

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT
DECISION NO. 6171 AS A PRECEDENT
DECISION PURSUANT TO SECTION
409 OF THE UNEMPLOYMENT
INSURANCE CODE.

In the Matter of:

DOROTHY SHAFFER, and others (Claimants)

PRECEDENT
BENEFIT DECISION
No. P-B-174

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| FORMERLY BENEFIT DECISION No. 6171 |
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The above-named claimants appealed to a Referee (SF-33176 and others) from determinations of the Department of Employment which held the claimants ineligible for benefits under Section 57(c) of the Unemployment Insurance Act [now section 1253(c) of the Unemployment Insurance Code]. On April 30, 1954, the Unemployment Insurance Appeals Board set aside the decision of the Referee and removed the matter to itself under Section 1336 of the Unemployment Insurance Code. A brief has been submitted on behalf of the claimants.

Based on the record before us, our statement of fact, reason for decision, and decision are as follows:

STATEMENT OF FACT

The claimants were last employed in the stewards department of an ocean-going vessel until December 2, 1953, when they became unemployed under circumstances hereinafter set forth.

Each of the claimants, as set forth in the appendix to the Referee's Decision, which is adopted and incorporated herein as though fully set forth, filed new or additional claims for benefits between December 2, and December 17, 1953, in various offices of the Department of Employment. The

Department issued determinations which in each instance held the claimants ineligible for benefits under Section 57(c) of the Unemployment Insurance Act. Each of the claimants again became employed by the same employer on or before December 17, 1953, and the period involved in this appeal with respect to individual claimants is not less than one nor more than two weeks.

The vessel on which the claimants were employed was laid up in dry dock for annual overhaul from December 2, 1953, until December 17, 1953. The members of the deck and engine departments were laid off by the employer, but the members of the stewards department were placed on leave of absence. Notice to this effect was posted on the ship's bulletin board and given to each member of the stewards department. The claimants would have forfeited their rights under the leave had they registered with the Central Registration Office, the only present means to obtain employment at sea. Because of conditions in the shipping industry and the large number of individuals unemployed at the time of layoff who would have had priority under the registration rules over the claimants, the claimants could not have expected permanent employment through the registration office for several months after such registration. There is a labor market in shore side work on a temporary basis for the claimants in the occupations which they follow at sea, and they assert that they were at all times prepared to accept it. The record discloses that some of the claimants applied for such work and that others did not. In prior years during the lay up of the vessel on which the claimants are employed, their employer issued notices of reduced earnings for the period of layoff and the claimants were paid benefits upon presentation of such notices. For reasons undisclosed by the record, such notices were not issued on this occasion. A Department representative testified that if claims had been filed on a partial basis, the claimants would not have been denied benefits. It is the contention of the Department, that the claimants should have sought work on their own behalf in order to be eligible for benefits.

REASON FOR DECISION

Pertinent to this case are the following provisions of Section 57 of the Unemployment Insurance Act [now section 1253 of the Unemployment Insurance Code].

"An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that:

"(a) A claim for benefits with respect to such week has been made in accordance with such regulations as the commission may prescribe.

"(b) He has registered for work, and thereafter continued to report, at a public employment office or such other place as the commission may approve, except that either or both of the requirements of this subdivision may be waived or altered by authorized regulation as to partially employed individuals attached to regular jobs.

"(c) He was able to work and available for work for such week.

* * *

"(e) He has made such effort to seek work on his own behalf as may be required in accordance with such regulations as the commission shall prescribe."

Also pertinent are the following sections of Title 22 of the California Administrative Code:

"200(k) [now section 1252-1]. 'Partially unemployed individual' means an individual who, during a particular week:

"(1) Earned less than his weekly benefit amount,

"(2) Was employed by a regular employer,

"(3) Worked less than his normal customary full-time hours for such regular employer because of lack of full-time work.

"(4) Was during such week continuously attached to his employer from the standpoint that there did not occur any severance of the employer-employee relationship."

* * *

"210 [now section 1326-6]. Employer Responsibility in the Initiation of a First Claim for Partial Benefits in a Benefit Year. (a) Not later than five days after the termination of any week in which an employer has had in his employ an individual

whose services have not been terminated and who had less than four full days of work, or the time or dollar earnings equivalent thereof, and such individual earned less than \$25, and in any event when such individual in a week of less than full-time work earns less than \$10 because of lack of work, such employer shall give each such individual a completed copy of Form DE 2063, Notice of Reduced Earnings."

* * *

"211 [now section 1326-7]. Employer to Furnish Evidence of Partial Unemployment. (a) After an employer has been notified of a claimant's weekly benefit amount, such employer shall, not later than five days after the termination of each week of partial unemployment, furnish the claimant with a copy of Form DE 2063, Notice of Reduced earnings, or furnish the claimant with a pay envelope, pay check stub, or copy thereof, or any other suitable medium."

* * *

"209 [now section 1253(c)-1]. Claimant's Effort to Seek Work on Own Behalf. A claimant is ineligible for unemployment compensation benefits for any period for which the department finds that he has failed to make reasonable effort to seek work on his own behalf. The facts and circumstances in each case shall be considered in determining whether such reasonable effort has been made. The claimant shall be required to show that he has, in addition to registering for work pursuant to Section 203 of these regulations, followed a course of action which is reasonably designed to result in his prompt re-employment in suitable work, considering the customary methods of obtaining work in his usual occupation or for which he is reasonably suited, and the current condition of the labor market."

* * *

"Provisions of this section do not apply to claimants applying for benefits for a week of partial unemployment."

The failure of the claimants' employer to provide them with certifications of reduced earnings was not determinative of their status as partially employed individuals. That they performed no services and earned no wages during the weeks for which benefits are claimed also does not establish that

they were not partially employed, as an individual who is totally unemployed for no more than two consecutive weeks may come within the scope of the partial claims procedure (Benefit Decision No. 4647). During the weeks involved herein, the claimants were continually attached to their employer by reason of a leave of absence for a period of not more than two consecutive weeks during which no work was available to them with that employer. Under the circumstances here presented, the claimants were partially employed irrespective of the manner in which their claims were filed (Benefit Decision No. 5975).

Although the leave of absence was for a period somewhat in excess of two weeks, the claimants were not totally unemployed for more than two consecutive weeks and hence the period of their leave of absence did not remove the claimants from the scope of the partial claims procedure. In addition, Section 209 of the Administrative Code specifically exempts partially unemployed individuals from seeking work on their own behalf, and hence the failure of some of the claimants to apply for work on their own initiative, is immaterial to their eligibility for benefits.

A partially employed individual must meet the availability requirements of the Act (Benefit Decision No. 5975). His availability is a limited one in the sense that he need only accept such suitable temporary work as may be offered him which would not prevent his return to work for his regular employer (Benefit Decision No. 5011). In the instant case, there was temporary shore side work for the claimants in their usual occupations irrespective of their failure to register with the Central Registration Office. Some of the claimants applied for such work. As to the others there is no evidence to contradict their assertion that they were prepared to accept it. Under such circumstances, the claimants were available for work.

The present case is to be distinguished from Benefit Decision No. 5980. In the cited case, the claimant was held unavailable because he limited himself to employment on one vessel on which he had had only short time employment and on which he had only vague prospects of re-employment in the immediate future. The present case is also distinguishable from other cases involving maritime claimants who were held ineligible because of failure to comply strictly with the union registration rules (Benefit Decision No. 4987).

By reason of the foregoing considerations, it is our conclusion that there was no basis for a denial of benefits under Section 57 of the Act.

DECISION

The determinations of the Department are reversed. Benefits are payable provided the claimants are otherwise eligible.

Sacramento, California, January 6, 1976

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

HARRY K. GRAFE

DISSENTING OPINION

I dissent for the reasons set forth in my dissenting opinion in Appeals Board Decision No. P-B-168.

In addition, I note that this case was "taken over" "by the Board pursuant to section 1336 of the Unemployment Insurance Code. There is no record available for our review (contrary to the statement in the second paragraph of the majority decision); therefore we are unable to ascertain whether the Board's removal of the case to itself was timely within the meaning of Isobe v. California Unemployment Insurance Appeals Board (11 Cal. 3d 313). The court in Isobe ruled that the ten-day limitation within which an appeal can be taken to this Board from a Referee's decision is also the jurisdictional time limit within which the Board can act to remove a case to itself.

In the instant case, we have no way of knowing whether the Board's "take-over" action was timely, and there is doubt whether the Board actually had jurisdiction to consider this matter originally, let alone whether the current Board can raise it to precedent status. If we follow the presumption that each Government action preceding the Board's "take-over" was performed in due course, it would appear that the Board's removal was in excess of the ten-day limit. I reach this conclusion on the basis of the dates on which claimants filed for benefits, the time required for the Department to process claims, and the assumption that the appeals to the Referee were disposed of within 30 days in accordance with federal standards. Under these assumed facts, the Board's "take-over" on April 30, 1954 would seem to be beyond the ten-day limit prescribed in Isobe, and there is a lack of jurisdiction to further consider the Referee's decision.

Moreover, the majority decision adopts and incorporates therein by reference the Referee's decision. However, not one member of the majority has seen the Referee's decision, it having been destroyed with the records of this case. Thus, on its face, the majority decision contains a fatal flaw, and for this reason alone, the decision should not have been exhumed from its final resting place.

This is one of the cases adopted by the majority without allowing any discussion of the merits, a clear violation of due process of law.

HARRY K. GRAFE