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Unemployment Compensation—Part Time Farming—Partial Unemployment

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the innocence of both parties may be inferred.[33] The trial judge, for fear of being reversed, may be reluctant to instruct on unavoidable accident. To this date, Washington, with the majority of states,[34] has not held it reversible error for the trial court to refuse to give the instruction.[35] The reason generally given is that the instructions on negligence, proximate cause, and burden of proof adequately protect the defendant.[36]

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UNEMPLOYMENT COMPENSATION

Part Time Farming—Partial Unemployment. "We . . . hold that a person is not automatically ineligible for unemployment compensation simply because he engages in some remunerative activity of a personal or self-directed nature. Respondent . . . was unemployed within the meaning of RCW 50.04.310."[1]

In these words the Washington Supreme Court permitted the recovery of unemployment compensation, under our statute, by a claimant who, though temporarily unemployed, assisted in the operation of his dairy farm.

This decision marks two important developments in the construction of RCW Title 50, which contains the Washington Unemployment Compensation statute. It represents the first attempt by the court to define "self-employed," which the statute omits to define, and, perhaps more importantly, it rests on a basis of reason and reflection, rather than on a dogmatic adherence to precedents from other jurisdictions. Both seem to carry importance for the future.

Mr. Bartel, the claimant, was customarily employed in various types of work for other employers in his locale. In addition, he and his wife and nineteen-year-old son opearted a small dairy farm, from which

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[33] In Van Ry. v. Montgomery, 58 Wn.2d 46, 47, 360 P.2d 573, 574 (1961), the court said: "In determining whether the court properly submitted to the jury the question of whether the accident was unavoidable, the evidence must be viewed in the light most favorable to the defendants." See Tomblinson v. Wise, 163 Wash. 341, 300 Pac. 1056 (1931).

[34] See Annot. 65 A.L.R.2d 12, 136 (1959).

[35] Cooper v. Pay-N-Save Drug Co., 59 Wn.2d 829, 835, 371 P.2d 43, 47 (1962).

[36] Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701 (1961). *Contra,* Haynes v. Martinez, 260 S.W.2d 369 (Tex. Civ. App. 1953).

[1] Bartel v. Employment Security Department, 160 Wash. Dec. 710, 720, 375 P.2d 154, 161 (1962).

they netted approximately $1,100 annually. Mr. Bartel's participation in this endeavor consisted chiefly in assisting with the milking, a task which required about three hours a day. He also assisted with other chores while otherwise unemployed. Overruling the Commissioner of Employment Security and sustaining the Whatcom County Superior Court, the supreme court held that Mr. Bartel was unemployed within the meaning of the statute.

The department argued, and the court agreed, that the terms "unemployed" and "self-employed" are inconsistent, and that if one is "self-employed," he cannot be "unemployed." The court quotes extensively from OPS. ATT'Y GEN. 53-55 No. 189 (1953), which discusses the precise point and concludes that the terms are mutually exclusive.

The claimant maintained that he was not "self-employed," but instead was "partially unemployed," within the meaning of the statute.[2] The department replied by citing a regulation promulgated by the commissioner pursuant to the statute.[3] This regulation provided that partial unemployment exists only when the relationship between employer and employee continues to exist, the only difference being a reduction in the number of hours employed. The court disposed of the regulation, saying that the department possesses no authority to impose conditions upon eligibility which are not imposed by the legislature.

Therefore the court was left with one question: Did the claimant's farming activities constitute "self-employment" so as to render him ineligible for unemployment compensation benefits?

Not only is this a question of first impression in the Washington courts, but it seems to have been seldom decided elsewhere. Furthermore, the few authorities are in conflict.

The department relied heavily on *Hatch v. Employment Security Agency*,[4] where the Idaho court held that an unemployed carpenter who worked eight or more hours each day in constructing a home for himself was ineligible for benefits under the Idaho statute, which is substantially identical in this respect to that of Washington.

Johnson v. Board of Review[5] presented the contrary view, the one adopted by the Washington court. The department admitted that the facts of the *Johnson* case are virtually indistinguishable from those of the instant case. Pointing to this admission, the court said, "There

[2] RCW 50.04.310.
[3] *Ibid.*
[4] 79 Idaho 246, 313 P.2d 1067 (1957).
[5] 7 Utah 2d 113, 320 P.2d 315 (1958).

is nothing to interfere with the applicability of the reasoning in the Utah case to the case at bar."[6]

Other than these cases which the court expressly considered in its opinion, there are few others. There is a cluster of decisions from the Pennsylvania courts,[7] and one recent case from Louisiana.[8] In each of these the borderline self-employed claimant was denied the benefits. Perhaps the Pennsylvania cases can be explained in terms of economic consequences to the state if the decisions had gone the other way: The courts appeared to be sensitive to the possibilities of a deluge of laid-off coal miner-farmers exhausting the unemployment fund in a short period of time. Given the prevailing economic circumstances in today's Pennsylvania mining country, the Pennsylvania courts' fears are probably well-founded. In *Zeringue v. Administrator,*[9] the Louisiana court purported to follow the Pennsylvania decisions, but that case is clearly distinguishable from them, and from the instant case. In *Zeringue* the claimant was a self-employed, but somewhat unsuccessful, insurance salesman. He had completely abandoned his former employment. The court pointed out, as did the Washington court in *Bartel,* that trivial self-employment would not have barred the claimant. But Zeringue's self-employment was full-time. Bartel's was clearly not.

For the reasons stated, it appears that the only apposite cases are the two that the court acknowledged.

The *Johnson* case is close on the facts, and the reasoning is persuasive:

> [O]ther business is not to be discriminated against in favor of self-employment by allowing compensation in the latter and denying it in the former; by the same token, where only partial income is available from either source, we can see no reason why benefits should be allowed to one partially employed by another but denied if he works for himself. That would subsidize working for others and penalize self-employment, and if self-employment were followed, would not fulfill the purposes of the Act.[10]

On the other hand, the *Hatch* case seems to be clearly distinguishable. The Idaho court found unappealing the prospect of awarding

[6] 160 Wash. Dec. at 719, 375 P.2d at 160 (1962).
[7] See, *e.g.,* Meckes v. Board of Review, 190 Pa. Super. 578, 155 A.2d 463 (1959); Kespelher v. Board of Review, 178 Pa. Super. 511, 116 A.2d 239 (1955); Kapera v. Board of Review, 178 Pa. Super. 508, 116 A.2d 238 (1955); Muchant v. Board of Review, 175 Pa. Super. 85, 103 A.2d 438 (1954).
[8] Zeringue v. Administrator, 136 So. 2d 87 (La. 1962).
[9] 136 So. 2d 87 (La. 1962).
[10] 7 Utah 2d 113, 320 P.2d 315, 318 (1958).

unemployment benefits to one who is constructing for himself a "modern Norman brick, three bedroom, two bathroom, home...."[11] It said,

> This is not a case of an unemployed person doing odd jobs or making minor improvements or repairs on his home.... This is a case of a skilled artisan pursuing his skill, and engaging in work of his craft during an extended period in the construction of a permanent and valuable improvement for himself.[12]

Yet, the Washington court did not choose to rest its decision on this distinction. It said,[13] "We do not purport to base our decision upon the weight of authority, but upon what we regard as the better reasoned interpretation...." It also said, "We think that the application of the Utah rule would best effectuate the purposes of the Employment Security Act."[14]

The court clearly established a rule of flexibility setting forth considerations that it deemed relevant, though not controlling:

(1) Availability of applicant for resumption of regular employment.
(2) Hours per week devoted to activity in question.
(3) Net income earned from such activity.
(4) Nature of regular employment.
(5) Does the applicant engage in the same activities during the course of his regular employment, and if so, to what extent?[15]

In light of the historical—and contemporary—objectives and purposes of unemployment compensation plans, the decision appears to be a sound one.[16]

The court has adopted a realistic approach, rejecting the formalistic

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[11] 313 P.2d 1067, 1071 (1957).
[12] 313 P.2d 1067, 1071 (1957).
[13] 160 Wash. Dec. at 719, 375 P.2d at 161 (1962).
[14] 160 Wash. Dec. at 719, 375 P.2d at 160 (1962).
[15] 160 Wash. Dec. at 715, 375 P.2d at 158 (1962).
[16] The purposes of unemployment insurance appear to be (1) provision of subsistence to workers (and their families) who have been temporarily thrown out of work by economic cycles and fluctuations and (2) maintenance of a floor under the purchasing power of the economy, so that a collapse such as that of the early 1930's might be prevented. Frances Perkins, then Secretary of Labor, testified before the U.S. Senate Finance Committee in 1935 as follows: "It becomes necessary [to] ... provide for a small but regular income for those who are put out of work during periods of depression through no fault of their own, for those affected for shorter periods due to technical improvements of machinery or to the seasonal fluctuations of industry over which they have no control, and for those affected by movements of industry from one section of the country to another. ...

"In thinking of the validity of a social means of providing against social insecurity, we have to recognize that in a method of production by machinery and by the application of power to machinery we have built up a positive necessity for mass consumption to balance our mass production. If people are not able to buy in large amounts the product of our great industries, those industries cannot continue to operate

limitations suggested by the Department in both its regulation and its arguments. It has established a policy of flexibility (possessing the earmarks of durability—all nine judges concurred in the opinion), which will permit the true sufferer to receive remuneration, but still it specifically refrained from opening the door to undeserving claimants:

> This decision is not to be construed as standing for the proposition that all persons who are laid off, and who are relatively unsuccessful in their self-employment endeavors, are considered to be unemployed, or partially unemployed, and entitled to receive the difference between the amount they make and the benefits to which they otherwise would have been entitled.[17]

This decision might be criticized for "opening the floodgates of litigation" as each farmer-laborer seeks to discover whether his particular circumstances will find favor with the supreme court, but this is why we have courts. Surely this decision will produce more litigation, but as each case is decided the boundaries will become more certain and fixed, and in the end we will have a rule that is the product of reason and policy, and not one that is closely circumscribed by the shortcomings of semantic definitions.

HAYES ELDER

WILLS

Testamentary Capacity—Insane Delusions. *In re Meagher's Estate*[1] apparently establishes a new rule requiring that the contestant of a will on the ground of insane delusions must show that the delusion,

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to produce goods, to make them and to sell at profit sufficient to attract to that industry the capital of the country. Without purchasers with money in their pockets, the wheel of that industry cannot keep going. . . . We must anticipate in the future the building up . . . of a large and steady purchasing power for a large number of people." Hearings on S. 1130 Before the Senate Committee on Finance, 74th Cong., 1st Sess. (1935). William Green, then president of the CIO, testified to the same effect. Evaluating the Federal Social Security Act in a speech (An appraisal of the Federal Social Security Act, Delivered before the Institute of Public Affairs, University of Virginia, Charlottesville, Virginia, evening of July 10, 1936) Winthrop W. Aldrich, Board Chairman of the Chase National Bank of the City of New York, commented as follows: "The gains through unemployment insurance are numerous. Its first effect is to diminish in the mind of the worker the fear of insecurity. He knows that if he should lose his job he would not immediately face a total loss of income. There will be at least some income during a few weeks or months while he is looking for new work. This relief . . . will be an amount that he can count on. There will be no humiliation in accepting it. . . . It will be an earned right. . . .

"There is something to be said, also, for the effect of unemployment insurance on business. It helps to stabilize the buying power of the workers. . . . [it] helps . . . to keep buying in its accustomed channels."

[17] 160 Wash. Dec. at 719, 375 P.2d at 161 (1962).

[1] 160 Wash. Dec. 691, 375 P.2d 148 (1962).