

1957

# Milton B. Johnson v. Board of Review of the Industrial Commission of Utah : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. R. Callister; Fred F. Dremann; Attorneys for Respondents;

---

## Recommended Citation

Brief of Respondent, *Johnson v. ICU*, No. 8553 (Utah Supreme Court, 1957).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2652](https://digitalcommons.law.byu.edu/uofu_sc1/2652)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

JUN 13 1957

LAW LIBRARY

# In the Supreme Court of the State of Utah

FILED

JAN 15 1957

MILTON E. JOHNSON,

*Petitioner,*

vs.

Clerk, Supreme Court, Utah

BOARD OF REVIEW OF THE INDUS-  
TRIAL COMMISSION OF UTAH,  
DEPARTMENT OF EMPLOYMENT  
SECURITY, et al,

*Defendants.*

Case No. 8553

## BRIEF OF RESPONDENT

E. R. CALLISTER

*Attorney General*

FRED F. DREMANN

*Special Assistant Attorney General  
Attorneys for Respondents*

## INDEX

	Page
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS .....	4
STATEMENT OF POINTS .....	5
ARGUMENT .....	6
Point 1. The decision of the Commission representative that the plaintiff (petitioner) was self-em- ployed and therefore not unemployed is sup- ported by the evidence .....	6
Point 2. A self-employed individual is not unemployed for the purposes of obtaining benefits within the meaning of the provisions of the Utah Em- ployment Security Act. ....	6
Point 3. The Board of Review did not err in affirming the decision of the Department representative...	28
CONCLUSION .....	29

## CASES CITED

Aley vs. Unemployment Compensation Board of Review, 116 A 2d. 241 .....	21
Commerce Clearing House (App. Ref. and Rev. Bd. decisions reported in)	
Illinois .....	12
Indiana .....	12
Iowa .....	13
Massachusetts .....	14
Creameries of America vs. Ind. Comm. of Utah, 98 U. 571, 102 P. 2d 300 .....	10
Fuller Brush Company vs. Ind. Comm. of Utah, 99 U. 97, 104 P. 2d 201 .....	10

	Page
Kapera vs. Unemployment Compensation Review Board, 178 Pa. Super. 508, 116 A 2d, 239.....	20
Martin vs. Unemployment Compensation Board of Review, 101 A. 2d 421 .....	18
Muchant vs. Unemployment Compensation Board of Review, 175 Pa. Super, 85, 103 A 2d 438 .....	18
Phillips vs. Michigan Unemployment Compensation Com- mission, et al, 35 N.W. 2d 237 .....	16
Jessie F. Tomlinson, Plaintiff, vs. Marion B. Folsom, Sec- retary of the Department of Health, Education, and Welfare of the United States of America, Defendant, Commerce Clearing House at Federal Paragraph 8186..	26
Ada T. Stemm, Plaintiff, vs. Marion B. Folsom, Secretary of the Department of Health, Education, and Welfare of the United States of America, Defendant, Commerce Clearing House at Federal Paragraph 8146.....	26

## STATUTES CITED

Chapter 35-4, Utah Employment Security Act.....	29
Section 35-4-2, Utah Code Annotated 1953 .....	7-10
Section 35-4-4, Utah Code Annotated 1953 .....	7-10
Section 35-4-5(c), Utah Code Annotated 1953..	8-10-11-23-28
Section 35-4-22(j) (1), Utah Code Annotated 1953.....	8-10
Section 35-4-22(j) (5) (C), Utah Code Annotated 1953.....	8
Section 35-4-22(m) (1), Utah Code Annotated 1953.....	9-10
Section 35-4-22(p), Utah Code Annotated 1953.....	9-10
Federal Social Security Act, Section 211 (SSA) .....	24

# In the Supreme Court of the State of Utah

---

MILTON E. JOHNSON,

*Petitioner,*

vs.

BOARD OF REVIEW OF THE INDUS-  
TRIAL COMMISSION OF UTAH,  
DEPARTMENT OF EMPLOYMENT  
SECURITY, et al,

*Defendants.*

Case No. 8553

---

## BRIEF OF RESPONDENT

---

### STATEMENT OF THE CASE

The claimant, Petitioner, filed a claim for unemployment compensation benefits effective April 1, 1956, reporting that he was unemployed due to a reduction of force at the United States Fuel Company. The record shows that the claimant, in addition to his work at the United States Fuel Company, was engaged in a farming enterprise. A Department representative ruled that because of his farming enterprise he was not "un-

employed” within the meaning of the Utah Employment Security Act. On May 9, 1956, the claimant, Petitioner, filed an appeal from a review decision of the original representative’s decision. The matter was regularly heard by the Appeals Referee, who, on June 1, 1956, affirmed the decision of the Department representative. The claimant, Petitioner, then appealed on the 6th day of June, 1956, to the Board of Review setting forth his grounds for appeal “that I am not self-employed, and that I am unemployed, and that I am available for full-time employment.” The Board of Review, on the 18th day of June, 1956, affirmed the decision of the representative and the Appeals Referee. The matter is now before this Court at the request of the Petitioner for a review of the Board’s decision.

## STATEMENT OF FACTS

The claimant, age 52, has been a farmer all of his life. Some ten years ago he found that he was unable to make a satisfactory living on his farm alone, and at that time he obtained employment in the coal mines. R-12. During the period from March, 1949, to February, 1954, the claimant worked approximately full-time in the mines. In 1954, 1955, and 1956, the claimant did not work in the mines during the summer months, being laid off due to a reduction of force. R-13. During all of the aforementioned years, the claimant operated the farm which he testified he had owned “all my life.” R-13.

The claimant resides in Huntington, Utah, and his farm is outside of town. R. 13. The farm consists of 254 acres with

the area being divided approximately as follows: 40 acres of irrigated land; 20 acres of pasture; and 194 acres of poor range land. At the time of the hearing in this matter before the Appeals Referee, the claimant had under irrigation and cultivation 5 acres of alfalfa, 4 acres of winter wheat, 7 acres of barley, 10 acres of oats, and about 8 or 9 acres of nurse crop planted with the grain. In addition the claimant owned two milk cows, six calves, and one bull, and had fourteen hogs and pigs and some thirty chickens. The claimant owned a tractor and most of the other necessary farm machinery and in addition thereto he owned an interest in a land "leveler." R-19. The estimated gross value of his total farm product was slightly less than \$2,000. Most of his farm product was consumed by the livestock he maintained on the farm. The claimant earned some \$2,500 during his base period as "wages."

## STATEMENT OF POINTS

1. THE DECISION OF THE COMMISSION REPRESENTATIVE THAT THE PLAINTIFF (PETITIONER) WAS SELF-EMPLOYED AND THEREFORE NOT UNEMPLOYED IS SUPPORTED BY THE EVIDENCE.

2. A SELF-EMPLOYED INDIVIDUAL IS NOT UNEMPLOYED FOR THE PURPOSES OF OBTAINING BENEFITS WITHIN THE MEANING OF THE PROVISIONS OF THE UTAH EMPLOYMENT SECURITY ACT.

3. THE BOARD OF REVIEW DID NOT ERR IN AFFIRMING THE DECISION OF THE DEPARTMENT REPRESENTATIVE.

## ARGUMENT

### POINT 1.

THE DECISION OF THE COMMISSION REPRESENTATIVE THAT THE PLAINTIFF (PETITIONER) WAS SELF-EMPLOYED AND THEREFORE NOT UNEMPLOYED IS SUPPORTED BY THE EVIDENCE.

The entire record, including the testimony of the claimant (Petitioner) supports the findings of fact that the claimant was a self-employed farmer. The claimant as previously pointed out, testified that he had been a farmer all of his life and he stated: "We are trying to make that farm our life, our livelihood." R-19. There can be no disputing the fact that the claimant was actively engaged in carrying on his occupation as a farmer, not only at the time he filled his original application for unemployment compensation benefits but during the period when he was working in the coal mines. It is obvious that his farming operation did not provide a sufficient income to support his family. This appears to be the primary reason why the claimant also worked in the coal mines.

The decision of the representative that the claimant is a self-employed farmer is fully supported by the evidence.

### POINT 2.

A SELF-EMPLOYED INDIVIDUAL IS NOT UNEMPLOYED FOR THE PURPOSES OF OBTAINING BENEFITS WITHIN THE MEANING OF THE PROVISIONS OF THE UTAH EMPLOYMENT SECURITY ACT.



The Employment Security Act provides:

Section 35-4-2.

“As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with a nationwide system of employment services, by devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of unemployment. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state, for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons.”

Section 35-4-4.

“An *unemployed* individual shall be eligible to receive benefits with respect to any week only if it has been found by the Commission that:” (Italics ours.)

Section 35-4-5(c).

“An individual shall be ineligible for benefits or for purposes of establishing a waiting period:”

“If the Commission finds that, being unemployed and otherwise eligible for benefits, he has failed without good cause, either to properly apply for available suitable work, or to accept a referral to suitable work when offered him by the employment office or to accept suitable work when offered him by an employer or by the employment office, *or to return to his customary self-employment* (if any) when so directed by the Commission. Such ineligibility shall continue for the week in which such failure occurred and for not less than one or more than the five next following weeks, as determined by the Commission according to the circumstances in each case.” (Italics ours).

Section 35-4-22(j) (1).

“ ‘Employment’ means any service performed prior to January 1, 1941, which was employment as defined in the Utah Unemployment Compensation Law prior to the effective date of this act, and subject to the other provisions of this subsection, service performed after December 31, 1940, including service in interstate commerce, and service as an officer of a corporation performed for wages or under any contract of hire written or oral, express or implied.”

Section 35-4-22(j) (5) (C).

“Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the Commission that—

such individual is customarily engaged in an independently established trade, occupation, profession, or

business of the same nature as that involved in the contract of service.”

Section 35-4-22(m)(1).

“ ‘Unemployment.’ An individual shall be deemed ‘unemployed’ in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount. The Commission shall prescribe regulations applicable to unemployed individuals making such distinctions in the procedure as to total unemployment, part total unemployment, partial unemployment of individuals attached to their regular jobs, and other forms of short-time work, as the Commission deems necessary.”

Section 35-4-22(p).

“ ‘Wages’ means all remuneration for personal services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash. Gratuities customarily received by an individual in the course of his employment from persons other than his employing unit shall be treated as wages received from his employing unit. The reasonable cash value of remuneration in any medium other than cash and the reasonable amount of gratuities shall be estimated and determined in accordance with rules prescribed by the Commission; provided, that the term ‘wages’ shall not include:”

The basic question confronting the Court in this matter is whether or not the Legislature, in adopting the provisions of the Utah Employment Security Act, intended that self-employed individuals were to be considered as not being unemployed for the purposes of obtaining unemployment compensation

benefits. Section 35-4-2, *supra*, the preamble to the Act, states that economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state, and further states that the purpose of the Act is to provide funds which might be paid to unemployed individuals in order to maintain purchasing power and limit the social consequences of unemployment. It points out that the reserves are to be used for the benefit of unemployed persons.

Section 35-4-4, *supra*, provides that only unemployed individuals shall be eligible to receive benefits.

Section 35-4-5(c), directs the Commission to order otherwise unemployed individuals to return to their customary self-employment, if any.

Section 35-4-22(j)(1), *supra*, defines employment as any service performed for wages.

Section 35-4-22(m)(1), *supra*, states that an individual is deemed to be unemployed in any week during which he performs no service and with respect to which no wages are payable to him.

This Court has, in the Fuller Brush case, 99 U. 97, 104 P. 2d 201, and the Creameries of America case, 98 U. 571, 102 P. 2d 300, ruled that a service means service for another and not for self. Section 22(p), *supra*, defines wages as all remuneration for personal services. The Act is completely silent as to earnings from self-employment. The only reference to the self-employed individual is that which is contained in the aforementioned Section 5(c). The Commission in administering the Employment Security Act has interpreted Section

5(c) to be a specific directive to the Commission to return any otherwise unemployed individual to his customary self-employment, and that when such individual does so return or has not left his self-employment, the Commission considers him to be employed and not unemployed.

Since there were no rules laid down upon which to determine whether or not an individual was engaged in a self-employment occupation, the Commission follows the rule that when an individual engages in a trade, business, profession, or occupation for a profit and when such trade, business, profession, or occupation is potentially profitable so that it may add substantially to his total income, then the individual so engaged is considered to be self-employed within the meaning of the aforementioned Section 5(c). The Commission considers such individual to be so engaged so long as he has not abandoned his trade, occupation, profession, or business and he is, during the week in question, performing substantial services in his self-employment.

In the instant case, of course, the claimant was applying for benefits during the normal agricultural growing season. An examination of rulings in Commerce Clearing House on unemployment compensation reveals that the practice in the several states varies to a considerable extent. In some of the states the farmer, for example, is considered to be self-employed during the planting, growing, and harvesting part of the year and not so self-employed during the period of the year when he has no continuing demand on his services. Other states have required the farmer to report the hours he has worked on his farm during periods of unemployment, and in those states a fixed

arbitrary value is placed on such hours of work and the resulting amounts deducted from any benefits to which he was entitled. In other states the yearly earnings of the self-employed individual are divided by 52 and, for the purposes of benefits, the resulting quotient, if any, is deducted from each weekly benefit check to which he may be entitled.

The following Appeal Referee and Review Board decisions are reported in Commerce Clearing House:

## ILLINOIS

“.195 A claimant who operates a farm consisting of 160 acres on which a hired man is employed for only five months of the year is not unemployed and eligible for benefits. Claimant who was willing to accept employment in the more remunerative occupation of carpentry is no different from a man working full time for low wages who is willing to accept other more remunerative employment.—Ref. Dec. No. AR-39-317, Dec. 12, 1939.” Reported at Page 16,181.

## INDIANA.

“In determining the income of a farmer from self-employment in operating his farm, the annual net income will be divided into 52 equal parts, representing the weeks of the year, and 1/52 of the entire annual income will be deducted each week as long as the farmer continues in part-time employment in operating his farm.—App. Trib. Dec. 40-A-75, 2-10-40.” Reported at Page 17,179.

“Where an individual operates a farm which does not require his full-time, he is entitled to benefits under the Indiana Unemployment Compensation Law in each week in which the value of his personal services rendered in that week is less than his weekly benefit

amount, each day's work on the farm being considered as having the value of \$2 since that is the prevailing wage for that type of labor in the community.—App. Trib. Dec. 40-A-298, 6-28-40.” Reported at Page 17,179.

## IOWA.

“.04 Benefit eligibility of 'self-employed' person. The Law section providing for the disqualification of an individual who fails to return to his customary self-employment (see Par. 1965, post), 'can only be sustained upon the theory that an individual who is "self-employed" is not "unemployed." The sole purpose and function of the Iowa Unemployment Compensation Law is to provide benefits to individuals who are "unemployed" and who, in addition thereto, meet certain standards of eligibility as provided therein.

“ 'An individual is employed when he performs services for wages. An individual is employed when he devotes the major portion of his working time and efforts to his individual enterprises and interests. The law contemplates the payment of benefits to an individual who, as part of the labor market, is seeking employment which he does not now have. It cannot reasonably be said that a farmer who devotes his entire working time and efforts to his farm is *unemployed*. It cannot be said that lawyers or doctors who devote the major portion of their working time and efforts to their professions are *unemployed*. Neither can it be said that the individual who devotes the major portion of his working time and efforts to the operating of his coal mine is *unemployed*. A man who enters upon a business venture of his own has removed himself from the labor market, at least during the period of his business venture.'—Comm. Dec. No. 40C-131, Dec. 5, 1940.” Reported at Page 18,140.

“.043 Farmers. — *Full-time farming operations.*—“The record will in this case disclose that the claimant



customarily devotes the major portion of his working time and efforts to his farm during the period for which he is claiming benefits. The claimant has an investment in his farm, livestock and machinery. During the years past he has attempted to manage such investment to show the greatest gain. While such an attempt is being made, it cannot be said that the claimant is unemployed . . . .’—App. Trib. Dec. No. 39A-635-CM, etc. Nov. 15, 1939.” Reported at Pages 18,140 and 18,141.

“*Miners operating farm.*—Claimant had been employed as a miner since 1914. In 1938, claimant rented an eighty-acre farm on which he lived. The claimant at all times directed the operation of the farm. He determined what land was to be cultivated and the kinds of crops that were to be planted and how they were to be harvested. Claimant became separated from his employment as a miner on May 4, 1939. He filed a claim for benefits on May 31, 1939. Whenever claimant was not working as a miner, he devoted the majority of his time to the operation of the farm. It was held that the periods of unemployment as a miner were controlling and determinative in ascertaining whether or not claimant was customarily self-employed. When claimant became unemployed as a miner, he devoted his entire time and efforts to farming, which constituted his individual enterprise and efforts. Claimant was, therefore, ‘customarily self-employed’ and, as a consequence, he is disqualified for benefits.—Comm. Dec. No. 39C-63, Nov. 14, 1939.” Reported at Page 18,141.

## MASSACHUSETTS.

“.618 Commercial enterprise.—A claimant who devoted all of his time to the development of his own business was not in total unemployment, although he was not receiving any direct salary or other compensation.—Bd. of Rev. Decs. Nos. 11804 Mass., 1565 Mass. and 2863.” Reported at Page 24,159.



"A claimant who was devoting part of each day to soliciting and filling printing orders was not available for employment and, therefore, not in unemployment even though he received very little remuneration. Bd. of Rev. Dec. No. 3537 Mass." Reported at Page 24,159.

"Two brothers, engaged as general contractors doing water and sewer construction work and employing as many as 20 persons, who applied for unemployment compensation when the weather interfered with their operations but were ready at all times to do any work which they could secure for their business, were held to be employers without an income from their business, not employees losing wages because of unemployment.—Bd. of Rev. Dec. No. X-43286." Reported at page 24,159.

"Owner of a retail store, who took no wages from the business but reinvested all his profits and who worked for wages at his usual occupation of construction worker whenever he could find work, but during intervals of unemployment spent his time in the active management of his store, was not eligible for benefits.—Bd. of Rev. Dec. No. 3214 Mass., Jan. 10, 1941." Reported at Page 24,159.

"A claimant who had been out of the labor market for a long time while self-employed and who ceased temporarily to receive an income from his self-employment during a dull season, although still making every effort which he could to secure contracts, was held not to be an unemployed worker losing wages due to unemployment even though he had made some efforts to find employment and would have accepted temporary employment which would not interfere with his resumption of the self-employment at any time.—Bd. of Rev. Dec. No. X-63648." Reported at Page 24,159.

".623. Family enterprise.—Claimant, during a regular seasonal layoff, operated his wife's popcorn stand,

turning over the proceeds for household expenses and paying the operating expenses from wages earned in his regular employment. He was in self-employment since he contributed his time and money to the enterprise. The fact that he was not gainfully employed was immaterial.—Bd. of Rev. Dec. No. 4235 Mass.” Reported at Page 24,159.

The state supreme courts in Michigan and Pennsylvania have considered the question of whether or not self-employed individuals fell within that class of individuals for whom the unemployment compensation laws were enacted. We quote at some length from several decisions in those two states. In the case of Phillips vs. Michigan Unemployment Compensation Commission, et al, 35 N.W. 2d 237, the Court ruled that the self-employed attorney was not unemployed. In that case the plaintiff, an attorney engaged in the practice of law since the year 1900, was employed by the X corporation as a worker in its manufacturing plant rather steadily from August 12, 1944, until October 6, 1947, when he was laid off due to lack of work. He continued in the practice of law, maintaining a law office in which he spent from 8 to 12 hours a day. He registered for work at the employment office and filed a claim for unemployment compensation benefits. The Commission ruled that he was employed and therefore ineligible to receive benefits. The Court said:

“The Act contains no expression of legislative intent to declare persons engaged in types of employment not covered by the protective provisions of the Act unemployed and therefore eligible under certain conditions to compensation. That the legislature did not so intend is apparent from section 2 in which the purpose of the Act is declared to be, inter alia, the prevention

of insecurity due to unemployment, and the accumulation of funds to provide benefits for unemployed persons in order to maintain their purchasing power. Such purpose does not include, nor is it consistent with, the idea of granting benefits to one gainfully employed in a type of employment not covered by the Act, such as rendering domestic, agricultural, or professional services for remuneration. Had the legislature so intended, it would have been unnecessary to provide, as was done in Section 48, that remuneration earned in agricultural labor shall be disregarded for the purpose of determining eligibility for total or partial benefits. Furthermore, the provision of section 29 that an individual shall be disqualified for benefits in all cases where he has failed, without good cause, to return to his customary self-employment, if any, when so directed by the commission, would be utterly pointless, if an individual who did return to his customary self-employment, such as the practice of law, were held to be entitled to receive total unemployment benefits.

“We believe that the words ‘unemployed individual’ are used in section 28 in their ordinarily accepted sense and that, taken in that light, one who is engaged in rendering service for remuneration or who devotes his time to the practice of a profession by which a living is customarily earned cannot be said to be unemployed.”

In most of the states in the United States many individuals who are working in factories or elsewhere also maintain self-employment enterprises, such as stores, service stations, farms, etc. Some of these individual enterprises are nothing more than hobbies. Others are merely maintained for the convenience of the family and are not, in the true sense of the word, operations for profit. With these latter types we are not concerned. Many of the others, however, are operated as businesses for

profit and in the true sense of the word. These people, then, work in the factories, etc., and accumulate wage credits which, if the individuals were fully unemployed, could be used as the basis for unemployment compensation benefits. If individuals find that their self-employed enterprise is not sufficient to maintain the standard of living to which they feel they are entitled, then they obtain jobs in covered employment, as so defined in the employment security acts, and earn wages to augment their income from the self-employment enterprises.

The Supreme Court of Pennsylvania in discussing this situation in the case of *Martin vs. Unemployment Compensation Board of Review*, 101 A. 2d 421, said:

“Conceivably, where a person divides his time and labor between work for another and potentially profitable work for himself as where e.g. a factory worker also operates say a store, a farm, or a work-shop, a suspension of work at the factory may not, and probably does not, expose him to the rigors of unemployment which the law is designed to alleviate.”

In the case of *Muchant vs. Unemployment Compensation Board of Review*, 175 Pa. Super. 85, 103 A 2d 438, the Court said:

“The claimant was regularly employed as a coal miner. By reason of lack of work due to a work stoppage in the steel industry he was laid off from June 2, 1952, to July 28, 1952.

“The claimant resides rent free on a farm containing 80 acres, which farm is owned by members of his family. In connection with a plan to establish a beef cattle herd of approximately 30 cattle, claimant has acquired and maintains 8 beef cattle. He also has acquired and maintains upon the farm two sheep, intending to build

up a herd of sheep of approximately 10. In order to maintain the cattle and sheep, claimant cultivates approximately 50 acres, producing from such cultivation hay, corn, wheat and oats, all of which is used as feed for the cattle and sheep.

"During the period in question, claimant devoted full time to the operation of his farm. Even when otherwise employed, claimant performs the necessary work in connection with the farm operation.

"The Board concluded that claimant was engaged in an activity sufficiently substantial in nature to constitute 'employment' and that by reason of such farming operation he was disqualified.

"The claimant admittedly had a relatively large farm which he personally worked during the period in question. The fact that he received no remuneration therefor during that time does not remove him from the definition of 'unemployed.' The efforts expended in those weeks may well contribute to his receipt of remuneration in the form of future profits from his farming enterprise. It cannot be said that such services are of a type to which no remuneration is payable. See *Phillips vs. Michigan Unemployment Compensation Commission*, 323 Mich. 188, 35 N.W. 2d 237.

"We have no doubt that claimant was available for recall to the mines at all times during the lay-off period. But the fact remains that he operated his farm during this interval, and therefore he was not unemployed while awaiting the call for the basic reason that one who is self-employed is not unemployed.

"We agree with the observation of the Board that such a ruling may tend to penalize the ambitious and energetic, but it must be borne in mind that the purpose of the Unemployment Compensation Law is to provide temporary benefits for the worker who is



unemployed through no fault of his own. See *Dawkins vs. Unemployment Compensation Case*, 358 Pa. 224, 234, 56 A. 2d. 254. It was not designed to insure a weekly income to those engaged in business ventures who may not realize a profit therefrom during various weekly periods. There may be a hardship in some cases where a regularly employed worker is also engaged in the conduct of a part-time business enterprise. However, if, as here, it is established that the claimant is actually engaged in the conduct of such an enterprise, the fact that he realizes no weekly profit from the business for the services rendered cannot operate to make him eligible for unemployment compensation benefits."

In the case of *Kapera vs. Unemployment Compensation Review Board*, 178 Pa. Super. 508, 116 A 2d. 239, decided July 21, 1955, the Court was considering a case in which the claimant had been employed by Westinghouse Electric Corporation as a machine helper. At the time he worked for Westinghouse he also operated an 86 acre farm. He was laid off and applied for unemployment compensation benefits. He was disallowed benefits on the grounds that he was not unemployed. We quote from the claimant's testimony and the decision of the Court.

The claimant testified: "I live on an 86 acre farm which I own together with my wife. My wife and a hired man which I have do the actual operation of the farm. I only do occasional work there as the hired man handles the farm. I have only 20 acres under tillage, the rest is in pasture and woodland; 6 acres of oats; 6 acres of wheat; 10 acres in corn; and some garden for the home. I have 26 head of cattle, 15 milking age. I have nothing whatsoever to do with the cattle unless my wife is ill or something and then I'll do her work for her. I usually work at Westinghouse but am presently laid off.

The milk averages \$5,000 per year. I would return to Westinghouse any time I am called as I have 9½ years of service there. I have always worked elsewhere as the farm isn't big enough to make a living on."

The Court's decision. "Section 4(u) of the Unemployment Compensation Law . . . as amended . . . provides that a claimant can only be deemed unemployed (1) with respect to any week (i) during which he performs no services for which remuneration is paid or payable to him and (ii) with respect to which no remuneration is paid or payable to him—. That appellant is engaged in a farming operation for his own benefit and with the hope of eventually realizing a profit therefrom is evident from his testimony. Since appellant assumed the risk of profit or loss, he cannot now look to the unemployment compensation fund to subsidize his business venture merely because he is not required to devote all of his time and effort to the farm work. In fact, appellant's farming operation was so extensive that he found it necessary to employ a farm hand. There can be no question that he was engaged in business for himself.

"Under the circumstances in the case at bar, appellant's situation does not represent the type of insecurity which was within the contemplation of the legislature. See *Shadowens Unemployment Compensation Case*, 177 Pa. Super. 49 110 A 2d 258. One who is self-employed is not unemployed. Muchant *Unemployment Compensation Case* 175 Pa. Super. 103 A 2d 438."

In the case of *Aley vs. Unemployment Compensation Board of Review*, 116 A 2d. 241, the claimant had worked for the National Tube Company and was laid off. He was denied benefits as being employed and not unemployed. The Court said:

“In the case at bar, appellant was, and for the past two years had been, an independent self-employed merchant engaged in business for the purpose of producing remuneration. The mere fact that his business may not have been profitable does not remove appellant from the category of a business man and bring him within the class of workers the Act was designed to protect.”

The Court then refers to its decision in the Muchant case *supra*.

Counsel for the appellant in the instant case argues that the Michigan and Pennsylvania court decisions, *supra*, are wrong in principle and that it is improper to compare farm land in Pennsylvania with farm land in the State of Utah. We think that the principle that the self-employed individual who is engaged in any trade, occupation, profession, or business which is potentially profitable is not included in the class of individuals for whom the Employment Security Act was passed is the sound one. We recognize that certain apparent injustices may result where an individual fails to make his enterprise a profitable one. However, the Employment Security Act is not designed to subsidize the several trades, occupations, professions, or businesses. To follow or apply a different plan would give rise to situations impossible of proper administration. Let us take the lawyer, for example, who earned sufficient credits in industry to qualify for unemployment compensation benefits. Let us assume that he maintained his office and during the period when he is otherwise totally unemployed, he spends his full time working at his occupation. Let us assume that he was, during October, November, and December of a given year, engaged in working on legal matters for which work he received



no payment until the following year when he was no longer claiming unemployment compensation benefits. Let us further suppose that his legal fees for the October, November, and December services exceeded a sum which, when divided by 13, would be in excess of his weekly benefit amount. You would, therefore, have a case in which the individual worked customary full-time hours and earned for each week an amount in excess of his weekly benefit amount. The benefits which would have been paid to such individual, were his self-employment disregarded, would not be recoverable.

The same situation would be true with reference to the farmer who was paid benefits during the growing season and who had no income from his farm operation until such time as he sold his crops, which time might well be months after he had ceased filing for benefits.

In practically no instance would the Commission, in paying benefits to a self-employed individual, be in a position to determine whether the individual was working less than full time at his self-employment or earning less than his weekly benefit amount. Of course, arbitrary rules for determining time worked and the value thereof, or determining earnings which are to be allocated to particular weeks, might be established as they have been in several of the states.

If the individual who is self-employed and yet who is not making a profit is to be considered unemployed and eligible for unemployment compensation benefits, then what meaning is to be ascribed to the language in Section 5(c) *supra*, which directs the Department to order such individual to return to,

or continue in, his self-employment. Even though the Act is otherwise silent with reference to self-employment, it is a well settled principle that employment includes self-employment. The dictionary defines employment as including work, business, vocation, calling, trade, or profession, and also defines it as "that which engages or occupies; that which consumes time or attention; also an occupation, profession, or trade; service; as, agricultural employment."

Counsel for the appellant argues that the Department and the Board are creatures of statute, that their powers and authority cannot be extended by judicial construction, and that because the terms "employment" and "unemployment" are defined by the Legislature and the term "self-employment" is not, the Legislature did not, therefore, intend for the Board or the Department representatives to read the term into the Act or define it by their own standards.

Apparently, counsel for appellant takes the position that self-employment enterprises must be entirely disregarded because neither did the Legislature set up any standards by which an individual's earnings in self-employment could be measured to determine whether or not they exceeded, for a particular week, the individual's benefit amount. The Legislature in directing the Commission to return self-employed individuals to their self-employment recognized that the Commission would find it necessary to make determinations as to the fact of the self-employment just as the Commission is required to make determinations as to the fact of the performance of service for others for wages.

Recent amendments to the Federal Social Security Act,

Section 211 (SSA) have brought self-employed individuals within the terms of that Act for the purposes of Old Age and Survivors Insurance. Prior to that time the self-employed individual was not considered to be the type of individual which the Act intended to cover. Up to that time the only services which were considered to be services within the meaning of the Act were those which were performed for employers as defined by the Act. Only through these amendments did the Social Security Act include self-employed individuals within that group for whose benefit the Act was passed.

Under the provisions of the Social Security Act, income from self-employment is deductible from the social security benefits of the retired worker to the same extent that earned income of other retired workers is deductible, provided the self-employed individual performs substantial services in self-employment during the month in question. As an aid to determining whether or not the individual does perform substantial services in self-employment, the social security administration has set forth the following factors which must be weighed:

1. The presence or absence of a paid manager, a partnership, or a family member who manages the business.
2. The amount of time devoted to the business.
3. The nature of the services rendered by the beneficiary.
4. The type of business establishment.
5. The seasonal nature of the business.
6. The relationship of the activity performed prior to the

period of retirement to that performed subsequent to retirement.

7. The amount of capital invested in the trade or business.

- In the case of Jessie F. Tomlinson, Plaintiff, vs. Marion B. Folsom, Secretary of the Department of Health, Education, and Welfare of the United States of America, Defendant, decided by the U. S. District Court for the Eastern Division of the Middle District of Alabama on December 21, 1955, and reported in Commerce Clearing House at Federal Paragraph 8186, the Court ruled that where the claimant owned, operated, and managed a grocery store and performed services in connection therewith for some two hours per day, he was performing substantial services in self-employment and his earnings therefore were deductible. See also Ada T. Stemm, Plaintiff, vs. Marion B. Folsom, Secretary of Health, Education, and Welfare, Defendant, decided by the United States District Court for the Northern District of California, Southern Division, on May 29, 1956, and reported in Commerce Clearing House at Federal Paragraph 8146.

The apparent purpose of the Federal Act in ascertaining whether or not the plaintiff performs substantial services in self-employment is to determine whether or not the self-employment income represents a return on a previous investment or whether the services are to be charged to the operations in certain months of the year. If the individual performs substantial services in each month of the year and earns in excess of \$1200, he loses his retirement benefits for that year.

We have pointed out the Federal practice merely to call

attention to the manner by which the social security administration determines whether or not an individual is performing substantial services in self-employment enterprise. The Federal Act, of course, requires a yearly accounting by the self-employed individual of his income from the self-employment, both for the purposes of accumulating benefit credits and for deductions from his benefit amounts.

Under the provisions of the Utah Employment Security Act, of course, self-employed individuals do not accumulate benefit credits on the basis of their earnings in self-employment. However, in the administration of the Utah Employment Security Act, if it were determined that the self-employed individual was entitled to unemployment compensation benefits for the week in which he performed less than full-time services and earned less than his weekly benefit amount, it would be incumbent upon the Commission to establish some rule for the allocation of his earnings and hours worked to the particular week for which he filed his claim for benefits. There are no provisions in the Act under which the Commission could arrive at a conclusion as to whether or not such self-employed individual worked less than full-time during the week for which he filed, and there are no provisions under which the Commission is charged with the responsibility of determining self-employment income for the particular week for which the self-employed individual might file a claim for benefits. It would appear that in no case would it be possible to determine what portion of an individual's annual self-employment income was attributable to a particular week prior to the end of his annual or fiscal year operations. At that point of time the individual would have already received his benefits and those bene-

fits would not be recoverable even though his earnings, when allocated over the 52-week period, would exceed his benefit amount for each week.

Because the Act in Section 5(c), *supra*, does make it clear that the Commission is to direct self-employed individuals to return to their self-employment, it would appear that the Legislature did not consider self-employed individuals to be unemployed within the purposes for which the Act was passed. We think the Michigan and Pennsylvania courts have properly found that self-employed individuals are not entitled to unemployment compensation benefits even though they did perform services in "employment" and even though while self-employed they are available for work within the meaning of the Employment Security Act. Even though the claimant (petitioner) is available for employment in covered industry, the Commission representative properly found that he did not meet the provision of the Act that he be unemployed.

An individual who is currently engaged in a substantial self-employment enterprise for a profit is ineligible to receive unemployment compensation benefits by reason of the fact that he is employed and not unemployed during any week with respect to which he performs substantial services in the furtherance of such trade, occupation, profession, or business.

### POINT 3.

THE BOARD OF REVIEW DID NOT ERR IN AFFIRMING THE DECISION OF THE DEPARTMENT REPRESENTATIVE.



Since the claimant (petitioner) had for many years been engaged in the self-employment enterprise of farming and since the record shows that the claimant was performing substantial services in carrying out such farming enterprise, the Board of Review did not err in affirming the decision of the representative and the Appeals Referee. The claimant was employed and not unemployed within the meaning of the Act.

## CONCLUSION

We respectfully submit that the representative, the Referee, and the Board of Review correctly found that the claimant (petitioner) was employed and not unemployed under the provisions of the Utah Employment Security Act, Chapter 35-4, and that, therefore, he did not fall within the class of individuals for whom the Act was intended to benefit. He is, therefore, ineligible to receive unemployment compensation benefits during the period when he is performing substantial services in his self-employment enterprise.

The decision of the Board of Review of the Industrial Commission of Utah should, therefore, be affirmed.

Respectfully submitted,

E. R. CALLISTER  
*Attorney General*

FRED F. DREMAN  
*Special Assistant Attorney General*  
*Attorneys for Respondents*