASES IN WHICH THE REQUALIFICATION REQUIREMENTS IN SECTION 5 OF THE TEXAS UNEMPLOYMENT COMPENSATION ACT ARE DISCUSSED.

Appeal No. 86-08495-10-051887. After filing his initial claim, pursuant to which he was disqualified under Section 207.044 of the Act, the claimant performed services for three individuals. None of these individuals were covered employers, liable to the payment of contributions or reimbursement, under the Act. Taken together, these three individuals paid the claimant wages in an amount exceeding six times the claimant's weekly benefit amount. HELD: The services performed by the claimant were performed in "employment" within the meaning of Section 201.041 of the Act. Consequently, the claimant met the requalification requirements prescribed by Section 207.044 of the Act. Also see Commission Rule 20(6), 40 TAC §815.20(6).

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MS CITIZENSHIP OR RESIDENCE REQUIREMENTS

MS 70.00 CITIZENSHIP OR RESIDENCE REQUIREMENTS.

INCLUDES CASES IN WHICH CITIZENSHIP OR RESIDENT REQUIREMENTS AFFECT THE RIGHT TO BENEFITS.

Appeal No. 87-20902-10-120887. Pursuant to initial claim dated May 6, 1987, the claimant established a base period from January 1, 1986 through December 31, 1986. The claimant is not a U.S. citizen. The claimant entered the U.S. from Ghana in 1978. In 1981, the claimant's then spouse, a U.S. citizen petitioned the U.S. Immigration and Naturalization Service (INS) for a relative immigrant visa for claimant, whereupon the INS denied this petition in 1982. The claimant appealed this action to the INS, who has taken no action as of the time of the Appeal Tribunal hearing. The claimant divorced and married a different individual. The INS approved a relative immigrant visa for the claimant on April 13, 1987 on the basis of a petition filed by the claimant's new spouse. HELD: The claimant was permanently residing in the U.S. under color of law during the base period of claim, a time when her appeal to the INS was pending, as Title 8, Chapter 1, Section 109.1(a)(3) of the Code of Federal Regulations provides that an alien who has properly filed application for adjustment to permanent resident status may be granted permission to work during the time necessary to decide the case. Therefore, the claimant is eligible for benefits based on services performed under Section 207.043 of the Act.

Appeal No. 87-020329-10-112887. The claimant was hired in March 1987. Section 274A of the Immigration and Nationality Act make unlawful the employment of unauthorized aliens; all individuals hired after November 6, 1986 must present proof of citizenship. Picture identification (such as a driver's license and a social security card) satisfy these requirements. Claimant had previously lost his social security card and could only submit his application for a new card. The employer, fearing liability, after numerous warnings, discharged claimant on September 22, 1987 for failure to provide proof of citizenship in a prompt manner. Subsequent to both termination and filing of initial claim for benefits, claimant received his new social security card, and established that he was a U.S. citizen. HELD: As claimant had taken all reasonable steps to prove his citizenship, his actions were not misconduct; therefore,

MS CITIZENSHIP OR RESIDENCE REQUIREMENTS

Appeal No. 87-020329-10-112887. (Cont'd)

no disqualification under Section 207.044 of the Act. As the Federal statute required the employer to discharge claimant, the employer's tax account is protected under Section 204.022 of the Act. (Also digested under CH 10.10 and cross-reference under MC 85.00.)

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MS CLAIM AND REGISTRATION

MS 75.00 CLAIM AND REGISTRATION.

INCLUDES CASES IN WHICH REQUISITES PERTAINING TO CLAIM AND REGISTRATION ARE DISCUSSED.

Appeal No. 83-07553-10-050187. Claimant worked for Brown & Root, Inc. from October 1982 through January 31, 1983. Claimant, an alien, held an H-1 visa classification, which allowed him to work for Brown & Root on a temporary basis. In January 1987, claimant filed an initial claim for benefits, backdated to 1983. A determination disallowing this claim under Sections 201.011(13) and 208.001(a) of the Act was mailed to claimant's correct address on January 27, 1987. Claimant appealed this determination on February 24, 1987, twenty-eight days later. Claimant gave a statement that he attempted to file the claim in June 1983. He testified he attempted to file within two weeks of the job ending. A witness testified he was with the claimant when he attempted to file in February 1983. Claimant and the witness testified that the Commission office told the claimant that he did not qualify because he was not a permanent resident. A claims supervisor testified this was not Commission policy and the claimant's description of the personnel and process was inaccurate. HELD: (1) The appeal was deemed timely under Commission policy of a one-time exception to timeliness on the issue of validity of the initial claim. (2) Testimony of claimant and his witness is sufficient to refute the general testimony of the Commission employee and to establish claimant was discouraged by Commission staff from filing claim in February 1983. (3) Valid claim under Sections 201.011(13) and 208.001(a) and backdating to February 15, 1983 authorized under Commission Rule 22, because claimant attempted to file that date, but was erroneously discouraged from doing so by a Commission employee.

Appeal No. 87-20876-10-121087. Claimant filed an initial claim dated June 17, 1987, with instructions to return and file for first two continued claims at 8:00 a.m. on July 1, 1987. Claimant called and advised he could not report until 8:30 because of an interview for an overseas job, which he had accepted. Thereupon he was told he could not file at 8:30 a.m., but to sign the claims and have his mother file them later. The mother was not allowed to file because, in the rush of leaving, he forgot to sign the forms. Upon return from

MS CLAIM AND REGISTRATION

Appeal No. 87-20876-10-121087. (Cont'd)

overseas, the claimant filed claims on November 5, 1987, backdated to June 24, 1987 and July 1, 1987. It was ruled that the claims were unacceptable under Section 207.021(a)(2) of the Act, and were voided. HELD: Although strict reading of Sections 207.021(a)(2) and 208.001 of the Act and Commission Rule 20 would support voiding the claim, the existence of Commission Rule 22 provides remedy for a case such as this rather than penalize an individual for being 30 minutes late for a scheduled filing as a result of a successful job interview. Adequate cause shown under Commission Rule 22 for acceptance of backdated claims and disallowance of claims under Section 207.021(a)(2) is reversed. (Cross-referenced under MS 95.35.)

Appeal No. 2495-CUCX-77. The claimant did not return to the local office to file backdated continued claims as scheduled because he had been led to believe by a Commission claimstaker that he was not to do this until after a later scheduled Appeal Tribunal hearing (involving an unrelated issue). Citing Commission Rule 22 (40 TAC §815.22), the Commission allowed the backdating of the claims, reiterating the principle that a claimant who is misled by Commission personnel should not be forced to suffer adverse consequences caused by his relying on the instructions given him.

Appeal No. 927-CA-77. In a case where the claimant's error in filing continued claims by mail is shown to be due to misinformation or confusion resulting from Commission personnel's failing to properly explain the claims procedure, the claimant will not be penalized. Backdated claims accepted under Rule 22 (40 TAC §815.22).

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MS CLAIM AND REGISTRATION

Appeal No. 796-CA-77. The claimant filed an initial claim on June 24. She filed a complaint with the NLRB which resulted in her reinstatement and an award of back pay retroactive to June 18, the date of her separation. The claimant, although apparently unemployed when she filed her initial claim, later received full back pay and since back pay is considered wages, she was held to have been employed on the date of her initial claim. HELD: The claimant's initial claim was voided under Section 201.011(20) and Section 208.001(a) of the Act. However, citing Commission Rule 22, the Commission authorized an initial claim backdated to the date of the claimant's first valid continued claim. (Cross-referenced under MS 375.05.)

Appeal No. 777-CUCX-77. The claimant was placed on mail-in claims and given sufficient cards for the month of November. A Commission representative testified that all mail-in claimants are instructed to mail their claim forms no earlier than and no later than the date on the claim. The claimant did not recall what instructions he had received but he mailed three claim cards of various dates in one envelope postmarked November 29, 1976 because he said he lacked postage to mail them individually. HELD: Section 208.001(a) of the Act requires that claims be filed according to regulations prescribed by the Commission and the Commission requires claims to be mailed on their effective dates. Therefore, the claims were voided.

Appeal No. 3306-CA-75. The claimant filed several mail-in claims earlier than their indicated date. When he recognized his error, the claimant reported in person and filed corrected claims which were subsequently voided. HELD: The mere fact that a claimant makes an error in mailing claim forms, is no reason to deny benefits for the claim dates in question. Accordingly, the Benefits Department was directed to process the claimant's corrected claims.

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MS CLAIM AND REGISTRATION

Appeal No. 2671-CA-75. The claimant provided an incorrect address for his last employer when filing his initial claim. The address given by the claimant was that of his brother, who was the employer's corporate secretary. The employer was actually located in another city and the claimant had reported there regularly when he worked for the employer. The employer failed to receive a copy of the claim. HELD: The claimant's initial claim was voided because he failed to give the Commission sufficient information to enable it to comply with Section 208.002. He was authorized to request a backdated initial claim giving the correct address of his last employer. However, the allowance of the request for backdating was made contingent on the claimant's explanation for his providing an incorrect address on the initial claim.

Appeal No. 2377-CA-75. Where no evidence of fraudulent intent on a claimant's part is shown, the claimant will be allowed to file a backdated initial claim naming the correct last employer.

Appeal No. 135-CA-71. An interstate initial claim may be voided when a claimant was not fully told of the benefits and drawbacks of filing against each of the states against which he could have filed.

Appeal No. 5930-AT-63 (Affirmed by 9839-CA-63). A claimant's failure to file a continued claim on schedule, although he had an opportunity to do so, is not good cause for backdating the claim.

Appeal No. 5605-AT-63 (Affirmed by 9814-CA-63). A claimant's failure to file an initial claim in time to use all wage credits available is not good cause for backdating the initial claim since any hardship caused the claimant was the result of his own failure to act in time.

Appeal Nos. 69199-AT-59 and 69200-AT-59 (Affirmed by 6893-CA-59). An initial claim is invalid under Sections 201.011(13) and 208.001(a) of the Act if the individual worked a regular full-time shift on the same date. (Also digested under MS 60.15. Note: The holding in this case is applicable to the date on which the claimant actually filed the initial claim, note the effective date of the claim.)

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MS CONSTRUCTION OF STATUTES

MS 95.35 CONSTRUCTION OF STATUTES: STRICT OR LIBERAL CONSTRUCTION

See Appeal No. 87-20876-10-121087 under MS 75.00.

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MS HEALTH OR PHYSICAL CONDITION

MS 235.40 HEALTH OR PHYSICAL CONDITION: PREGNANCY.

APPLIES TO CASES WHICH INVOLVE BENEFIT RIGHTS OF CLAIMANT FOR PERIODS DURING PREGNANCY OR AFTER CHILDBIRTH, DECIDED UNDER SPECIAL PROVISIONS FOR DENIAL OF BENEFITS DURING THOSE PERIODS, OTHER THAN SPECIAL ABLE AND AVAILABLE, WORK REFUSAL, AND VOLUNTARY LEAVING PROVISIONS. (NOTE: FOR POINTS RELATING TO PREGNANCY DECIDED UNDER ABLE AND AVAILABLE, WORK REFUSAL, AND VOLUNTARY LEAVING PROVISIONS, SEE LINES AA 235.40, SW 235.40, AND VL 235.40.)

Not applicable under Texas Law.

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MS INCARCERATION OR OTHER LEGAL DETENTION

MS 250.00 INCARCERATION OR OTHER LEGAL DETENTION.

APPLIES TO CASES WHICH INVOLVE BENEFIT RIGHTS OF CLAIMANTS WHO HAVE BEEN IMPRISONED OR OTHERWISE LEGALLY DETAINED, DECIDED UNDER SPECIAL PROVISIONS FOR DENIAL OF BENEFITS UNDER THOSE CONDITIONS, OTHER THAN SPECIAL ABLE AND AVAILABLE, MISCONDUCT, AND VOLUNTARY LEAVING PROVISIONS. (NOTE: FOR POINTS RELATING TO IMPRISONMENT OR OTHER LEGAL DETENTION DECIDED UNDER ABLE AND AVAILABLE, MISCONDUCT, AND VOLUNTARY LEAVING PROVISIONS, SEE LINES AA 250.00, MC 15.00, MC 490.00, VL 135.00, VL 290.00, AND VL 495.00.)

Not applicable under Texas Law.

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MS INTERSTATE RELATIONS

MS 260.00 INTERSTATE RELATIONS.

INCLUDES CASES WHICH INVOLVE RECIPROCAL AGREEMENTS OR OTHER UNEMPLOYMENT INSURANCE FACTORS PERTAINING TO TWO OR MORE STATES.

Appeal No. 941-CUCX-77. On January 13, 1976, the claimant filed an initial claim in and against the District of Columbia. On April 13, 1976, the claimant filed an initial claim in and against Texas. The Commission paid the claimant $630.00 before it was discovered that he had filed a prior valid initial claim in the District of Columbia. On September 23, 1976, the claimant's Texas initial claim was voided because of the prior claim and the existing benefit year. The $630.00 payment made by Texas was transferred to the District of Columbia and Texas received reimbursement for those benefits from the District of Columbia. Subsequently, a determination was issued which notified the claimant that he had been overpaid $630.00 by Texas which he was obligated to repay to the Commission under Section 214.002 of the Texas Unemployment Compensation Act. The claimant filed a late appeal from the overpayment determination and the Appeal Tribunal dismissed his appeal for want of jurisdiction. HELD: Section 203.030 of the Texas Act authorizes the Commission to make to other states or federal agencies, and to receive from such agencies, reimbursements from or to the fund in accordance with arrangements entered into pursuant to subsection (b) of Section 211.003 of the Act. The payments made to the claimant by the Commission as a result of his claim were transferred to the Unemployment Compensation Board of the District of Columbia pursuant to an agreement of the type permitted by Section 211.003. Therefore, the overpayment determination sent to the claimant, requesting repayment to the Commission, was void from its inception. Since the determination was void from its inception, the Commission held that Section 212.053's appeal time limits did not apply and set aside the Appeal Tribunal's decision dismissing the claimant's appeal for want of jurisdiction. (Also digested under PR 405.15 and 430.30; cross-referenced under MS 340.05 and PR 430.20.)

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS OVERPAYMENTS

MS 340.00 OVERPAYMENTS.

340.05 OVERPAYMENTS: GENERAL.

Appeal No. 1551-CA-77. The claimant (a non-English speaker) received a notice of forfeiture of benefits. He sought assistance from a Notary Public who informed him he need not take any action. His late appeal was dismissed by the Appeal Tribunal. HELD: Section 214.003 provides for the forfeiture of benefits to become effective only after a claimant has been afforded the opportunity for a fair hearing. Since the claimant acted prudently in seeking assistance in reading the determination and relied to his detriment on that assistance, he was denied his opportunity for a fair hearing. The Commission, therefore, considered the case on its merits. (Also digested under PR 450.10).

See Appeal No. 941-CUCX-77 under MS 260.00.

340.10 OVERPAYMENTS: FRAUD OR MISREPRESENTATION.

INVOLVES A DISCUSSION OF THE QUESTION OF WHETHER THE CLAIMANT OR ANOTHER HAS WILLFULLY OR KNOWINGLY MISREPRESENTED OR FAILED TO DISCLOSE A MATERIAL FACT FOR THE PURPOSE OF OBTAINING BENEFITS.

Appeal No. 514-CA-76. The claimant filed twelve continued claims and indicated on each of the claims that she had had no work or earnings during the preceding seven-day period. Actually, the claimant had worked from 10-50 hours per week during the period covered by her continued claims. Pursuant to her request, the claimant received a lump sum payment of her earnings after these claim weeks. The claimant argued that she was not obligated to report work or earnings on these claims because she had not received any wages at the time the claims were filed. She acknowledged receipt of a Form B-91 ("Unemployment Insurance Information for Claimants") which advised her that all hours worked and all earning for the time covered by a weekly claim must be reported on the claim, even though earnings for the work have not

MS OVERPAYMENTS

Appeal No. 514-CA-76. (Cont'd)

yet been received. She also acknowledged that the claim form itself inquires, in the alternative, whether the claimant had work or earnings during the preceding seven days. HELD: After noting that Section 214.003 requires a showing of "willfulness", the Commission stated that, in Section 214.003 as in penal statutes, "willfulness" can also include an act done without reasonable grounds to believe it to be lawful. The Commission found the claimant's asserted belief, that she could work 20-50 hours per week and receive unemployment benefits for the same period so long as payment for the work was deferred, to be so unreasonable and contrary to written instructions as to constitute a willful nondisclosure of material facts under Section 214.003.

Appeal No. 695-CA-72. For the provisions of Section 214.003 of the Act to be applicable, there must be an intentional and willful misrepresentation or nondisclosure of a material fact. A claimant who was suffering from a disease which was affecting his brain at the time he was filing claims and who insisted he did not willfully or intentionally fail to report his work earnings was held not to have violated the provisions of Section 214.003.

Appeal No. 1246-CA-71. Because of the seriousness of the penalty, Section 214.003 of the Act will be invoked only when there is a high degree and quality of evidence sufficient to establish that the claimant is guilty of fraud.

Appeal No. 7839-AT-69 (Affirmed by 6-CA-70). When a claimant willfully misrepresents the reason for his separation from his last employment for the purpose of obtaining benefits to which he would not have been entitled had he given the correct reason for separation, the provisions of Section 214.003 of the Act are applicable.

Appeal No. 29792-AT-66 (Affirmed by 506-CA-66). The provisions of Section 214.003 are not applicable unless evidence is clear and convincing that the claimant intended to misrepresent a material fact. The provision of Section 214.003 are not applied when the facts misrepresented by the claimant were not material in that the true facts would not have caused the claimant to be disqualified for benefits.

340.15 OVERPAYMENTS: NONFRAUDULENT.

INVOLVES BENEFIT OVERPAYMENTS WHERE THE QUESTION OF FRAUD IS NOT AN ISSUE.

See cases digested under MS 340.20.

340.20 OVERPAYMENTS: RESTITUTION.

RELATES TO A DISCUSSION OF RESTITUTION OF BENEFITS TO WHICH THE CLAIMANT WAS NOT ENTITLED.

Appeal No. 97-012552-90-121098. The claimant fully disclosed information concerning the length he worked for the trade affected employer, and this information was available to TWC as early as June of 1997. The information clearly showed the claimant had not worked for the trade affected employer for at least 26 weeks at wages of $30 or more a week during the 52 week period ending with his first qualifying separation, as required under 20 CFR § 617.11(a)(2)(iii). Although the claimant had disclosed all necessary information, he was paid $8,502.00 in TRA benefits before a determination was issued on August 31, 1998, denying his application for TRA benefits because he did not meet the 26-week test. This established an overpayment which the claimant was informed he was liable to repay under the provisions of 20 CFR § 617.55(a). HELD: The Commission affirmed the denial of the claimant's application for TRA benefits and affirmed the overpayment. However, the Commission concluded that, in accordance with the provisions of 20 CFR § 617.55(a), since the overpayment was made without fault on the part of the claimant, the Special Payments Unit would be directed to send the claimant a request to waive recovery of the overpayment. The Commission

MS OVERPAYMENTS

Appeal No. 97-012552-90-121098 (con't)

also noted that, in order for the State to establish a policy not to apply the waiver provisions of 20 CFR § 617.55(a), it would be necessary for the State to publish such a decision for the information of the public as required under 20 CFR 617.55(a)(2)(ii)(C)(4).

Appeal No. 90-12054-10-120190. The claimant was erroneously credited with base period wages from an employer for which the claimant never worked. The claimant immediately, and persistently thereafter, reported this error to her TWC local office. Nonetheless, the claimant continued to be issued weekly benefits in amounts reflecting the inclusion of the erroneous wage credits. These improper payments continued for more than five months until the claimant's entitlement was recalculated and an overpayment established. HELD: The Commission affirmed the deletion of the wage credits erroneously credited to the claimant's base period. However, the Commission voided the initial determination and the Appeal Tribunal decision ruling that the claimant was liable to repay the erroneously paid benefits under Section 212.006 of the Act, reasoning that Section 212.006 applies only to situations in which an overpayment arises because a determination or decision is reversed on appeal through the administrative process. There was no such reversal in this case. The Commission also held that Section 214.002 of the Act did not apply because, in this instance, there was no nondisclosure or misrepresentation by the claimant or by another and because the overpayment here was caused solely by the Texas Workforce Commission. The Commission cited Martinez v. TEC and Mollinedo v. TEC (see the "Court Cases" Appendix to this manual) in support of this holding regarding the inapplicability of Section 214.002 of the Act.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS OVERPAYMENTS

Appeal No. 1700-CF-77. The claimant made every effort to keep the Commission notified of her application for a receipt of workmen's compensation payments. She nonetheless was paid unemployment insurance benefits without reduction and an overpayment was established under Section 214.002. HELD: The overpayment in this case was not the result of nondisclosure or misrepresentation of a material fact. Accordingly, Section 214.002 was not applicable and the overpayment was reversed.

Appeal No. 97-CA-77. The claimant notified the Commission on his continued claim that he had received Federal Old Age Benefits for the preceding seven-day period. Disqualification under Section 207.049(a)(3) of the TUC Act was not established and claimant was issued payment on the claim and for subsequent claims totaling $504. HELD: In light of the claimant's specific disclosure on the claim, the Commission was of the opinion that the claimant did not come within the scope of Section 214.002 of the Act. The overpayment in the amount of $504 established under Section 214.002 of the Act was reversed. The disqualification from receipt of future benefits under Section 207.049(a)(3) of the Act was affirmed.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS RECEIPT OF OTHER PAYMENTS

MS 375.00 RECEIPT OF OTHER PAYMENTS.

375.05 RECEIPT OF OTHER PAYMENTS: GENERAL.

INCLUDES CASES CONTAINING (1) A GENERAL DISCUSSION OF THE RECEIPT OF OTHER PAYMENTS, (2) POINTS NOT COVERED BY ANY OTHER SUBLINE UNDER LINE 375, OR (3) POINTS COVERED BY THREE OR MORE SUBLINES.

Appeal No. 9987-ATC-71 (Affirmed by 1206-CAC-71). Payments made to a claimant by an employer in accordance with Public Law 90-202 because of age discrimination, are considered as wages and are attributable to the period beginning with the date the claimant applied for work with the employer and was refused employment. (In regard, the principle is analogous to the cases involving the award of back pay.) (Also digested under CH 30.60 and cross-referenced under MS 620.00.)

See Appeal No. 796-CA-77 under MS 75.00.

375.10 RECEIPT OF OTHER PAYMENTS: DISABILITY COMPENSATION.

INVOLVES A DISCUSSION OF REDUCTION OR CANCELLATION OF BENEFITS BECAUSE OF THE RECEIPT OF DISABILITY PAYMENTS.

Appeal No. 5306-F-70 (Affirmed by 616-CF-70). Benefits under the Federal Employees' Compensation Act for a job-incurred disability are similar to workmen's compensation benefits provided by state law and are disqualifying under Section 207.049(a)(2) of the Act.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS RECEIPT OF OTHER PAYMENTS

Appeal No. 92-CF-62. An individual who is receiving disability benefits under Title II of the Social Security Act is not disqualified for unemployment benefits under Section 207.049(a)(3) of the Texas Unemployment Compensation Act.

MS 375.15 RECEIPT OF OTHER PAYMENTS: LIEU OF NOTICE, REMUNERATION (SEVERANCE PAY).

DISCUSSES REDUCTION OF BENEFITS BECAUSE OF THE RECEIPT OF REMUNERATION IN LIEU OF SEPARATION NOTICE.

Case No. 176943. The claimant was laid off from his position. He was not given advance notice of this separation. Five days after the separation, the claimant signed an agreement that he would waive any legal claims against the employer and that he would keep certain information confidential. In exchange for this agreement, the employer agreed to pay the claimant 11 weeks' worth of wages as "severance pay." Any violation of the agreement would cause the claimant to forfeit these payments. HELD: For a claimant to be disqualified under Section 207.049(a)(1) of the Act, the payments in question must be made as an actual substitute for advance notification of a separation. Here, the claimant was paid in exchange for his agreement not to sue the employer and to keep certain information confidential. Therefore, although this was determined with reference to the claimant's weekly salary, the employer received something of value from the claimant. No disqualification under Section 207.049(a)(1), as the wages were not in lieu of notice.

Appeal No. 2302-CA-76. When discharged, the claimant was issued wages in lieu of notice covering the period from March 16 through May 6, 1976. She filed her initial claim on April 13, 1976. The Appeal Tribunal disqualified the claimant under Section 207.049(a)(1) of the Act from the date of her initial claim, April 13, 1976, through May 6, 1976. HELD: The Appeal Tribunal correctly applied Section 207.049(a)(1) to begin on the date of the claimant's initial claim rather than the beginning date of the period covered by the wages in lieu of notice for the reason that the Commission cannot disqualify an individual from the receipt of benefits during a period prior to that individual's filing an initial claim. To do so would be a meaningless act since an individual cannot draw benefits prior to filing an initial claim.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS RECEIPT OF OTHER PAYMENTS

MS 375.15 RECEIPT OF OTHER PAYMENTS: LIEU OF NOTICE, REMUNERATION (SEVERANCE PAY). (CONTINUED)

Appeal No. 748-CA-70. A disqualification under Section 207.049(a)(1) is applicable to all benefit periods covered by the wages in lieu of notice payments, even if the claimant elects to take these payments in a lump sum.

Appeal No. 3913-CA-49 (Affirmed by El Paso Court of Civil Appeals, 243 S.W. 2d 217). A severance payment made in accordance with a contractual agreement which is based on length of service, does not constitute wages in lieu of notice. It is payment for prior services and is not attributable to any period of time subsequent to the separation. The only separation payment which is disqualifying under the Act is wages in lieu of notice. Wages in lieu of notice is applicable to payments made to the employee because the employer does not give the employee advance notice of discharge.

Appeal No. 96-012205-10-102696, a disqualification under Section 207.049(a)(1) is applicable to all benefit periods covered by a payment made to an employee because the employer does not give the employee advance notice of discharge, even if the payment is mistakenly termed “severance pay”. The payment was made out of employer concern that the claimant was the sole support of her family. There was no contractual agreement for such pay based upon length of service.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS 375.20 - 375.25

MS RECEIPT OF OTHER PAYMENTS

MS 375.20 RECEIPT OF OTHER PAYMENTS: LOSS OF WAGES, COMPENSATION FOR.

DISCUSSES REDUCTION OF BENEFITS BECAUSE OF RECEIPT OF COMPENSATION FOR LOSS OF WAGES.

Opinion No. WW-13, the Attorney General of Texas 1-30-57. Receipt of supplemental unemployment benefits from trust funds accumulated and paid out under the provisions of the contracts between Ford Motor Company and the UAW-CIO and General Motors Corporation and the UAW-CIO does not preclude an individual from receiving benefits under the Texas Unemployment Compensation Act. Such benefits are, in effect remuneration for past services and thus are "wages". However, since the benefits are to be received because of services performed by the employee prior to layoff, the benefits are allocable to that prior period and are not "with respect to" the benefit period for which he is seeking unemployment insurance benefits.

375.25 RECEIPT OF OTHER PAYMENTS: OLD-AGE AND SURVIVORS' INSURANCE.

DISCUSSES REDUCTION OR CANCELLATION OF BENEFITS BECAUSE OF RECEIPT OF OLD-AGE OR SURVIVOR'S INSURANCE.

Note: House Bill 1086, passed by the 74th Session of the Texas Legislature discontinues deduction of Social Security Old Age Benefits (OAB). Beginning with June 16, 1995, such pensions will no longer be deducted from unemployment compensation claims.

Appeal No. 2423-CA-77. The receipt of survivors' benefits does not come within the purview of Section 207.049(a)(3) providing for disqualification from benefits when receiving Old Age Benefits under Title II of the Social Security Act.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS RECEIPT OF OTHER PAYMENTS

Appeal No. 621-CA-74. A claimant was not receiving the increase in his OASI within the definition of Section 207.049(a)(3) of the Act until he actually received the check reflecting that increase.

Appeal No. 163-CA-67. The total amount of Old Age Benefits paid to a claimant must be deducted from his unemployment insurance. The amount withheld for Medicare must be included in total Old Age Benefits paid to the claimant.

Appeal No. 92-CF-62. Disability payments received under the Social Security Program are not deductible under Section 207.049(a)(3) because they are not Old Age Benefits.

Appeal No. 7366-CA-60. The language of Section 207.049(a)(3) of the Act provides for disqualification for any benefit period with respect to which a claimant is receiving or has received remuneration in the form of Old Age Benefits. The claimant will not be disqualified prior to the date he actually receives his first benefits even though the benefits covered a prior period of time.

Appeal No. 55775-AT-57 (Affirmed by 5798-CA-57). A claimant who is entitled to receive Old Age Benefit payments but does not receive them because they are being used to offset a prior over-payment of such benefits, must have the value of these payments deducted the same as if he were actually receiving benefits.

375.30 RECEIPT OF OTHER PAYMENTS: PENSION.

DISCUSSES REDUCTION OR CANCELLATION OF BENEFITS BECAUSE OF THE RECEIPT OF A PENSION, EITHER GOVERNMENTAL OR NONGOVERNMENTAL.

Case No. 793210-2. If a claimant is receiving deductible remuneration under Section 207.050 of the Act when the Initial Claim is filed, the disqualification will be effective with the Initial Claim date. Otherwise, the disqualification will begin on the date on which the first payment was received, even though the first payment includes a retroactive lump sum covering prior months during which unemployment benefits were paid.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS RECEIPT OF OTHER PAYMENTS

Appeal No. 89-04118-10-041290. Where a claimant's annuity from a particular employer vested prior to the beginning of the claimant's base period and where services performed by the claimant for that same employer after the beginning of the base period in no way affected the claimant's eligibility for, or increased the amount of, the claimant's annuity, the amount of such annuity is not subject to deduction under Section 207.050 of the Texas Unemployment Compensation Act.

Appeal No. 89-11214-10-092989. The claimant last worked for the U.S. Navy and was forced to retire on the basis of a temporary partial medical disability. The claimant's temporary disability retired pay was calculated in relation to the individual's active duty base pay. HELD: As the claimant's retired pay bore a direct relationship to the level of the individual's prior remuneration, it was based on the previous work of the individual rather than solely on that individual's disability. Therefore, the claimant's benefits were subject to reduction under Section 207.050 of the Act.

375.40 RECEIPT OF OTHER PAYMENTS: RAILROAD RETIREMENT BENEFITS.

DISCUSSES REDUCTION OR CANCELLATION OF BENEFITS BECAUSE OF THE RECEIPT OF RAILROAD RETIREMENT BENEFITS.

Note: House Bill 1086, passed by the 74th Session of the Texas Legislature discontinues deduction of Railroad Retirement benefits. Beginning with June 16, 1995, such pensions will no longer be deducted from unemployment compensation claims.

Appeal No. 4330-AT-71 (Affirmed by 599-CA-71). Railroad retirement benefits received under the Railroad Retirement Act are disqualifying under Section 207.049(a)(3) of the Act because they are "similar payments under an act of Congress".

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS RECEIPT OF OTHER PAYMENTS

MS 375.55 RECEIPT OF OTHER PAYMENTS: WORKER'S COMPENSATION.

DISCUSSES REDUCTION OR CANCELLATION OF BENEFITS BECAUSE OF RECEIPT OF WORKER'S COMPENSATION.

Appeal No. 706-CA-69. A compromise settlement of worker's compensation that does not allocate the compensation payment to any specific period of time is not disqualifying under Section 207.049(a)(2) of the Act.

Appeal No. 10288-AT-64 (Affirmed by 174-CA-64). Receipt of a lump-sum settlement covering time loss from work for the specific period of time the claimant was off from work because of a temporary, total disability is disqualifying for this entire period of time under Section 207.049(a)(2) of the Act.

Appeal No. 6221-CA-58. Receipt of worker's compensation for a temporary, total disability is disqualifying under Section 207.049(a)(2) of the Act for the period designed for which the benefits are paid. The type of agreement is immaterial so long as the agreement specifies the nature and duration of the disability for which payment is made.

Appeal No. 3964-CA-49. Worker's compensation received for a permanent, partial disability is not disqualifying under Section 207.049(a)(2) of the Act.

Appeal No. 91-006068-10-041792. "Impairment income benefits" as provided for in Section 4.26 of the Worker's Compensation Act (Article 8308-4.26, Vernon's Texas Civil Statutes) constitute compensation for a permanent partial disability and thus are not disqualifying under Section 207.049(a)(2) of the Texas Unemployment Compensation Act.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS SEASONAL EMPLOYMENT

MS 410.00 SEASONAL EMPLOYMENT.

INCLUDES CASES WHICH CONTAIN A DISCUSSION OF THE RIGHTS TO BENEFITS UNDER THE PROVISIONS RELATING TO SEASONAL WORKERS AND SEASONAL EMPLOYMENT.

410.10 SEASONAL EMPLOYMENT: FARM AND RANCH LABOR.

INCLUDES CASES WHERE WORK WAS ALLEGED TO HAVE BEEN EXEMPT AS "FARM AND RANCH LABOR" AND WAGES EITHER NOT REPORTED OR CLAIMED TO HAVE BEEN ERRONEOUSLY REPORTED.

Appeal No. 1728-CA-73. The claimant in this case was engaged in both exempt agricultural labor and non-exempt labor. The employer did not maintain records showing the amount of time claimant spent in exempt labor as required by Commission Rule 16, subsection 3. As a result, the testimony available was based on period of time of several months' duration rather than on a pay-period basis. HELD: Since the employer did not present any evidence to show that the claimant was engaged in exempt employment more than half the time on a pay-period by pay-period basis as required by Section 201.076 of the Act, all of the claimant's work for the employer was considered to be covered employment.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS WHEN EMPLOYMENT BEGINS

MS 500.00 WHEN EMPLOYMENT BEGINS.

INVOLVES SITUATIONS WHERE IT IS NECESSARY TO DETERMINE WHETHER THE ACTIONS OF THE PARTIES HAVE RESULTED IN ESTABLISHING AN EMPLOYMENT RELATIONSHIP.

Appeal No. 632-CA-65. The claimant was offered her former position with her last employer. The claimant agreed to come back, but she never appeared for work. Although the claimant had already previously been disqualified under Section 207.045 of the Act based on her separation from the employer, the Appeal Tribunal assessed a disqualification, based on the work refusal, under section 207.045 rather than Section 207.047 of the Act. HELD: The claimant should have been disqualified under Section 207.047 rather than Section 207.045 of the Act because she had never performed any work or received any earnings from the "employer". She refused an offer of work and no employment relationship had been established. Partial disqualification under Section 207.047.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS WHEN SEPARATION OCCURS

MS 510.00 WHEN SEPARATION OCCURS.

INVOLVES SITUATIONS WHERE IT IS NECESSARY TO DETERMINE WHEN SEPARATION ACTUALLY OCCURS.

Appeal No. 2133419. In the oil and gas industry, it is customary for employees working on vessels at sea to routinely alternate pre-determined periods of work on a vessel with pre-determined rest periods (home rotations). In this case, the claimant knew since beginning the job that the work schedule involved working 28 days on board the vessel followed by 28 days of home rotation, after which he would report back to work on the vessel. During home rotations, the claimant was required to take professional training, at the employer's expense, and respond to the employer's communications. The employer remained obligated to continue the benefits of employment. The claimant was paid on a bi-weekly basis for each day spent working on the vessel, but was not paid for the days spent on home rotation. After completing one such 28-days of work on the vessel, the claimant began a typical 28-day home rotation. During the period of home rotation, the claimant filed for unemployment benefits, knowing that he was scheduled to return to work on the vessel. HELD: Separation is an issue that requires an examination of all the facts and circumstances. The employment relationship in this case was not severed when the home rotation began, even though the claimant stopped performing services and earning wages. Employment relationships in the off-shore oil and gas industry that involve regular, rotating periods of extended off-shore work followed by extended periods of cessation in work and pay connected to a mutually understood return to work date continue until one party notifies the other that the employment relationship has been severed. In this case, the claimant notified the employer that the employment relationship had been severed, for purposes of unemployment benefits, when the claimant filed a claim for unemployment benefits. The claimant in such a situation voluntarily quits the work without good cause connected with the work. Disqualification under Section 207.045 of the Act.
Cross referenced at MC 5.00, VL 135.20 and VL 510.40.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS WHEN SEPARATION OCCURS

Appeal No. 99-001852-10-022300. The claimant worked four hours for the employer on December 27, 1999. He did not work a full shift on this date due to inclement weather. The claimant did not work on December 28, 1999, due to inclement weather. The employer sent crews back to work December 29, 1999, since the weather had cleared up. However, the claimant did not report for work on this date. The claimant returned to work on December 30, 1999, and worked this day and the following day. The claimant filed his initial claim for benefits on December 28, 1999. The claimant knew he should return to work when the weather improved. HELD: The employment relationship continues whenever inclement weather causes a brief cessation of work, such as in this case, of three days or less. When a claimant files a claim during this time, a separation occurs and the claimant must show good cause connected with the work to avoid a disqualification for leaving without good cause connected with the work. The record reflects no evidence that the claimant had good cause connected with work for quitting, therefore, we will reverse the Appeal Tribunal decision by disqualifying the claimant from the receipt of benefits under Section 207.045 of the Act. (Also digested at VL 450.20).

Appeal No. 96-009657-10-090297. The claimant worked as a substitute teacher for this employer, an independent school district, completing her last assignment on May 12, 1997. Shortly before the regular school year ended on May 22, 1997, the claimant requested her name be removed from the substitute teacher availability list so that she could travel overseas on a personal vacation beginning May 19, 1997. This request was granted. Had the claimant not removed her name from the availability list, continued work as a substitute teacher would have been available through June 27, 1997, when the summer session ended. The claimant had performed substitute teaching services during two previous summer sessions. HELD: At least in situations where one party has taken affirmative action to end the employment relationship prior to filing a claim and clearly lacked good cause connected with the work for quitting, the Commission will look to that affirmative action for a ruling on separation. Disqualified under Section 207.045. (Cross referenced at VL 135.05).

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS WHEN SEPARATION OCCURS

Appeal No. 97-006341-10-060597. In the home health care referral industry, either the worker or the referral service may initiate reassignment. In this case, the claimant was removed from her current assignment at her own request because she was dissatisfied. When the employer offered claimant reassignment later that same week, claimant declined because the only way she could get to the new client's home was by bus. The employer had never furnished transportation. HELD: Claimant's separation occurred when she refused reassignment, not when she requested removal from her previous client. Claimant's dislike of the only available means of transportation—riding the bus—does not constitute good cause to leave voluntarily, because transportation was claimant's responsibility. (Cross referenced at VL 150.20, VL 510.40, and VL 515.90).

Appeal No. 86-02537-10-020587. On August 18, the claimant and other employees were subjected to a temporary layoff and were told to return to work on September 2. The claimant never returned and never called in to the employer. She filed her initial claim on October 9. HELD: The claimant was separated from employment when the temporary layoff began. As no misconduct was involved in that separation, no disqualification under Section 207.044). (Cross-referenced under MC 135.30.)

Appeal No. 370-CA-70. When a claimant is reduced from full-time work to regular part-time work with the same employer and files a valid initial claim as a partially unemployed individual, the separation which should be considered under Chapter 207C of the Act occurred when the claimant was changed from full-time work to part-time work. (Cross-referenced under MC 5.00, VL 450.40 and VL 505.00.)

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS WHEN SEPARATION OCCURS

Appeal No. 6008-AT-69 (Affirmed by 639-CA-69). The claimant became incapacitated after he was laid off for an indefinite length of time due to bad weather and was replaced while he was unable to work. The separation occurred when he was laid off indefinitely due to the weather. No disqualification under Section 207.044.

Appeal No. 39676-AT-66 (Affirmed by 1546-CA-66). A claimant who is employed in regular part-time work and has not been separated from this work cannot show this work as her last work on her initial claim since there has been no separation. A claimant must show the last work from which she was separated prior to her initial claim. (Cross-referenced under 600.05.)

Also see cases under MC 450.55 and TPU 80.00, generally.

Appeal No. 6684-AT-59 (Affirmed by 6731-CA-59). The continuance of fringe benefits after layoff, as provided in the union contract, does not constitute wages where a claimant performs no services and receives no wages. The separation occurs at the time the claimant is placed in layoff status. This decision cites Karchmer vs. State, 225 S.W. 2d 222, and Todd Shipyards vs. TEC, 245 S.W. 2d 371. (Cross-referenced at MS 620.00.)

Also see Appeal No. 3229-CAC-75 under CH 30.40.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

600.00 – 600.05

MS INCORRECT LAST EMPLOYING UNIT ON INITIAL CLAIM

MS 600.00 INCORRECT LAST EMPLOYING UNIT ON INITIAL CLAIM

600.05 INCORRECT LAST EMPLOYING UNIT ON INITIAL CLAIM: GENERAL.

CASES NOT COVERED BY FOLLOWING SUB-HEADS AND INVOLVES QUESTION OF WHETHER CLAIMANT HAS NAMED HIS CORRECT LAST EMPLOYING UNIT.

Case No. 361479. The claimant's daughter was eligible for child care services funded by the Tarrant County Workforce Development Board. According to Texas Workforce Commission rules, the daughter was able to self-arrange unregulated relative care with the claimant. Reimbursement was disbursed through a contractor of the Tarrant County Workforce Development Board. The contractor exercised no control over the manner in which the child care services were provided and did not offer any training to the claimant. It simply forwarded the payments to the claimant based on the time sheets she submitted. **HELD**: The services were performed for the benefit of the claimant's daughter, and she determined who was going to perform the service. The contractor did not exercise any control over how the childcare services were performed. Thus, the claimant's daughter should have been named as the last employing unit.

Appeal No. 3947-CA-76. Prior to filing his initial claim for benefits, the claimant had most recently worked as an independent contractor. His initial claim, which named this independent contract work as his last work, was disallowed and a backdated initial claim was taken on which his last "employment" was listed. HELD: The claimant correctly named his last work as an independent contractor even though that work was not performed "in employment". Section 208.002 of the Act requires that the Commission mail notice of the filing of an initial claim to the individual or organization for whom the claimant last worked. This does not necessarily require that the last employment be named but that the last work be named whether or not it was in employment.

Appeal No. 90-06210-10-060190. On his initial claim, the claimant named as his last work a municipal work release program in which he had participated pursuant to the order of a municipal court judge, in lieu of incarceration or the payment of a fine for traffic offenses. For this work, the claimant had received credit against his outstanding traffic fines at the rate of $5.46 per hour. HELD: The claimant did not name his correct last work as required by Section 208.002 of the Act. The claimant's compulsory participation in the work release program authorized by a court of law in lieu of incarceration is analogous to services performed by inmates of a penal or custodial institution which are excluded by Section 201.074 of the Act from the definition of "employment." The claimant did not receive or earn wages for his participation in the program; rather, he earned credit at an hourly rate against fines owed to the municipality. The claimant's performance of services and receipt of credit against fines did not constitute "work" for the notification purposes of Section 208.002 of the Act because his services were ordered by a court of law.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS INCORRECT LAST EMPLOYING UNIT ON INITIAL CLAIM

Appeal No. 123-CA-70. If a claimant preached for a church and received remuneration for his services and it was the last work the claimant performed prior to the initial claim, the church must be shown as the last employer on the initial claim.

Appeal No. 49-AT-68. Section 214.003 is applicable to a situation where a claimant knowingly and willfully names an incorrect last employer to avoid disqualification. The claimant admitted that he named an incorrect last employer because he felt certain the reasons for separation from his actual last employer would result in disqualification.

Appeal No. 5182-CA-53. Where the claimant worked simultaneously for two employers and is laid off by one, he must show the work separated from on his initial claim because he has not been separated from the other work.

Appeal No. 4254-CA-49. The claimant thought he was required, when filing an initial claim for benefits, to name his last regular employment. Consequently he failed to name his actual last work, a two-day temporary job, on his initial claim. HELD: The initial claim naming an incorrect last employer was voided but the claimant was allowed to file a correct backdated initial claim because no evidence of fraudulent motive was present.

See Appeal No. 39676-AT-66 (Affirmed by 1546-CA-66) under MS 510.00.

MS 600.10 INCORRECT LAST EMPLOYING UNIT ON INITIAL CLAIM: SELF EMPLOYMENT.

INCLUDES CASES INVOLVING THE QUESTION OF WHETHER AN ASSOCIATION OR CONNECTION WHICH MIGHT OTHERWISE LEGALLY BE CLASSIFIED AS "SELF EMPLOYMENT" MAY BE CORRECTLY SHOWN AS THE "LAST WORK" ON THE INITIAL CLAIM.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS INCORRECT LAST EMPLOYING UNIT ON INITIAL CLAIM

Appeal No. 88-05036-10-042188. A claimant cannot name a partnership as his last work if he was a partner, as he was actually self-employed and cannot show working for himself as his last work. Initial claim disallowed under Sections 207.021(a)(2) and 208.002 of the Act.

Also see Appeal No. 88-05036-10-042188 under CH 40.20 and MS 630.00.

Appeal No. 62-CA-65. The claimant first worked as an employee, then as an independent contractor for "employer", until the work was completed. His last work was that as an independent contractor and should be shown on the initial claim as the last work.

600.15 INCORRECT LAST EMPLOYING UNIT ON INITIAL CLAIM: LAST WORK.

CASES WHICH INVOLVE THE QUESTION OF WHETHER THE CORRECT LAST EMPLOYING UNIT HAS HAD NOTICE OF THE FILING OF THE CLAIM.

Appeal No. 2001-CA-77. Section 208.002 of the Act requires the Commission to mail a copy of each initial claim to the last individual or organization for whom the claimant last worked prior to his initial claim. The Commission held that it is not necessary to the fulfillment of this obligation that the claimant's relationship with such last work be shown to have been "employment" as defined by Section 201.041 of the Act.

Appeal No. 1508-CA-76. The claimant's next-to-last employer and his last employer were closely associated, sharing some supervisory personnel, and the claimant named his next-to-last employer as his last employer when he filed his initial claim. The claimant's correct last employer received actual notice of the claimant's initial claim. HELD: Since the companies were closely associated, sharing some supervisory personnel, and since the last employer received actual notice of the claim, the claimant complied with the terms of Section 208.002 of the Act insofar as naming a last employer is concerned.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS INCORRECT LAST EMPLOYING UNIT ON INITIAL CLAIM

MS 600.20 INCORRECT LAST EMPLOYING UNIT ON INITIAL CLAIM: LABOR DISPUTE.

INCLUDES CASES INVOLVING THE QUESTION OF WHETHER TEMPORARY STOP GAP EMPLOYMENT WHILE ON STRIKE MAY BE SHOWN AS LAST WORK ON INITIAL CLAIM.

Appeal No. 85-05701-10-051485. Citing its holding in Appeal No. 5881-AT-69 (Affirmed by 652-CA-69) (LD 175.00), the Commission held that where intervening employment following the inception of a labor dispute is either (1) significant in duration or (2) substantially greater in duration than the period of employment with the employer engaged in the labor dispute, such intervening employment is not so casual or temporary as to warrant application of Section 207.048 of the Act to the claimant. Therefore, the claimant's initial claim, naming the intervening employer as the "last work", should not be disallowed under Section 208.002 of the Act. (Also digested under LD 175.00.)

Appeal No. 4391-CA-50. The employer-employee relationship continues while an employee is on strike and that employee must name the employer against whom he is striking as the last work on his initial claim even though there is intervening work. There must be a manifest intention by the employee to resign in order to terminate this relationship.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS QUALIFYING WAGES ON INITIAL CLAIM

MS 610.00 QUALIFYING WAGES ON INITIAL CLAIM.

CASES INVOLVING THE DISTINCTION BETWEEN WAGES "EARNED" AND WAGES "RECEIVED" FOR THE PURPOSE OF ESTABLISHING QUALIFYING WAGES ON INITIAL CLAIM.

Appeal No. 87-10097-10-061387. The claimant had contended that he was entitled to additional base period wage credits from a particular employer. At the Appeal Tribunal hearing, the claimant presented; (1) check stubs reflecting only a portion of his earnings in question and (2) a W-2 form reflecting his 1986 earnings from the employer (for whom claimant had worked for only 10 months during calendar year 1986, the first 9 months of which were included in the claimant's base period.) HELD: Proration of the claimant wages as shown on his W-2 form will establish a more accurate allocation of wage credits than relying on the admittedly incomplete check stubs produced by the claimant.

Appeal No. 76-F-68 (Affirmed by 16-CF-68). A cash advance to a seaman on wages already earned is reportable as wages in the calendar quarter in which the wages are received by the seaman. (See Commission Rule 15, 40 TAC §815.15).

Appeal No. 234-CF-66. Back pay awards are attributable to the periods of time designated in the award and must be treated as paid during the periods of time designated for which they are paid. This ruling on back pay awards is an exception to the usual interpretation of Section 207.004(a) of the Act which specifies that the Commission shall establish wage credits for each individual by crediting him with the wages for employment received by him during his base period from employers.

Appeal No. 16325-AT-64 (Affirmed by 744-CA-64). Wages are credited to the calendar quarter of the base period in which they are received by the claimant regardless of the calendar quarter in which they were earned.

Also see Appeal No. 981-CA-76 under MS 620.00.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS WHAT CONSTITUTES WAGES

MS 620.00 WHAT CONSTITUTES WAGES.

INCLUDES CASES WHICH INVOLVE THE QUESTION OF WHETHER REMUNERATION PAID THE CLAIMANT CONSTITUTES "WAGES" WHICH SHOULD BE REPORTED BY THE EMPLOYER.

Appeal No. 87-10568-10-062187. In order to qualify for the exemption described in Section 201.067(2) of the Act, an unemployment work relief or work training program must have, as a minimum, the following characteristics: (1) There is an employer-employee relationship which is not based on normal economic consideration; (2) Qualification for the jobs take into account as indispensable factors the economic and social status of the applicants; (3) The product or services are secondary to providing financial assistance, training or work experience to individuals to relieve them of their unemployment or poverty or to reduce their dependence upon various measures of relief, even though the work may be meaningful or serve a useful public purpose; and (4) The program is financed or assisted in whole or in part by a federal agency or a state or a political subdivision thereof. In addition, such an unemployment work relief or work training program will also have one or more of the following characteristics: (1) The wages, hours, and conditions of work are not necessarily commensurate with those prevailing in the locality for similar work; (2) The jobs did not, or rarely did, exist before the program began (other than under similar programs); and (3) The services furnished, if any, are in the public interest and are not otherwise provided by the employer or its contractors.

Appeal No. 89-12624-10-113089. The claimant had been employed in a work-study program at a state-supported institution of higher learning and sought base period wage credits based on this employment. HELD: The Commissioners cited the ruling of the Travis County Court At Law No. 1 in The University of Texas System v. TEC and Janie Aleman, which held that Section 201.069

MS WHAT CONSTITUTES WAGES

Appeal No. 89-12624-10-113089. (Cont'd)

of the Act excluded from the definition of employment all services performed by work-study participants at institutions of higher education. The Commissioners reasoned that because a court of competent jurisdiction has ruled that Section 201.069 of our statute excludes from employment the services of a work-study participant employed by any institution of higher education, the Texas Workforce Commission should be guided by such ruling, in the absence of a contrary ruling from a higher authority.

Appeal No. 2855-CA-77. Prior to filing her initial claim, the claimant had worked throughout her base period in a work-study program at a college. During the entire duration of her work-study employment, she was at least a half-time student. HELD: Under Section 201.069 of the Act, the claimant's services did not constitute employment because she was performing services in the employment of a school and was regularly attending classes at such school.

Appeal No. 2622-CA-77. The claimant worked as a truck driver. His compensation consisted of a 5% commission on the gross revenues of his truck. He was permitted to draw up to a fixed amount each week against his gross earnings for personal expenses. The employer's quarterly reports reflected only the claimant's gross earnings less the advances and the advances themselves were not reported at all. HELD: The claimant was awarded additional wage credits to reflect the amounts of his advances and these were credited to the quarter in which the advances were actually made.

Appeal No. 981-CA-76. Section 201.081 of the Act defines wages to mean all remuneration paid for personal services, including the cash value of all remuneration paid in a medium other than cash. Therefore, the cash value of an apartment furnished to the claimant must be included in the wages credited to the claimant from this employer. Furthermore, since the claimant received monetary remuneration on a bi-monthly basis, the value of the non-monetary remuneration received by him was proportionately allocated among his bi-monthly pay periods. (Cross-referenced under MS 610.00.)

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS WHAT CONSTITUTES WAGES

Appeal No. 1621-CA-73. If an employer does not produce payroll records and comply with Commission rules by reporting the amount of wages paid to an employee under Section 207.004(c) of the Act, the Commission may rely on the best information obtained by it as to the claimant's work and wages during the base period.

Appeal No. 9987-ATC-71 (Affirmed by 1206-CAC-71). Payments made to a claimant by an employer in accordance with Public Law 90-202 because of age discrimination, are considered as wages and are attributable to the period beginning with the date the claimant applied for work with the employer and was refused employment. (In this regard, the principle is analogous to the cases involving the award of back pay.) (Also digested under CH 30.60 and MS 375.05.)

Appeal No. 2835-AT-71 (Affirmed by 657-CA-71). The term "wages" does not include the amount of any payment made to or on behalf of an employee under a plan established by an employer which makes provisions for his employees generally on account of sickness or accident disability.

Appeal No. 5273-AT-68 (Affirmed by 860-CA-68). An insurance solicitor and debit collector who is paid by the week a sum which is determined solely by the amount of his insurance sales and collections during the preceding calendar quarter is held to have been paid solely by way of commission and is exempt under Section 201.071 of the Act.

Appeal No. 2371-AT-67 (Affirmed by 55-CA-68). Payments made to the claimant by the employer during a period when he was not working and was drawing workmen's compensation due to an injury, as provided by union contract, were not for personal services and were not wages as defined under Sections 201.081 and 201.082.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS WHAT CONSTITUTES WAGES

Commission decision involving tax liability of Transport Workers of America. Payments made by a union to union officials and member for time lost from their regular employment due to their pursuit of union business constitute wages under Section 201.081 of the Act.

Also see Appeal No. 9987-ATC-71 (Affirmed by 1206-CAC-71) under MS 375.05 and Appeal No. 6684-AT-59 (Affirmed by 6731-CA-59) under MS 510.00.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS WHAT CONSTITUTES EMPLOYMENT

MS 630.00 WHAT CONSTITUTES EMPLOYMENT.

INCLUDES CASES WHICH INVOLVED THE QUESTION OF WHETHER SERVICES RENDERED WERE IN EMPLOYMENT AS DEFINED IN SECTION 19(G) OF THE ACT.

Appeal No. 88-05036-10-042188. The claimant last worked for a partnership in which he was a general partner and manager. He named this work as the last work on his initial claim. Without consulting the other partners, the claimant had reported to the Texas Workforce Commission wages paid to himself. HELD: A claimant cannot name a partnership as his last work if he was a partner, as he was actually self-employed and cannot show working for himself as his last work. The claimant was, therefore, not in "employment" as that term is defined in Section 201.041 of the Act and all wage credits erroneously reported by the employer for the claimant during his base period were deleted. As the deletion of such wage credits left no reported wage credits within the claimant's base period, the claimant's initial claim was disallowed under Section 207.021(a)(5) of the Act. (Also digested under CH 40.20 and cross-referenced under MS 600.10.)

Appeal No. 86-03686-10-022587. The claimant contracted with a company, a subject employer, to work as an extra in a television commercial. That organization paid the claimant and it hired a production company. Although the company which contracted with the claimant sent a representative to the filming of the commercial, he gave only general directions to the production company's director. The latter actually controlled the actions of the actors and the filming of the commercial. HELD: The organization which contracted with the claimant and paid the claimant was his employer regardless of his having been given directions as to his part in the commercial by an employee of another entity which had itself been employed by the employer.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS WHAT CONSTITUTES EMPLOYMENT

Appeal No. 87-17475-10-100287. The claimant, an adult, and his father performed services for the employer, an employer subject to the Act. The employer told the father how the job of painting car washes was to be performed. In turn, the father supervised the claimant's work as a painter. The claimant worked at least 8 hours a day, was paid by the hour and was paid directly by the employer. HELD: The facts that the claimant was paid by the hour, that he worked at least 8 hours a day, that the employer instructed his supervisor as to how work was to be performed, that the claimant had a continuing relationship with the employer, that the claimant was paid by the employer, and that the claimant felt he was an employee, all show that the claimant was in "employment" as defined by Section 201.041 of the Act.

Appeal No. 86-13145-10-070687. The claimant performed services on a full-time basis during the day for the employer, a private university. She also attended evening classes at the university. HELD: Although the claimant was regularly attending classes at the university while working there, her primary association with the employer was as an employee and not as a student. Since the claimant's academic pursuits were secondary to her employment, the Commission held that she was engaged in employment as defined by the Act. Thus, the exclusionary language in Section 201.069 did not apply to the claimant's performance of services.

Appeal No. 86-00651-10-122986. During his base period, the claimant worked for a foreign corporation which was a wholly-owned subsidiary of a domestic Texas corporation liable under the Texas Unemployment Compensation Act. The foreign corporation performs services for the Texas corporation on a contractual basis. Throughout the claimant's employment, he worked for the foreign corporation and was usually stationed in Singapore. Although the claimant usually took instructions from a supervisor in Singapore who was an employee of the foreign subsidiary, the claimant usually interfaced and received instructions from a vice-president of the Texas corporation, headquartered in Houston. The claimant also occasionally engaged in business travel with employees of the Texas corporation. The Texas corporation also handled all of the payroll records for the foreign subsidiary and the claimant received

MS WHAT CONSTITUTES EMPLOYMENT

Appeal No. 86-00651-10-122986. (Cont'd)

his paychecks from Houston. Lastly, the Texas corporation and the foreign subsidiary shared some members of their Board of Directors. HELD: As the claimant's services were performed, in substantial part, under the direction and control of the Texas corporation based in Houston, the claimant was in the employment of that corporation within the meaning of Section 201.041 of the Act. The fact that the claimant was ostensibly performing services for the foreign corporation is irrelevant since that entity would be considered the agent of the Texas corporation under Section 201.046) of the Act. This conclusion was further supported by the following: the claimant worked closely with and received instructions from employees of the Texas corporation, he received his paychecks from the Houston office of the Texas corporation, which handled the foreign corporation's payroll records and some officers of the Texas corporation were also officers and directors of the foreign corporation.

Appeal No. 85-12107-10-092286. Claimant worked two days for the employer as an actor to complete a film. Claimant's agency negotiated the contract with the employer. Claimant was directed to work at a specific location and was paid union scale. HELD: The fact that the claimant offered his services to more than one employer did not render him an independent contractor. During the period he was performing, he was under the specific control of the employer. Additional wage credits awarded.

Appeal No. 4123-CSUA-76. The claimant had performed child care services during her base period for a neighbor who was attending a work incentive training program. The claimant was reimbursed for such services by the State Department of Public Welfare (now the Department of Human Resources) pursuant to a written contract between the claimant and her neighbor, which was witnessed by a DPW representative. During the performance of such services, the claimant was never supervised in any way by either her neighbor or any DPW representative. At the end of each month, the claimant submitted a payment voucher to DPW which

MS WHAT CONSTITUTES EMPLOYMENT

Appeal No. 4123-CSUA-76 (Cont'd)

indicated the number of hours she had performed child care services for her neighbor. No deductions were made in the claimant's reimbursements by DPW for federal income taxes or for social security taxes. HELD: The claimant was not in the employment of DPW within the meaning of Section 201.041 of the Act. Although it was understood, by the terms of the written contract between the claimant and the recipient, that the claimant would be reimbursed by DPW, no rights of control or direction over the performance of services by the claimant was reserved by DPW nor did the evidence indicate that such direction or control were actually exercised by DPW.

Appeal No. 2831-CA-76. The claimant worked during his base period as a trainee for a community action agency under a grant provided by the Comprehensive Migrant and Seasonal Farmworkers Program funded by the Department of Labor. All of his wages were paid by this program. His work ended at the end of the training program. HELD: The claimant was not employed in covered employment and was therefore denied wage credits. Section 201.067(2) therefore states that "employment" shall not include service performed as part of an employment work relief or work training program assisted or financed in whole or in part by any federal agency. The Commission found the claimant to have been employed in such a work training program.

Appeal No. 2347-CA-76. The claimant was employed by the Economic Development Administration, a federal agency, in a program designed to train persons in the field of restoration craftsmanship. The claimant was an unemployed, skilled carpenter who had had no experience in restoration work. HELD: The claimant was not working in covered employment. His employment was exempt under Section 201.067(2) of the Act which provides that employment shall not include service performed as a part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS WHAT CONSTITUTES EMPLOYMENT

Appeal No. 1528-CA-72. The fact that the claimant considered herself to be an independent contractor is strong evidence that claimant was an independent contractor.

Carol and N.J. Segal, Jr., dba the Lages Co. and A.L. Mechling Barge Lines, Inc. The Commission in this case established some guidelines for dealing with an employer practice known as payrolling. Payrolling may be defined as an attempt by an employer to avoid, in whole or in part, the legal incidence of unemployment compensation tax by using an agent to report its payroll on the poor risk segment of its payroll. In this manner, an employing unit could avoid having to pay the unemployment tax altogether or an employer, by placing its high risk employment on another payroll, can lower or retain a low tax rate on its overall payroll. It is the Commission's responsibility in administering the Act to limit such a practice as payrolling so that it will not adversely affect the intended purpose of the Act.

Three elements to consider when determining who is to be required to make contributions into the unemployment compensation fund are:

(1) For whom is the service performed?
(2) Who pays for the service performed?
(3) Who controls the performance of the service?

Commission decision involving tax liability of Austin Postal Services, Inc. Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution, is exempt from "employment" under Section 201.073 of the Act. However, the employer has the burden of proving individuals so employed were under age eighteen.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS WHAT CONSTITUTES EMPLOYMENT

Commission decision involving tax liability of Dallas Automobile Club. If a written contract of hire gave the employer the "right to control" the manner and details of how the work is to be performed, it does not matter that the employer did not, in fact, exercise such control.

Commission decision involving tax liability of Logan U. Mewhinney, M.D. An employee is considered in employment until the employer-employee relationship has been severed, such as by a resignation or by a discharge. Part-time employees who have regular working hours each week and are paid on a semi-monthly salary are employees on their days off, regardless of whether they were actually performing services or not.

Commission decision involving tax liability of Chatham & Associates. A court reporter is a highly trained professional practicing a skilled calling. If he is not supervised in his work, furnishes his own transportation and pays his own expenses, his remuneration is based on the amount of work he performs and no deductions are made from his earnings, and he is free to determine the hours of work and, generally, the site of the work, he is not in employment and no unemployment taxes are due on his earnings.

Commission decision involving tax liability of Regina Guild. An actual rather than potential exemption by the Internal Revenue Service of an allegedly non-profit organization is required before an employing unit's status can be considered under Section 201.023 of the Act. Otherwise, Section 201.021 applies.

Commission decision involving tax liability of Rio Grande Family Radio Fellowship, Inc. The corporation was not a convention or association of churches. Although it was operated primarily for religious purposes, it was not operated, supervised, controlled or principally supported by a church or a convention or association of churches. Therefore, services performed for the corporation were not exempt under Section 201.066 unless the corporation was a church. The corporation was not a church because it was interdenominational and was not a body of Christian believers having the same creed, rites, etc. It was simply a radio station which primarily broadcasted programs of a religious nature.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS 630.00 (7)

MS WHAT CONSTITUTES EMPLOYMENT

Commission decision involving tax liability of MilMar, Inc. etc. (owners of shrimp trawlers). Unless there is total relinquishment of control through a bare-boat, or demise, charter, the owner of the trawler is considered, under maritime law, to have sufficient control to be charged with the duties of an employer. The owner is the employer of the captain and the crew. (See Section 201.075 of the Act.)

Commission decision involving the tax liability of Ruth Craig dba Yellow Cab of Grayson. The Commission was faced with the question of the employment status of taxi cab drivers operating under a lease agreement. In reaching a conclusion that the drivers in this case were employees of Yellow Cab of Grayson, the Commission followed several federal cases which have invariably held drivers, who were not accountable for the balance of fares collected and who paid a stipulated daily rental to the owner of the cabs, to have been lessees or independent contractors. Conversely, those drivers who pay the owner of the cabs a percentage of the fares and who are dispatched by phone or radio are generally considered to be in employment.

Commission decision involving the tax liability of Barshu, Inc. Barshu, Inc. was the owner of several trucks equipped for specialized hauling. The trucks were leased to C & H Transportation Co. The Commission determined that the drivers operating the trucks were not employees of Barshu, Inc. The legal entity which possesses the necessary permits from the appropriate state and federal authorities to engage in business as a specialized motor carrier not only has the right to control the drivers of the trucks operating under its permits but, in fact, has the duty to exercise direction and control over the performance of their services.

APPEALS POLICY AND PRECEDENT MANUAL

MISCELLANEOUS

MS WHAT CONSTITUTES EMPLOYMENT

Commission decision involving the tax liability of C & H Transportation Company, Inc. C & H Transportation Co., Inc., was engaged in the interstate transport of various products. It operated under certificates of public convenience and necessity issued by the Interstate Commerce Commission and various state regulatory agencies. An issue of tax liability arose concerning whether the drivers of tractors leased to C & H Transportation were employees of that company. The Commission found that while a number of factors tended to indicate control by C & H over drivers of the leased equipment, the elements so indicating control were the direct result of government regulations. Various elements of control which the lessee (C & H) was required by government regulation to maintain were not inconsistent with the driver not being the lessee's employment.

Commission decision involving the tax liability of Sandra and John D. Hartley, dba Big John Enterprises. When a transportation company leases a tractor from a person also performing services as a driver, the cost of leasing the motor vehicle and the cost of providing a driver should be separated to determine the amount of wages or earnings which should be reported to the Commission for the purpose of determining the amount of unemployment compensation contributions due the Commission by the company. The existence of the employment relationship is reinforced where the company's dispatchers dictate when, where and how the drivers are to perform their duties and where the drivers are required to submit periodic reports to the company.

Decision involving tax liability of United Missionary Aviation Inc. dba Missionary Tape and Equipment. The Legislature did not intend to exempt from unemployment taxation services performed for every organization engaged in some form of religious activity. Conversely, they set out specific categories of organizations entitled to an exemption. Since the corporation in question was not a church, convention or association of churches and was not controlled or principally supported by the church, convention or association of churches, it was not exempt under Section 201.066 of the Act, and it was not necessary to decide whether the corporation was operated primarily for religious purposes.