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CIRCUIT COURT ORDER/OPINION
Stephine Gwin, Circuit Court Clerk

C/N

Appeal Docket No: 2887

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44 Section of the Act

Date: 10/4, 2007

(Signature)
R. Douglas Daligga, Director
MES - Board of Review

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

ELLIOTT'S AMUSEMENTS, LLC,

Employer/Appellant,

No. 07-251-AE

v

Hon. JOYCE DRAGANCHUK

RONALD L. GARRISON,

Claimant/Appellee,

and

STATE OF MICHIGAN, Department of
Labor & Economic Growth, Unemployment
Insurance Agency,

Agency/Appellee.

Thomas C. Johnson (P29195)
Attorney for Appellee UIA
Michigan Department of Attorney General
Unemployment Division
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Lansing, MI 48933

ORDER AFFIRMING DECISION OF EMPLOYMENT
SECURITY BOARD OF REVIEW AND DISMISSING THE APPEAL

At a session of the Court, held in the County of Ingham, State
of Michigan, held on the 1st day of Oct., 2007.

Present: Honorable Joyce Draganchuk
Circuit Court Judge

The Appellant having filed an Appeal from a decision by the Michigan Employment Security Commission Board of Review, briefs having been filed, Oral Argument having been held on September 12, 2007, and the Court being fully advised:

IT IS ORDERED that the decision by the Michigan Employment Security Board of Review is affirmed and the appeal is dismissed for the reasons stated on record after oral argument.

Dated: Oct. 1, 2007

Hon. Joyce Draganchuk
Circuit Court Judge

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



MICHAEL A. COX
ATTORNEY GENERAL

CADILLAC PLACE
3030 WEST GRAND BOULEVARD
DETROIT, MICHIGAN 48226
M.E.S. BOARD OF REVIEW

OCT 03 2007

FACSIMILE COVER SHEET

FILED: _____
R. DOUGLAS DALIGGA
DIRECTOR

TODAY'S DATE: October 3, 2007

TO: Donna Welch, Neil Zechman, Stephine Gwin and Robert Wilkis or
Marcia Durant

DIVISION/AGENCY: Attorney General/Unemployment Insurance Agency

OFFICE PHONE: _____

AGENCY FAX (616) 356-0411

NUMBER: _____

MESSAGE: Please see attached Case No. 07-251-AE
ELLIOTT'S AMUSEMENTS, LLC v. RONALD GARRISON and
UIA
SS No.

FROM:

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NUMBER OF PAGES (includes cover sheet): 3

2887

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STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

RONALD L. GARRISON,

Appeal Docket No.: L 2005 00074 RM1 2887

Claimant

Social Security No.: ~~95-2-2-100~~

ELLIOTT'S AMUSEMENTS LLC,

Employer

DECISION OF BOARD OF REVIEW

This matter is before the Board of Review on the employer's appeal of a Referee (Administrative Law Judge) decision issued August 10, 2006, which held the per diem amounts the employer paid to the claimant to be remuneration under Section 44(1) of the Michigan Employment Security (MES) Act and affirmed the June 14, 2005 Agency redetermination. A copy of the Referee decision is attached and incorporated by this reference.

After reviewing the entire record in this matter, we find the Referee's decision should be affirmed for the following reasons:

The claimant testified that he worked six months out of the year for the employer. The employer provided trailers for the employees to stay in. The employees paid rent to the employer for the trailer and food of \$10.00 per week, which was deducted from their paychecks. The claimant testified he always stayed in the trailer when they were on the road. The employer operated in the Detroit area four to five times a year, which was also where the claimant's home was located. The claimant could go home if he had transportation when the employer was in the Detroit area, but did not do so because he lacked transportation or did not want to walk. The claimant testified that he sometimes stays in a hotel room, but pays for it himself and submits the receipt to employer with receipts for fuel. The claimant got \$150.00 per week for the per diem; a total of \$300.00 per week, including wages. The employer also provided money for expenses like fuel, which was separate from the per diem.

The employer's witnesses and the Agency's witness did not testify at the April 6, 2006 Referee hearing.

Section 44 of the MES Act provides:

(1) **“Remuneration”** means **all compensation paid for personal services, including commissions and bonuses**, and except for agricultural and domestic services, **the cash value of all compensation payable in a medium other than cash**. Any remuneration payable to an individual that has not been actually received by that individual within 21 days after the end of the pay period in which the remuneration was earned, shall, for the purposes of subsections (2) to (5) and section 46, be considered to have been paid on the twenty-first day after the end of that pay period. For benefit years beginning after the conversion date prescribed in section 75, if back pay is awarded to an individual and is allocated by an employer or legal authority to a period of weeks within 1 or more calendar quarters, the back pay shall be considered paid in that calendar quarter or those calendar quarters for purposes of section 46. The reasonable cash value of compensation payable in a medium other than cash shall be estimated and determined in accordance with rules promulgated by the unemployment agency. Beginning January 1, 1986, remuneration shall include tips actually reported to an employer under section 6053(a) of the internal revenue code by an employee who receives tip income. **Remuneration does not include** either of the following:

- (a) Money paid an individual by a unit of government for services rendered as a **member of the national guard** of this state, or for similar services to another state or the United States.
- (b) Money paid by an employer to a worker under a **supplemental unemployment benefit plan** under section 501(c) of the internal revenue code of 1986, regardless of whether the benefits are paid from a trust or by the employer.

[Emphasis added.]

In Seligman v MESC, 164 Mich App 507 (1988), the issue was whether the value of lodging provided by employer (Seligman) for resident caretakers was considered wages for the purposes of the MES Act. The court found that under Agency Rule 112, the “reasonable cash value of lodging is only deemed to be wages if it is extended as partial or entire remuneration for services rendered.” Seligman, at 511. The court found that the lodging was provided solely for the “convenience of the employer.” Seligman, at 511. The court found the facts showed the employees lived in the apartments rent-free, were required to live on-premises to handle tenant complaints, and nothing in the facts showed the apartments were intended remuneration. Seligman, at 511-512. The court noted that under Rule 112(1) the MESC (now Unemployment Insurance Agency) interpreted wages to include lodging:

- (1) If board, rent, housing, lodging, meals, or similar advantage is extended in any medium other than cash as partial or entire remuneration for service constituting "employment" as defined in section 42 of 1936 PA 1, MCL 421.42, then the reasonable cash value of the board, rent, housing, lodging, meals, or similar advantage is wages unless the board, rent, housing, lodging, meals, or similar

advantage is furnished solely for the convenience of the employer. However, for purposes of this rule, payments in any medium other than cash shall not apply to agricultural or domestic service, except for purposes of subrule (7) of this rule. [Rule 112(1).]

Rule 112(2) provides:

(2) If the cash value for the board, rent, housing, lodging, meals, or similar advantage is agreed upon in any contract of hire, then the amount agreed upon is the value of the board, rent, housing, lodging, meals, or similar advantage. Check stubs, pay envelopes, and other documents which are furnished to employees and which set forth cash value are acceptable as evidence as to the amount of the cash value agreed upon in any contract of hire, except as provided in subrules (4) and (6) of this rule.

The court placed great deference to the Agency's interpretation. Seligman, at 515.

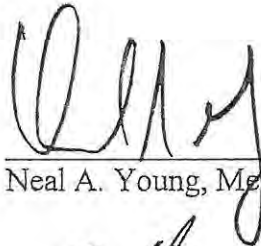
In the employer's written argument to the Board, the employer's attorney does not explain why Seligman, supra, is not controlling in this matter. Rather, the employer's attorney relies on Treasury Regulations for the argument that the per diem payments here are not wages. In Rowan v US, 101 S Ct 2288 (1981), the Court held that Treasury Regulations interpreting the definition of "wages" in FICA and FUTA to include the value of the meals and lodging are invalid, for the failure to implement the statutory definition. The Court stated, "Congress intended its definition of "wages" to be interpreted in the same manner for FICA and FUTA as for income-tax withholding." Rowan, at 2297. The court in Seligman, supra, recognized that the codified treasury regulation was held invalid in Rowan, supra. In Seligman, at 515, the court went further stating, "the federal agency in charge of implementing FUTA has stated that the Rowan interpretation of wages is not necessarily applicable to the definition of 'wages' in State unemployment compensation law." The court stated that interpretation in Rowan does not apply in unemployment compensation.

Therefore, we find Seligman, supra, is controlling in this matter. The employer does not assert that employees were required to live on site. The claimant admitted he could have lived at home (when in Detroit), but did not do so for his own convenience and not due to the employer's convenience. Unlike the employer in Seligman, this employer did not provide free lodging to its employees. The employer did not control claimant's use of the per diem monies, and the claimant could have spent the money on things other than food. It is our opinion that the Referee's decision should be affirmed.


The Referee's decision is hereby affirmed.

The per diem amounts the employer paid to the claimant are remuneration under Section 44(1) of the MES Act.

This matter is referred to the Agency for action consistent with this decision.



Neal A. Young, Member



Charlotte Duncil, Member

MAILED AT LANSING, MICHIGAN JAN 25 2007

This decision will become final unless a written request for rehearing to the Board OR appeal to the appropriate circuit court is RECEIVED on or before
FEB 26 2007

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME.