BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

DEAN J. THOMAS
(Claimant-Respondent)

CONSOLIDATED ROCK PRODUCTS
(Employer-Appellant)

PRECEDENT
BENEFIT DECISION
No. P-B-18
Case No. 68-1503

The employer appealed from Referee's Decision No. LB-10549 which held that the claimant was available for work and entitled to reduced benefits under the Unemployment Insurance Code for the week ending November 25, 1967. The employer and the Department of Employment have presented oral argument.

STATEMENT OF FACTS

The claimant is a long-term employee of the above named employer and works as a mix driver at the rate of $4.03 per hour. For the week ending November 25, 1967 he submitted to the Department of Employment a Notice of Reduced Earnings (DE 2063) showing that he had gross earnings with the employer of $32.24 for the payroll week ending November 25, 1967. On this notice the employer checked "No" in answer to the question "Did this employee report for all work that was available during this payroll week?" The reason given for this answer was "Sick, non-occupational." The date of illness was shown as November 24, 1967. Based upon this statement the department paid benefits to the claimant for this week in the amount of $45.

The claimant had established a valid claim with a benefit year commencing November 27, 1966. The weekly benefit amount on this claim was $65. He served his waiting period for the benefit year for the week ending December 3, 1966. Thereafter, he had been paid seven weeks of benefits including the week ending November 25, 1967, all of which were in reduced amounts.

The claimant is a member of the union having a collective bargaining agreement with the employer-appellant. This agreement does not provide for the payment of sick pay to members who are absent from work because of

illness. For seniority and dispatching purposes a member who is not able to work on any day is considered to have worked and earned eight hours straight time pay and is so charged for dispatching purposes.

The issues in this case are:

1. Was the claimant entitled to claim and receive unemployment insurance benefits as a partially unemployed individual for the week ending November 25, 1967?

2. Was the claimant able to work within the meaning of section 1253(c) of the code?

REASONS FOR DECISION

Section 1252 of the Unemployment Insurance Code provides in part as follows:

"1252. An individual is '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 that week are less than his weekly benefit amount. Authorized regulations shall be prescribed making such distinctions as may be necessary in the procedures applicable to unemployed individuals as to total unemployment, part-total employment, partial unemployment of individuals attached to their regular jobs, an other forms of short-time work…." (emphasis added)

The claimant herein has claimed benefits for the week ending November 25, 1967 as a partially unemployed individual. Section 1252-1, Title 22, California Administrative Code, defines a partially unemployed individual as follows:

"(c) A person is a partially unemployed individual if, during a particular week, he:

"(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."

Here the claimant earned less than his weekly benefit amount, was employed by his regular employer, and was continuously attached to his employer from the standpoint that there did not occur any severance of the employer-employee relationship. He thus met the requirements of (1), (2), and (4) of subsection (c). However, he did not work less than his normal customary full-time hours because of lack of full-time work as required by (3). To the contrary, he did not work on November 24, 1967 when work was available for him because he was ill and unable to work. Therefore, the claimant was not eligible to claim and receive benefits as a partially unemployed individual for the week ending November 25, 1967.

The Department of Employment and the referee held that the claimant was eligible for benefits based upon Benefit Decision No. 6811 issued by the then three member Appeals Board on March 15, 1967.

Both the department and the employer herein have requested that we overrule Benefit Decision No. 6811. Benefit Decision No. 6811 is distinguishable in that the claimant in that case did not claim benefits as a partially unemployed individual. Nevertheless, the principle upon which that case rests is so inextricably applicable to the facts of this case that we cannot ignore it. Further, we believe the payment or denial of benefits should not rest solely upon such technicalities as to whether the claimant made an unfortunate choice as to the type of claim he should file for a particular week. For example, had the claimant filed a "Continued Claim" for benefits for the week in issue rather than utilizing the procedures for filing of claims as a partially unemployed individual, he would have been eligible for reduced benefits under the principle expressed in Benefit Decision No. 6811.

In Benefit Decision No. 6811 the claimant had worked for the employer, a motor car manufacturer, for approximately 12 years. He was absent from work on August 1, 1966 (a Monday) due to illness. He returned to work and worked on August 2, 1966. Effective August 3, 1966 the plant shut down due to a seasonal layoff occasioned by a model change and the necessary retooling. The claimant immediately filed a claim for benefits which was made effective July 31, 1966. However, he was held ineligible for benefits under section 1253(c) of the code for the week ending August 6, 1966 because he was not available for work each and every normal workday during that week. Upon appeal the board reviewed a number of prior decisions involving the

eligibility for benefits of claimants who for various reasons were not able to accept employment during a portion of the week for which they claimed benefits. In holding the claimant available for work and eligible for benefits, it was stated:

> "... Here, the claimant, while in an active employment relationship, was excused from work by his employer for an entire work day but returned to work and worked an entire shift prior to his layoff. It would be illogical to hold that his one day's excused absence from work made him unavailable for work at a time when he was employed. It appears to us that his conduct or activities prior to his registration for work and filing of a claim for benefits should not affect his eligibility for benefits unless such conduct or activities were the direct cause of his unemployment. . . ."
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> "In applying the concept of whether a claimant did or did not, as a practical matter, miss a work opportunity as a basis for determining eligibility under code section 1253(c), we have been concerned with cases in which the claimants were unemployed at the time they were unable to work or unavailable for work for a portion of a week. However, as we pointed out in Benefit Decision No. 6642, the claimant there in was in a fully employed status at the time she was excused from work just as was the claimant in this case. In our opinion, the work opportunity concept simply is not applicable in cases of this kind."

We are unable to agree with the reasoning and result reached in Benefit Decision No. 6811.

Section 1253(c) of the Unemployment Insurance Code provides in pertinent part that an unemployed individual is eligible for benefits with respect to any week only if he was able to work and available for work for that week.

Pursuant to Attorney General Opinions Nos. 47/221 (10 Ops. Cal. Atty. Gen. 208) and 54/107 (24 Ops. Cal. Atty. Gen. 81) a claimant must be able to work and available for work for each day during the claimant's normal workweek in order to meet the eligibility requirements of section 1253(c).

Thus, when a claimant files a claim for benefits for a week, whether it be a week of total unemployment or a week of less than full-time work in which wages were payable to him less than his weekly benefit amount, he must show that he was able to work and available for work for each normal workday of that week in order to be eligible for benefits.

In the instant case the claimant, because of illness, was not able to work on November 24, 1967, a normal workday for the claimant. The employer had work for the claimant on that day and, had the claimant worked, he would have earned $32.24. These earnings coupled with his other earnings from the employer during the week would have totaled $64.48. He would then have been entitled to receive benefits for the week in the amount of $13. However, if we were to apply the reasoning of Benefit Decision No. 6811 he would receive $45 in benefits.

In contrast to unemployment compensation disability benefits which are payable on a dally basis, unemployment insurance benefits are payable on a weekly basis. If a claimant is unable to work on one or more normal workdays of a week because of illness he is not entitled to any unemployment insurance benefits for that week. Whether this result is equitable is a matter for legislative consideration. We must apply the law as it is written. Certainly it would be inequitable to charge the employer's reserve account for benefits paid to a claimant for a week when that employer had suitable work available for the claimant which he was unable to accept because of illness. In effect we would be authorizing the payment of benefits to the claimant from the unemployment insurance fund to compensate for his loss of wages due to illness.

For such reasons we believe Benefit Decision No. 6811 must be and is overruled. However, we approve the result reached in Benefit Decision No. 6642 where the claimant had reported for work at 7 a.m. and worked until 9:30 a.m. when she went home for a short period of time because of a stomach upset. She called the employer some time between 11 a.m. and 12 noon, her normal lunch hour, and advised that her stomach distress had ended and that she was ready to return to work. She was advised not to return because she had been laid off effective 11 a.m. that same day due to lack of work. In our opinion it would be an unnecessarily strict interpretation of the statute to hold that such a claimant did not meet the ability to work and the availability for work requirements of section 1253(c) of the code for the week when only temporarily absent from work for a portion of a day prior to layoff for lack of work.

In the instant case we hold that the claimant's inability to work on November 24, 1967 with the resulting loss of a work opportunity and earnings on that day rendered the claimant ineligible for benefits under section 1253(c) of the code for the week ending November 25, 1967.

DECISION

The decision of the referee is reversed. The claimant was not eligible for benefits under section 1253(c) of the code for the week ending November 25, 1967.

Sacramento, California, July 16, 1968.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

LOWELL NELSON

JOHN B. WEISS