

**DEPARTMENT OF EMPLOYMENT AND TRAINING**

**BOARD OF APPEALS**  
1100 NORTH EUTAW STREET  
BALTIMORE, MARYLAND 21201

(301) 383-5032

**STATE OF MARYLAND**  
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Governor

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SEVERN E. LANIER  
Appeals Counsel

MARK R. WOLF  
Chief Hearing Examiner

**— DECISION —**

Decision No.: 1076-BR-85

Date: December 9, 1985

Appeal No.: 8507061

S. S. No.:

Claimant: Francis F. Borkowicz

C

L.O. No.: 40

Employer: Airco Welding Company

Appellant: CLAIMANT

**Issue:** Whether the claimant is receiving or has received a governmental or other pension, retirement or retired pay, annuity or other similar periodic payment which is based on any previous work of such individual, which is equal to or in excess of his weekly benefit amount within the meaning of §6(g) of the law, and whether the claimant is overpaid benefits within the meaning of §17(d) of the law.

**— NOTICE OF RIGHT OF APPEAL TO COURT —**

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON January 8, 1986

**— APPEARANCES —**

FOR THE CLAIMANT:

FOR THE EMPLOYER:

REVIEW ON THE RECORD

Upon review of the record in this case, the Board of Appeals affirms the decision of the Hearing Examiner.

The Board agrees that the non-contributory pension received by the claimant is deductible from unemployment insurance benefits under §6(g) and is not a dismissal payment or wages in lieu of notice (also referred to as "severance pay") under §6(h) (in which case it would not be deductible because the employer permanently discontinued the operation of the plant).

The Board has dealt with similar, though not identical, issues in prior cases. In the Board precedent case Carey v. Stewart & Co., 717-BH-83, the Board concluded that a special "non-vested pension benefit", paid to employees at the time the employer was permanently closing its operations, was dismissal pay as contemplated by §6(h) because: (1) the money to fund it was not obtained from a pension fund and (2) the money was specifically intended as additional severance pay by the employer, for certain employees who, because of the closing of the stores, had lost the opportunity to gain vested pension rights.

This is a factually different situation from the case here, where the pension money is from a pension fund, set up long before the plant's closing was contemplated and where all employees in the pension plan are receiving benefits. There is no evidence that this pension was specifically intended as dismissal pay.

Further, in Jancewski v. Bethlehem Steel Corporation, 2150-BH-83, the Board ruled that special retirement pay was not severance pay under §6(h), but was deductible under §6(g), because it was a part of the regular pension plan and was paid only to those employees who qualified for and applied for the pension.

The shutdown agreement in this case, (Claimant's Exhibit No. 4) does make provision to allow certain employees who are plan participants but not vested in their accrued benefit under the plan to vest as of December 20, 1984. However, this one accommodation does not alter the Board's conclusion that the payments in question are in the nature of a pension. The shutdown agreement, in fact, specifically provides for the receipt of "severance pay" in a separate section.

In argument, the claimant's attorney has cited the case of Guilfoyle v. Dow Jones & Co., 218 N.Y.S. 2d 617 (1971), where the New York Court held that pension benefits paid after a plant shutdown do not constitute the taking of a retirement pension, but the taking of severance pay. However, that case is legally and factually distinguishable from this case in a very important

way. The Court in Guilfoyle placed great importance on the fact that the claimant did not actually retire at the time he received the pension, because the law in effect in New York at that time, as cited in Guilfoyle stated, in appropriate part:

If a claimant retires or is retired from employment by an employer and, due to such retirement, is receiving a pension or retirement payment under a plan financed in whole or in part by such employer, such claimant's benefit rate ... shall be reduced as hereinafter provided.

Guilfoyle, supra at 619.

Thus the statute upon which that case was based was very different from the present Maryland statute, §6(g), which has no requirement that the claimant actually be retired in order for the pension to be deductible from benefits. Further, there is no evidence in this case before the Board regarding whether this claimant actually retired (and under Maryland law, none is required).

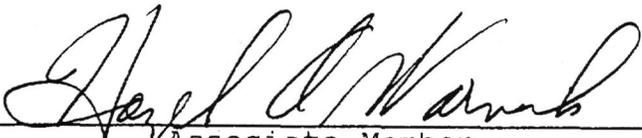
Therefore, the Board does not find the case cited by the claimant to be persuasive. The decision of the Hearing Examiner will be affirmed.

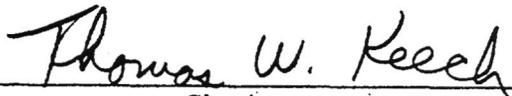
#### DECISION

The claimant is receiving or has received a pension or other similar periodic payment amounting to \$48.00 per week. This amount must be deducted from the claimant's weekly benefit amount of \$175, according to §6(g) of the Maryland Unemployment Insurance Law. The claimant is eligible for reduced benefits in the amount of \$127 per week. This reduction in benefits is effective beginning with the week ending May 4, 1985 and extends until this pension is no longer received in this amount or until Airco Welding is no longer a base period employer of this claimant.

The claimant is overpaid benefits in the amount of \$336.00 for the period from the week ending May 4, 1985 until the week ending June 15, 1985.

The decision of the Hearing Examiner is affirmed.

  
\_\_\_\_\_  
Associate Member

  
\_\_\_\_\_  
Chairman

I concur in the result.

*Maurice E. Hill*

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Associate Member

D

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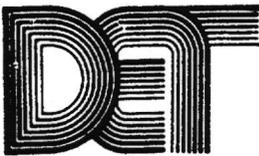
CLAIMANT

EMPLOYER

I. Duke Avnet, Esquire

Thomas B. Murphy

UNEMPLOYMENT INSURANCE - EASTPOINT



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Chief Hearing Examiner**

**— DECISION —**

<b>Claimant:</b>	Francis F. Borkowicz	<b>Data:</b>	Mailed 8/9/85
		<b>Appeal No.:</b>	07601
		<b>S. S. No.:</b>	
<b>Employer:</b>	Airco Welding Company	<b>L.O. No.:</b>	40
		<b>Appellant:</b>	Claim ant

**Issue:** Whether the claimant is receiving or has received a governmental or other pension, retirement or retired pay, annuity or other similar periodic payment which is based on any previous work of such individual, which is equal to or in excess of his weekly benefit amount within the meaning of Section 6(g) of the Law. Whether the appealing party filed a timely appeal or had good cause for an appeal filed late within the meaning of Section 7(c)(ii) of the Law. Whether the claimant is overpaid benefits within the meaning of Section 17(d) of the Law.

**— NOTICE OF RIGHT TO PETITION FOR REVIEW —**

**ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A REVIEW AND SUCH PETITION FOR REVIEW MAY BE FILED IN ANY EMPLOYMENT SECURITY OFFICE, OR WITH THE APPEALS DIVISION, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL**

**THE PERIOD FOR FILING A PETITION FOR REVIEW EXPIRES AT MIDNIGHT ON August 26, 1985**

**— APPEARANCES —**

**FOR THE CLAIMANT:**

**FOR THE EMPLOYER:**

Francis F. Borkowicz - Claimant  
1. Duke Avnet - Attorney  
Thomas B. Murphy - Staff  
Representative - United Steel  
Workers of America; Irvin  
Bechtel - Observer

Not Represented

Other: Lillian Rose - Claims Specialist  
IV - Department of Employment and  
Training

EVALUATION OF THE EVIDENCE

The claimant's attorney argued that pension benefits made payable after a plant shutdown does not constitute the taking of a retirement pension, but the taking of severance pay and consequently does not disqualify employees from unemployment insurance benefits, this is a holding in the case of Guilfoyle v. Dow Jones & Company, 318 N.Y.S. 2nd 617, (1971).

FINDINGS OF FACT

Notice of Benefit Determination denying the claimant Maryland Unemployment Insurance benefits because he was in receipt of pension benefits within the meaning of Section 6(g) of the Maryland Unemployment Insurance Law was mailed to the claimant and the employer at their addresses of record on June 19, 1985. The Benefit Determination contained a statement that the last date for filing an appeal was July 5, 1985.

The claimant filed an appeal which was postmarked on July 12, 1985. The claimant has an eighth grade education. The claimant did not fully understand the Benefit Determination mailed to him on June 19, 1985 in regards to his denial of benefits for the receipt of a pension, and an overpayment resulting under Section 17(d) of the Maryland Unemployment Insurance Law.

The claimant filed a claim for unemployment insurance benefits effective June 27, 1984. The claimant's weekly benefit amount was determined to be \$175.00 a week. The claimant had been employed at the Airco Welding Company of the British Oxygen Corporation, Inc. located in Sparrows Point, Maryland. The claimant was employed from October 27, 1958 to December 20, 1984. The claimant worked as a warehouse worker. He earned \$10.15 per hour. The Airco Welding Division closed its Sparrows Point, Maryland plant on December 20, 1984 due to the impact of foreign imports.

The claimant will be receiving a non-contributory pension from the British Oxygen Corporation Group, Inc. effective May 1, 1985 in the amount of \$205.92 per month. The Department of Employment and Training determined the claimant to be overpaid in the amount of \$48.00 for the claim weeks ending May 4, May 11, May 18, and May 25, 1985, June 1, 1985, June 8, 1985 and June 15, 1985 for a total overpayment of \$336.00 pursuant to Section 17(d) of the Maryland Unemployment Insurance Law.

CONCLUSIONS OF LAW

It will be held that the claimant/appellant had good cause to file an appeal late within the meaning of Section 7(c) (ii) of the Maryland Unemployment Insurance Law.

It is concluded from the testimony that the claimant is in the receipt of pension in the amount of \$205.92 per month. Under the Federal legislation, Section 3304(a)(15) the Federal Unemployment Tax Act, effective April 1, 1980, it is required that the claimant's weekly benefit amount be reduced by the weekly amount of the governmental or other pension, retirement, or retired pay, annuity, or any other similar periodic payment which is based on the previous work of the individual.

As his pension is based on the claimant's previous employment, it will reduce his weekly benefit amount \$48.00 per week. His new weekly benefit amount should be \$127.00 pursuant to Section 6(g) of the Law.

It will be held that the claimant is overpaid unemployment benefits in the amount of \$48.00 for the claim weeks ending May 4, May 11, May 18, May 25, 1985, June 1, 1985, June 8, 1985 and June 15, 1985 for a total overpayment in the amount of \$336.00 pursuant to Section 17(d) of the Maryland Unemployment Insurance Law.

DECISION

It is held that the claimant/appellant had good cause to file a late appeal within the meaning of Section 7(c) (ii) of the Maryland Unemployment Insurance Law.

Due to the claimant's receipt of a non-contributory pension within the meaning of Section 6(g) of the Maryland Unemployment Insurance Law, the claimant's weekly benefit amount is reduced by \$48. The claimant's weekly benefit amount is now \$127. The determination of the Claims Examiner under Section 6(g) of the Law is affirmed.

The claimant is overpaid \$48 for the claim weeks ending May 4, May 11, May 18, May 25, June 1, June 8, and June 15, 1985 for a total overpayment in the amount of \$336 pursuant to Section 17(d) of the Maryland Unemployment Insurance Law.



Marvin I. Pazornick  
HEARINGS EXAMINER

Date of hearing: 7/29/85

Cassette: 5148 B, 5149 A-B, 5151 A

amp (L. Hardin)

COPIES MAILED ON 8/9/85 TO:

Claimant  
Employer  
Unemployment Insurance-Eastpoint

1. Duke Avnet, Attorney at Law

Thomas B. Murphy

Donna Gross-Room 413