UNEMPLOYMENT INSURANCE: In absence of fraud four separate corporations having a majority of the same stockholders, and not individually having eight employees, do not come under the Unemployment Compensation Act.

October 19, 1939

10-24

FILED 52

Hon. Joseph A. Lennon
Assistant Attorney-General
905 Central National Bank Bldg.
St. Louis, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of October 4, 1939, which reads as follows:

"Ernest E. Winkelmann called at my office concerning the interpretation of Section 3 (H)-(4) of the Missouri Unemployment Compensation Law.

"There are involved four separate corporations which operate separate drug stores in the City of St. Louis. One corporation was formed October 13, 1913; another corporation was formed July 1, 1915, and the third corporation was formed July 1, 1915; the fourth corporation was formed and organized February 8, 1935. All of these corporations operate separate and distinct stores at different addresses in the City of St. Louis. These corporations were formed primarily by Ernest A. Winkelmann and Henry F. Winkelmann for the purpose of furnishing employment for their children.

"The stock in these four corporations is divided up among nine people, the majority, however, being held by Ernest A. Winkelmann and Henry F. Winkelmann. The amounts in the various corporations can be ascertained by writing Ernest E. Winkelmann at 7631 So. Broadway.

"The Unemployment Compensation Commission of Mo. is contending that all of these corporations should be considered as a single unit under Section 3 (H) -(4) of the Missouri Unemployment Compensation Law.

"I understand there are a number of similar situations in the City of St. Louis which is causing great confusion to the owners of these corporations. I believe an opinion from the Attorney-General's Office would be in order covering this subject; there is no question in my mind that this thing is going to come up frequently.

"I gather from the correspondence of the Unemployment Compensation Commission that they have definitely concluded in their opinion, regardless of the fact these are separate corporations, that they are one employing unit under the sections aforementioned. Of course, the stockholders in these corporations contend otherwise. There is a very substantial sum of money involved at this writing and, of course, will be larger in the future. These taxpayers are not satisfied with the interpretation placed on these sections by the Unemployment Compensation Commission and are extremely anxious that the Attorney-General's Office render an opinion thereon."

Section 3, par. (g), of the Unemployment Compensation Act, Laws of Missouri, 1939, page 888, reads as follows:

"'"Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1936, had in its employ one or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit

> which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this Act. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this Act, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of the work."

It will be noticed under the above paragraph (g) that an individual performing services within this state for any employing unit which maintains two or more separate establishments within this state, shall be deemed to be employed by a single employing unit. That phrase applies only where the same employing unit has two or three other places of business in this state, and does not apply to the statement of facts set out in your request.

Section 3, par. (h), sub-section (1), of the same act, reads as follows:

> "Any employing unit which for some portion of a day but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals irrespective of whether the same individuals are or were employed in each such day; * * "

Under this section in order that an employing unit come within the terms of the Unemployment Act there must be eight or more individuals employed in the concern. In answering your request we are presuming that each and every separate corporation set out in your statement did not have eight or more employees, but the aggregate number of employees of all of the separate corporations consisted of more than eight individuals. The section which is mainly under construction is Section 3, par. (h), subdivision(4), of the Unemployment Act, Laws of Missouri, 1939, which appears on page 889. This section reads as

follows:

> "Any employing unit which, together with one or more other employing units, is owned or controlled by legally enforceable means or otherwise, directly or indirectly, by the same interests, or which owns or controls one or more other employing units by legally enforceable means or otherwise, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection; * * * "

It will be noticed in the above sub-section that the word "same" appears. Under the statement of facts set out in your request, although the majority of the stock is held by the same persons in each corporation, it does not necessarily mean that they are owned or controlled directly or indirectly, by the same interest, for the reason that being corporations each store is a separate and distinct entity from the other store. You also state in your request that the purpose of the forming of the separate and distinct corporations was so that the children of each of the two main principal stockholders could have employment and a business of their own. It will also be noticed in the above section that the words "directly or indirectly", are used, which, in other words is a prevention of the use of fraud or a sham to evade the terms of the Unemployment Act.

It has been repeatedly held that a corporation is distinct and separate from its members or stockholders. 14 C. J. page 58, section 19, states the rule as follows:

> "Since a corporation is a person distinct from its members or stockholders, it follows that, even though the same individuals may be the incorporators of, or own stock in, two separate corporations, and even though such corporations may have the same individuals as officers, there is no identity between the two corporations, and neither is liable for

the acts or faults of the other merely because of the identity of the members or stockholders and officers. A holding corporation has a separate corporate existence, and is to be treated as a separate entity, unless the facts show that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth."

Also, in the case of Knott v. Fisher Vehicle Woodstock & Lumber Co., of Erin, Ark., 190 S. W. 378, the court said:

"This is an interplea ingrafted on an attachment suit. The defendant in the attachment is the Fisher Vehicle Woodstock & Lumber Company, a Missouri corporation, and the interpleader is a corporation of Arkansas with practically the same name. For convenience we will designate the defendant as the Missouri corporation and the interpleader as the Arkansas corporation. The Missouri corporation became indebted to plaintiff, and he brought suit and attached the property of interpleader, some woodworking machinery, as defendant's property, and the Arkansas corporation has interpleaded claiming ownership. A. B. Fisher purchased this attached machinery from an Indiana manufacturing company and mortgaged it back to secure $2,500 of the purchase price. Fisher then helped organize the Missouri corporation, which took over the property subject to the mortgage which had been duly recorded. The Missouri corporation became involved in debt and made default in the payment of this mortgage debt. The mortgage was foreclosed by the holder of the note, an Indiana bank, and that bank became the purchaser and owner of the machinery. Fisher then helped organize the Arkansas corporation, and the Indiana bank sold this machinery to it. Plaintiff, a creditor of the Missouri corporation, attached this property of the Arkansas corporation as belonging to the former. "

The court further said, at l. c. 379:

> "There was no fraudulent conveyance by the Missouri corporation, plaintiff's debtor, and, unless the property on its transfer to the Arkansas corporation became the property of the Missouri corporation, plaintiff had no right to attach it. This, however, was not the theory upon which plaintiff recovered, as his instruction predicated his right to recover on the transfer being fraudulent. This particular property was no more subject to attachment as the property of the Missouri corporation than was any other property owned by the Arkansas corporation. Similarity or even identity of names does not make the identity of corporations formed under different sovereignties. Even if there was identity of stockholders, the corporations would be distinct (10 Cyc. 287; 5 Thompson on Corporations, sections 5985, 6094; Richmond & I. Const. Co. v. Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625; * * * "

In the above case the stockholders of the Missouri Corporation were the same stockholders of the Arkansas Corporation. The court in that case, under the facts as set out in the case, held that the two separate corporations were not formed for any fraudulent purpose. The rule is greatly discussed in the case of Majestic Company v. Orpheum Circuit, 21 Fed. 2d 720, l.c. 724, where the court said:

> "In legal conception a corporation has an entity separate and distinct from its stockholders; and the act of the corporation is not that of the stockholders. Nor is its obligation that of its stockholder. Hall's Safe Co. et al. v. Herring-Hall-Marvin Safe Co. (C. C. A.) 146 F. 37, 14 L. R. A. (N.S.) 1182, modified 208 U. S. 554, 28 S. Ct. 350, 52 L. Ed. 616; Richmond, etc., Co. v. Richmond, etc., R. R. (C. C. A.) 68 F. 105, 34 L. R. A. 625. (3) A corporation is not liable for the acts or the obligations of another corporation, merely

because it controls such other by reason of ownership of its stock. New York Trust Co. v. Carpenter (C. C. A.) 250 F. 668; Minifie v. Rowley, 187 Cal. 481, 202 P. 673; City of Winfield v. Wichita Natural Gas Co. (C. C. A.) 267 F. 47; Watson v. Bonfils (C. C. A.) 116 F. 157; Syndicate Co. v. Bohn (C. C. A.) 65 F. 165, 169, 27 L. R. A. 614; 12 Columbia Law Review, 496, 517; Richmond, etc., Co. v. Richmond, etc., R. R. (C. C. A.) 68 F. 105, 34 L. R. A. 625.

"The corporate entity will not be ignored at law nor in equity, whether the control is in the hands of one or many stockholders. City of Winfield v. Wichita Natural Gas Co. (C. C. A.) 267 F. 47; 12 Columbia Law Review, 496, 517; Richmond, etc., Co. v. Richmond,etc., R. R., supra; Watson v. Bonfils, supra; Aiello v. Crampton (C. C. A.) 201 F. 891; East St. Louis, etc., Ry. Co. v. Jarvis (C. C. A.) 92 F. 735.

"(4) The corporation will be regarded as a legal entity as a general rule, and the courts acting cautiously and only when the circumstances justify it, will ignore the fiction of corporate entity, where it is used as a blind or instrumentality to defeat public convenience, justify wrong, or perpetrate a fraud, and will regard the corporation as an association of persons. Peckett v. Wood (1916 C. C. A. 3d Cir.) 234 F. 833; New York Trust Co. v. Carpenter (1918 C. C. A. 6th Cir.) 250 F. 668; The Gloucester (D. C. Mass. 1923) 285 F. 579; Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 273, 28 S. Ct. 288, 52 L. Ed. 481, 487; City of Winfield v. Wichita Natural Gas Co. (C. C. A.) 267 F. 47; Richmond, etc., Co. v. Richmond, etc., R. R. (C. C. A. 6) 68 F. 105, 34 L. R. A. 625; Watson v. Bonfils (C. C. A. 8) 116 F. 157; East St. Louis, etc., Ry. v. Jarvis (C. C. A. 7) 92 F. 735; Aiello v. Crampton (C. C. A. 8) 201 F. 891; Hall's Safe Co. et al. v. Herring-

Hall-Marvin Safe Co. (C. C. A. 6, 1906) 146 F. 37, 14 L. R. A. (N.S.) 1182, modified 208 U. S. 554, 28 S. Ct. 350, 52 L. Ed. 616; Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641; Peterson v. Chicago, R. I. & P. R. Co. (1907) 205 U. S. 364, 27 S. Ct. 513, 51 L. Ed. 841; Pullman's Palace Car Co. v. Mo. P. R. Co., 115 U. S. 587, 6 S. Ct. 194, 29 L. Ed. 499; Peckett v. Wood (1916 C. C. A. 3) 234 F. 833; In re Watertown Paper Co. (1909 C. C. A. 2) 169 F. 252; Smyth v. Asphalt Belt R. Co. (1923 D. C. Tex.) 292 F. 876; Georgia S. & F. Ry. Co. v. Georgia Public Ser. Comm. (1923 D. C. Ga.) 289 F. 878; City of Holland v. Holland City Gas Co. (1919 C. C. A. 6) 257 F. 679; Haskell v. McClintic-Marshall Co. (1923 C. C. A. 9) 289 F. 405; Stone v. Cleveland, C., C. St. L. Ry. Co., 202 N. Y. 352, 95 N. E. 816, 35 L. R. A. (N. S.) 770; Ulmer v. Lime Rock R. Co. (1904) 98 Me. 579, 57 A. 1001, 66 L. R. A. 387; Bergenthal v. State Garage & Trucking Co., 179 Wis. 42 (1922) 190 N. W. 901; Pittsburgh & Buffalo Co. v. Duncan (C. C. A.)232 F. 584; Martin v. Development Co. of America (1917) (C. C. A. 9) 240 F. 42; United States v. Milwaukee Ref. Transit Co. (C. C.) 142 F. 247; Edward Finch Co. v. Robie, 12 F. (2d) 360 (C. C. A. 8 Cir.); 31 Harvard Law Review, 894; 27 Harvard Law Review, 386; 17 Columbia Law Review, 128, 132 to 133; 2 Mass. Law Quarterly, 308, 309 to 310; 28 Harvard Law Review, 811; 32 Harvard Law Review, 424, 428; 20 Harvard Law Review, 223 to 224; 96 Central Law Journal, 201; 12 Columbia Law Review, 496, at 517."

In all of the cases cited and set out in the above partial opinion in that case it appears that the rule is not settled conclusively, but is a mixed question of fact and law; that in each case a separate rule or opinion could be formed, all depending upon the facts in the case. It is all based upon the general rule that the legal entity of a corporation is recognized and the courts uphold the separate and distinct entity in all cases, except in very few exceptions where it is used as a blind, or instrumentality to defeat public convenience, justify wrong, or perpetrate a fraud, and in that case the courts have interpreted the corporation as an association of persons.

CONCLUSION.

WHEREFORE, in view of the above authorities, it is the opinion of this department that corporations separately formed and operating, although consisting of the same stockholders, or same officers, who have received their certificate of incorporation as separate corporations from the Secretary of State do not come within sub-division 4, paragraph (h), of Section 3, of the Unemployment Compensation Act, 1939, page 889, unless, under the facts of the incorporation and their operation they are used as a blind or instrumentality to defeat public convenience, justify wrong, or perpetrate a fraud.

It is further the opinion of this department that although we do not pass upon the facts in the case, it appears from the statements in your request that it was not the intention of Ernest A. Winkelmann and Henry F. Winkelmann to evade the Unemployment Act, but was for the purpose of furnishing employment for their children. Further facts may be used to show that their intentions were fair in the matter and not for the purpose of defeating public convenience, justifying a wrong, or perpetrating a fraud. That the certificate of incorporation may have been obtained for each of the separate corporations some time before the enactment of the Unemployment Act, which was in 1937.

This office cannot render an opinion to cover all facts that resemble the facts stated in your request, for the reason that it is a mixed question of fact and law, whether or not the separate corporations are operating, owned and controlled by legal enforceable means, directly or indirectly, by the same interest, so as to not come within the terms of the Act by reason of a sham or fraud.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

TYRE W. BURTON
(Acting) Attorney-General

WJB:RW