

**In the Matter of the *Employment Insurance Act*,
S.C. 1996, c. 23**

and

**In the Matter of a claim for benefits by
Noel Buckley**

and

**In the Matter of an Appeal to an Umpire by the Claimant
from the decision of a Board of Referees given
at Burnaby, British Columbia on May 14, 2007**

Appeal heard at Vancouver, British Columbia on April 16, 2008

DECISION

R. C. STEVENSON, UMPIRE:

Mr. Buckley appeals from the decision of a Board of Referees dismissing his appeal from Commission rulings (1) that it could not pay him benefits from February 7, 2005 to May 27, 2005 and as of May 30, 2005 because he was involved in the operation of a business and could not be considered unemployed and (2) imposing a penalty of \$3,180 for making false declarations and the consequent issue of a notice of a very serious violation.

Mr. Buckley lost his employment as an engineering physicist with Cellex Power Products Inc. on October 8, 2004. He applied for benefits on November 1. On November 20 he was seriously injured in a mountain biking accident.

Designing and assembling bikes had been Mr. Buckley's part time hobby since February 2002. He contracted out the manufacture of components. In April 2003, for liability reasons, he incorporated as 668598 BC Ltd. While employed with Cellex he devoted 20 to 30 hours a week during evenings and weekends to his hobby. He continued to devote the same amount of time while unemployed in 2005. It was only after his unemployment benefits were exhausted and he had not found another employment that he decided to devote

his efforts full time to the bike business. In November 2005, after the time period in issue on the appeal, he incorporated another company, Knolly Bikes Inc. He did not draw any income from his bike venture until March 2006.

The Self-employment Issue

Mr. Buckley received sickness benefits from November 20, 2004 to February 5, 2005 and regular benefits from February 6, 2005 to October 29, 2005. The issue before the Board of Referees was whether, from February 7, 2005 to October 29, 2005, he was self-employed or engaged in the operation of a business and, if he was, whether he was self-employed or engaged to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood.

To be entitled to benefits a claimant must be unemployed. Subsection 11(1) of the *Employment Insurance Act* provides that a week of unemployment is a week in which a claimant does not work a full working week. Subsection 30(1) of the *Employment Insurance Regulations* says that a claimant who is self-employed or who is engaged in the operation of a business on his own account is considered to have worked a full working week. However, subsection 30(2) of the Regulations provides that where a claimant is self-employed or engaged in the operation of a business to such a minor extent that one would not normally rely on it as a principal means of livelihood, he will not be regarded as working a full working week.

Subsection 30(3) of the Regulations says:

The circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2) are

- (a) the time spent;
- (b) the nature and amount of the capital and resources invested;
- (c) the financial success or failure of the employment or business;

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- (d) the continuity of the employment or business;
- (e) the nature of the employment or business; and
- (f) the claimant's intention and willingness to seek and immediately accept alternate employment.

While all six factors are relevant the time spent and the intention and willingness to seek and accept alternate employment are most important. A claimant who does not have the time to work or who is not actively seeking work should not benefit from the Employment Insurance system.

Charbonneau v. Canada (Attorney General), 2004 FCA 61; 324 N. R. 89 at paragraph 10.

With respect to this issue the Board of Referees, under the heading FINDING OF FACT / APPLICATION OF LAW, said:

The issue before the Board is the imposition of a disentitlement pursuant to Sections 9 and 11 of the *Employment Insurance Act* and Sections 30 of the Regulations for failing to prove he was unemployed. The onus of proof is on the claimant to prove that he has a week of unemployment. To put it another way, the onus is on the claimant to rebut the presumption that he is working a full working week (*Lemay (A-662-97)* and *Turcotte (A-664-97)*).

The Board, when reviewing this issue must consider the following factors: time spent, the nature and amount of capital and other resources invested, the financial success or failure of the business, the continuity of the business, the nature of employment and the claimant's intention and willingness to seek and accept alternate employment.

The Board finds as fact that by the claimant's own admission he was working 20-30 hours on his "bike hobby" and the promotion of his bike invention which tended to be more hours than he was spending looking for a job. The Board finds also as fact that in Exhibit 10-3 of the claimant's financial statement for the year ended April 30, 2006, that one does not have to be making income to be involved in self-employment. . . . The Board also finds as fact that the claimant stated that he did put down "self employed" on his 2006 Income Tax form but was not sure what he put down in 2004, or 2005. The Board believes that the claimant should know whether he recorded self employment in 2004 and 2005 on these Income Tax forms and by not answering the question he leaves himself open as to whether he was self employed.

And under the heading DECISION:

After a careful review of the information contained in the docket and that obtained at the hearing, as well as relevant provisions of the *Act* and applicable jurisprudence, the Board **dismisses** the appeal on the issue of failing to prove he was unemployed.

Subsection 114(3) of the *Employment Insurance Act* requires that a decision of a Board of Referees include a statement of the findings of the Board on questions of fact material to the decision. Failure to do so is an error of law. In this case the Board failed to make adequate findings with respect to the six factors mentioned in subsection 30(3) of the Regulations and also considered irrelevant matters such as the time spent in the business compared to time spent looking for employment and Mr. Buckley's inability to say whether he said on his Income Tax returns for 2004 and 2005 that he was self-employed. It would be surprising if he did as he did not have any self-employment income to report.

The decision of the Board of Referees must be set aside. While the matter could be referred back for re-hearing by a newly constituted Board of Referees there is no issue of credibility involved and I will give the decision the Board of Referees should have given, addressing first the six prescribed factors.

Time spent. Mr. Buckley devoted 20 to 30 hours a week to the bike design business throughout the period in issue. While that falls short of what is generally considered to be full time, it is a substantial investment of time and energy.

Nature and amount of capital and resources invested. The only detailed financial information in the record is a comparative statement of income and deficit and a comparative balance sheet for the years ended April 30, 2005 and 2006. As of April 30, 2005 the company had cash of \$4,893, accounts receivable of \$4,039 and income taxes receivable of \$24,250. It had capital assets of \$2,537 consisting of computer equipment, software and furniture, fixtures and equipment. Current liabilities were \$69,970 and there was \$44,725 due to the shareholder, Mr. Buckley. The figures changed significantly by April

30, 2006 but we do not know how much of the change occurred after October 2005. The fact investments were made before 2005 does not render them irrelevant to the period from February to October 2005 - the venture was ongoing.

Financial success or failure of the business. The business had not achieved any financial success. The numbered company had a deficit of \$66,421 at April 30, 2005 and \$118,637 at April 30, 2006.

Continuity of the business. The business was continuing throughout the time that Mr. Buckley received unemployment benefits.

Nature of the business. Mr. Buckley is one of those fortunate people whose interests coincide with his qualifications and abilities. Engineering physics goes hand in hand with the design and development of bicycles of any kind.

Intention and willingness to seek and accept other employment. When Mr. Buckley was interviewed on June 16, 2006 (Exhibit 8) he said he was available for work in his usual occupation. He had accepted two contracts but could not perform them because of his injury. He said it was difficult to find work in his field because the "industry was down." He said, "Basically I was looking for contract work and mechanical design, in the alternative energy field, but that was not available. They [Cellex Power Products Inc.] told me that there was potential work available but it never evolved."

Mr. Buckley was spending roughly half of normal working hours at the business throughout the period in issue. He looked for work in his field and would have accepted employment if it had been available. It was only when he

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had neither employment nor unemployment benefits that he decided to make the bike business a full time venture. One who devotes half of normal work time to a business that is continually losing money would not normally rely on it as a principal means of livelihood. I therefore find that Mr. Buckley was engaged in the business to the minor extent described in subsection 30(3) of the Regulations.

The Penalty Issue

In its letter imposing the penalty the Commission said:

According to our records, you knowingly omitted on 12 occasion(s) to furnish information. Contrary to what you undertook, we have learned that you were self employed. You omitted to advise of your self employment activities on your application for benefits. You were also advised that you were to declare any work that was done without pay on your interdec reports. In addition, you failed to report that you were outside of Canada between September 26, 2005 and September 30, 2005. . . . Please be aware that under the Employment Insurance Act a penalty of \$3,180 for 12 false declarations(s) has been imposed.

In its written representations to the Board of Referees the Commission said:

The Commission concluded that the claimant knowingly made a misrepresentation by providing false or misleading information when he failed to declare his self employment from May 30, 2005 onwards and that he was outside of Canada from September 26, 2005 to September 30, 2005.

The Commission also outlined the guidelines it used in fixing the amount of penalties both before June 1, 2005 - related to a claimant's weekly benefit rate - and after June 1, 2005 - related to the overpayment resulting from false representations. It said Mr. Buckley's penalty was calculated as follows:

This was the claimant's first offence so the base penalty is 50% of the overpayment. The overpayment is \$9,086.00. The Commission determined that there were mitigating circumstances in that the claimant stated that he "guesses" that he did not report his business as he was not making any money at this business. The penalty was reduced by another 15%.

$$\$9,086 \times 35\% = \$3,180$$

The Board of Referees said this with respect to the penalty issue:

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To determine whether a penalty has been correctly assessed, the Board must determine whether a false or misleading statement has been made, whether it was made knowingly, and, if so, did the Commission properly exercise its discretion in respect to the penalty. It is clear that the statement made by the claimant was incorrect. The claimant himself admitted as much. When asked "did you work", the claimant responded "no" even though he had worked. Thus, the statement was false or misleading.

It is well established that it is not enough that information be shown to be false, but it must be shown that the claimant knowingly supplied that false information in order to be subject to a penalty. Was the statement made knowingly? **Gates A-600-94** states "knowingly" is determined by a balance of probabilities based on the evidence of each case. Jurisprudence has also established that there does not have to be an intention to deceive the Commission on the part of the claimant to make a finding that the claimant knowingly provided false or misleading information. "It is (also) well established that it is not enough that information be shown to be false, but it must be shown that the Applicant knowingly supplied that false information in order to be subject to a penalty" (**BAJWA A-89-02**). What needs to be decided is, on the balance of probabilities, did the claimant subjectively know the information given was false for a penalty to be imposed.

In this case, the claimant was given a "Rights and Obligations" information sheet when he completed his application for benefits which clearly states the claimant has an obligation to report all work and all earnings, and whether the claimant was self employed. The claimant failed to do this. The claimant admitted in the hearing that when he sent the report card in, it was technically wrong. The Board is of the view that the claimant did know his card was filled out incorrectly with regards to "self employment" as the claimant now states he should have filled in "yes" technically with an explanation. This led to an overpayment which he acknowledges he should not have received. The Board finds that the false or misleading statement was made knowingly and thus, the imposition of penalty is justified.

CUB 13298

The reporting cards are simple enough to complete. If an answer to a question "Did you work Yes or No" turns out to be false, it is difficult for anyone to be persuaded that the false answer was not knowingly given."

CUB 29564

"The false statements are clear. The fact that the claimant received the earnings is not disputed by him. He considers that he simply made a mistake. While that may be, as explained, the burden is on the claimant once a false statement is shown to exist, to bring forward a reasonable explanation to show that it was not made knowingly. I cannot find that the claimant has met that burden."

CUBs 13298 and 29564 were used by the Board in reaching its conclusions.

The Board finds that the Commission took into consideration all the circumstances of the case and has exercised its discretion in a judicial manner in determining the quantum of the penalty (see **Purcell A-694-94**).

Counsel for Mr. Buckley argued that if the appeal succeeded on the self-employment issue it follows that there has been a determination that Mr. Buckley was "unemployed", that the questions will have been answered

correctly and no false statements will have been made. She further contends, as set out in her written submission:

It was therefore entirely reasonable for the claimant to assume that the question "Did you work?" was connected to whether he was involved in "new" work. It was reasonable for Mr. Buckley to assume that the question, which was asked in the context of determining his eligibility for EI benefits, did not include his bike hobby as "work" or "self employment", given that he had spent no additional time on his bike hobby throughout his entitlement period.

The Commission's position is that it is not for a claimant to decide whether his or her self-employment amounts to working a full working week for the purpose of subsection 30(3) and that it is responsibility of the claimant to answer the question asked in a straightforward manner that enables the Commission to make that assessment for itself, citing *Conner v. Canada (Attorney General)*, Court File No. A-173-99 at paragraph 14. But in that case the claimant's self-employment was not minor in extent. In the later case of *Canada (Attorney General) v. Miller*, 2002 FCA 24; Court File No. A-722-00, the same judge said, at paragraph 18, "... given the context in which it is asked, a claimant may well think that he or she is being asked directly about work and eligibility, especially since not all work will disqualify a person from receiving benefits."

I will allow the appeal with respect to Mr. Buckley's failure to report his self-employment.

The Board of Referees did not address the matter of his failure to report his absence from Canada from September 26 to 30, 2005 and thus failed to exercise its jurisdiction. I will give the decision the Board should have given.

Mr. Buckley made his reports using the Interdec system. That dialogue did not ask him if he was out of Canada during the two week period covered by the report. However, when claimants apply for benefits they are told that one of

their responsibilities is to report any absence from their area of residence or any absence from Canada.

Section 38 of the *Employment Insurance Act* authorizes the Commission to impose a penalty if a claimant makes a claim that she knows is false or misleading because of the non-disclosure of facts. When Mr. Buckley made his claim and did not inform the Commission by an appropriate means that he has been out of Canada during part of the reporting period he knowingly made a claim that was misleading because of that non-disclosure.

Mr. Buckley's benefit rate was \$413. Under the former guidelines a penalty in that amount would have been imposed. Under the new guidelines it would be \$207.

Disposition

On the self-employment issue, the appeal is allowed.

On the penalty issue, the appeal is allowed and the penalty is reduced to \$207.

The notice of a very serious violation is reduced to a notice of a minor violation.

Ronald C. Stevenson
Umpire

FREDERICTON, NEW BRUNSWICK
June 11, 2008

OTTAWA, ONTARIO
July 4th, 2008

CUB 70652

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