BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

DONALD K. RITTENHOUSE (Claimant-Respondent)	PRECEDENT BENEFIT DECISION NO. P-B-32
DEPARTMENT OF EMPLOYMENT (Appellant)	Case No. 68-3066

The Department of Employment appealed from Referee's Decision No. LA-18671 which held the claimant eligible for benefits for the one-week period May 19 through May 25, 1968, under the provisions of section 1253(c) of the Unemployment Insurance Code, on the ground that during that week the claimant was available for work. Written argument has been submitted by the Department of Employment and the claimant.

STATEMENT OF FACTS

Effective April 7, 1968 the claimant filed a claim for unemployment insurance benefits in the Duarte office of the Department of Employment.

The claimant has had considerable experience as a heavy truck driver but because he lost his driver's license he is unable to accept this type of work. The claimant also has had considerable experience working on docks, loading and unloading trucks and checking merchandise. He also has had experience as a lathe operator in machine shops.

Although most of the work on the docks, loading and unloading trucks and checking merchandise, occurs during the night hours, the claimant testified that he has obtained other types of work on the day shift. He also indicated that he had looked for work as a mechanic or a lathe operator.

On Tuesday and Wednesday, May 21 and 22, the claimant was required to be in federal court from 10 a.m. until 4:30 and 5 p.m., in connection with a suit which he had instigated against the sheriff's office for

false arrest. Because of this fact, the department held the claimant ineligible for benefits under section 1253(c) of the code.

The claimant testified that many employers who hire dock workers to load and unload trucks work such employees on the night shift. The Department of Employment representative testified that approximately 80 percent of the employers employing workers in machine shops employ them on the day shift. There was no evidence to show that on the two days the claimant was in court during the week ended May 25, 1967, the Department of Employment or any prospective employers attempted to contact the claimant to offer him a work opportunity.

REASONS FOR DECISION

Section 1253(c) of the Unemployment Insurance Code presently provides as follows:

> "1253. An unemployed individual is eligible to receive unemployment compensation benefits with respect to any week only if the director finds that:
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> * * *
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> "(c) He was able to work and available for work for that week."

Prior to 1945, the predecessor of this section in the Unemployment Insurance Act provided in section 57(c) as follows:

> "Sec. 57. An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that:
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> * * *
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> "(c) He is able to work and available for work."

In Opinion NS-5544, the Attorney General of California interpreted section 57(c) of the act as it then read (3 Ops. Cal. Atty. Gen. 380). In that opinion, the Attorney General was considering whether a claimant who was unavailable for work for a short period of time during a week of unemployment was ineligible for benefits under the act. There, it was stated:

"Here it is admitted that the claimant was physically able and available for work during five days of the week in question, but, because of a temporary indisposition, was not available to work for the other two days of the week. However, he was not called for work during these two days. Inasmuch as claimant was physically able to work and available for work for one or more days during that week, and inasmuch as he was not called for work, he should be regarded as being physically able to work and available for work during the entire week."

In 1945, the State Legislature amended section 57 (c) of the act to read as follows:

"Sec. 57. An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that:

* * *

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

The Attorney General in Opinion No. 47-221, issued in November 1947 (10 Ops. Cal. Atty. Gen. 208), interpreted the amendment to section 57(c) of the act as follows:

"It is a familiar rule that a material change in the wording of a statutory provision indicates that the Legislature intended a change in the respects in which the previous language was amended. 23 Cal. Jur. 778; Estate of Broad, 20 Cal. 2d 612; W. R. Grace & Co. v. Commission, 24 Cal. 2d 720. It is an equally familiar rule that the presumption obtains that every word, phrase, and provision employed in a statute was intended to have some meaning and to perform some useful purpose. 23 Cal. Jur. 779, 780, 781.

"It is well established that the preposition 'for,' when used in a clause relating to a period of time, clearly means 'during,' 'throughout,' or 'during the continuance of ' such period of time. Hanson v. Goldsmith, 170 Cal. 512. . . ."

Additionally the Attorney General stated in that opinion:

"Availability for work, as used in section 57(c), requires no more than availability for suitable employment. Garcia v. Commission, 71 Cal. App. 2d 107. Suitable employment means work in the individual's usual occupation or for which he is reasonably fitted (section 13(a) Unemployment Insurance Act).

"Applying the above principles, it is our conclusion that under section 57(c) as amended September 15, 1945, an unemployed Individual shall be eligible to receive unemployment Insurance benefits with respect to any week only if he was throughout or during the continuance of such week able to work and available for work as customarily, normally, or ordinarily required by work in his usual occupation or for which he is reasonably fitted.

"In other words, if an individual's usual occupation, or work for which he is reasonably fitted, customarily, normally, or ordinarily calls for a seven-day work week, then such individual must be able to work and available for work each day of the week. If a six-day work week is appropriate then unavailability on the seventh day would not alone render the claimant ineligible under section 57(c)."

This opinion was reaffirmed by the Attorney General in Opinion No. 54-107 issued in August 1954 (24 Ops. Cal. Atty. Gen. 81), and in such opinion the Attorney General also rejected the suggestion that a claimant be held eligible for benefits for a week in which for "compelling reasons" he was unavailable for one normal workday. There it was stated:

"To accept the suggested test of 'compelling circumstances' in determining eligibility, accordingly, would be to add administratively the phrase 'without good cause' to section 1253(c), which the Legislature, apparently with deliberation, did not include in that section because it did incorporate the phrase in sections 1256 and 1257(b)."

Since 1945, this section of the Unemployment Insurance Act (which is now section 1253(c) of the Unemployment Insurance Code) has been amended at least twice, but the legislature has not seen fit to change the wording of the statute as it relates to a claimant's ability to work and availability for work during a week of unemployment. The legislature did, in 1959, amend the Unemployment Insurance Code by adding section 1253.1, which reads as follows:

"1253.1. An unemployed individual who is in all respects otherwise eligible for unemployment compensation benefits shall not be deemed ineligible for any week in which, for not exceeding two working days, he cannot reasonably be expected to work because:

"(a) There has been a death in his immediate family.

"(b) He is unlawfully detained."

Had the legislature intended further relaxation of section 1253(c) of the code to provide that unless a job opportunity was lost a claimant may not be held unavailable for work during any one week, it could have so stated at that time.

The laws of some other states provide for the reduction of weekly benefits for days on which a claimant is not available for work. For example, the Illinois law provides for reducing a claimant's weekly benefit amount by one-fifth for each day a claimant is unable to work or is not available for work during a benefit week (section 500 C. 1. Illinois Compensation Act). The Indiana law provides for reducing a claimant's weekly benefit amount by one-third for each normal workday during which the claimant is unable to work or unavailable for work (section 1203, Indiana Employment Security Act).

The California Legislature has not seen fit to make any such provisions in the California Unemployment Insurance Code, and it must therefore be concluded that the State Legislature intended that in order for a claimant to be considered able to work and available for work during any one week he must be able to work and available for work each and every regular workday during that week, unless he qualifies for the specific exceptions contained in section 1253.1 of the code. We may not by our decision change or alter the law; we must apply the law as it is written. If inequities result, the cure is with the legislature.

In Benefit Decisions Nos. 6581, 6620, 6625, 6645 and others, there developed what might be designated the "lost work opportunity" concept. Briefly stated, this concept holds that a claimant who is unavailable for work for a short period of time is not ineligible for benefits under section 1253(c) of the code if the facts show that during the period of his unavailability he lost no work opportunities. To follow this concept to its logical conclusion would require us to first ascertain if during a period when the claimant was

unavailable for work he lost any work opportunities. If no such work opportunities were lost, then we would have to hold the claimant eligible for benefits under section 1253(c) of the code even though the facts showed that during the period he was entirely unavailable for work.

We reject this concept and hold that in order for a claimant to meet the eligibility requirements of section 1253(c) of the code for any week, it must be shown that the claimant was able to work and available for work each and every workday of that week.

Applying this principle to the facts in the instant case, it must be concluded that during the week May 19 through May 25, 1968, the claimant did not meet the eligibility requirements of section 1253(c) of the code. While it is true that a large proportion of the jobs which the claimant has held since losing his driver's license occurred on the night shift, the facts show that he has also looked for and obtained employment on the day shift. While he was in court during two ordinary working days of the week, he could not have accepted work on the day shift without abandoning his suit. The record does not show that the claimant was willing to abandon his suit.

In the past, this board has stated that in order to be held available for work, a claimant must be ready, willing and able to accept suitable work. So long as the claimant was engaged in his attendance in court, he was not ready, willing and able to accept suitable work on the day shift and therefore he cannot be held to meet the availability requirements of section 1253(c) of the code each and every regular workday of the week ended May 25, 1968.

Benefit Decisions Nos. 6581, 6620, 6625, 6645 and others which apply the "lost work opportunity" concept are overruled.

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 May 19 through May 25, 1968.

Sacramento, California, December 24, 1968.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

LOWELL NELSON - Dissenting
(Written Opinion Attached)

CLAUDE MINARD

JOHN B. WEISS

DON BLEWETT – Dissenting
(Written Opinion Attached)

DISSENTING OPINION

In our opinion a precedent decision, based upon the record which is presently before us, should not be issued in this case.

When the claimant registered for work with the Department of Employment, he was given a primary work classification of truck driver despite the fact that his work application showed he could not accept work as a truck driver because he had lost his driver's license. He was given a secondary work classification of laborer, mechanic. This classification purportedly was based upon the fact that "several years ago" he had worked for an electric sprayer company operating a multiple drill press and turret lathe. The departmental representative testified that she was not familiar with dock work of the type performed by the claimant, and stated that type of work did not exist in the area served by the local office. Consequently, the testimony offered by the departmental representative concerning the labor market purportedly related to the claimant's secondary registration as laborer, mechanic. Yet, this testimony was based upon her knowledge of employers in the area who operated machine shops. Presumably then, she considered the claimant was qualified to operate a multiple drill press and turret lathe, and she was not giving testimony concerning the labor market for laborer, mechanic.

Based upon this state of the record, it is our opinion the testimony in the record concerning the prevalence of day shift work as compared to night shift has no evidentiary value. The record simply does not show whether the claimant is presently qualified to perform work as a multiple drill press or turret lathe operator based upon experience of "several years ago." Nor does it show whether he is qualified as a laborer, mechanic or whether there is a labor market for such services.

What the record does show is that the claimant has been recently employed as a dock worker, trucking and checker. His hours of work have been on the night shift. According to his testimony, such work is obtained by bidding on the desired shifts, with seniority workers getting the preference as to shifts. Ordinarily, a new worker obtains night shift work. Further, there is an implication in the record that a worker must make a choice and cannot bid for both day and night work. However, the record is far from being clear in this respect.

Also, the record is not clear as to whether the claimant's presence in court was required during the two days in issue; or whether he would have been willing to forego his suit; or whether he could have obtained a continuance in the event he obtained day shift employment. The record is clear that he would have accepted night shift employment on those days, which may have been the only employment available to him in the labor market.

Under these circumstances, we do not believe it is proper to decide this case, which has been designated as a precedent decision, based upon a record which permits only speculation and surmise as to what effect the claimant's presence in court may have had upon his attachment to the labor market. Therefore, we would remand this case for the purpose of obtaining additional evidence so that a complete and adequate record can be developed on which a proper precedent decision could be based.

Additionally, we disagree with the action of the majority in overruling Benefit Decisions Nos. 6581, 6620, 6625, and 6645.

As recently as October 29, 1968, this board issued Precedent Decision No. P-B-28, a unanimous decision. In this decision we considered the availability for work of a claimant who, during a week, was absent from his normal labor market for three normal workdays because of a death in his immediate family. The issue was whether section 1253.1 of the code permitted any exception to its provisions which prohibit the denial of benefits for any week in which, for not exceeding two working days, a claimant cannot be reasonably expected to work because "there has been a death in his immediate family."

We concluded that under accepted principles of statutory construction no exception could be permitted and that benefits must be denied under section 1253(c) of the code. But, of significance is the following quotation from that decision:

> "As a general rule eligibility for benefits under the above section requires satisfaction of the requirements of availability for the entire workweek, and any claimant who has withdrawn from the labor market or rendered himself unavailable for employment for a portion of the workweek is ineligible for benefits for the entire week (Benefit Decisions Nos. 6333 and 6457). However, in Benefit Decisions Nos. 6581 and 6625 we

held that inability to work or unavailability for work for a short period of time within a workweek did not render the claimant ineligible for benefits when the evidence disclosed there was no loss of employment opportunities."

Presumably, we gave our approval to Benefit Decisions Nos. 6581 and 6625 which the majority now overrules. Such inconsistent actions on our part can only create confusion as to what the applicable law in such situations is, or should be. But, beyond that, we are concerned because we believe Benefit Decisions Nos. 6581, 6620, 6625, and 6645 reached the proper conclusions based upon a just and fair application of the law to the facts of those cases.

In Benefit Decision No. 6625 we stated:

> "In construing the availability for work requirement, we have attempted at all times to use a realistic approach in deciding labor market conditions and the need for claimants to be ready, willing, and able to accept suitable work in order that their unemployment may not be unduly extended."
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> "Each case must be decided on its own facts. In holding in the present case that the claimant was available for work, we have not considered whether the claimant's absence from her normal labor market was due to 'compelling circumstances.' We have concluded that she was available for work because her activities did not in any way impair her availability for work and did not reduce or jeopardize her opportunities for employment."

The decision also made reference to Attorney General's Opinion No. 54-107 (24 Ops. Cal. Atty. Gen. 81) cited in the majority opinion, wherein the Attorney General suggested that hardship in individual cases may have resulted from an overly strict and restrictive application of the availability for work requirement. We do not believe that the addition of section 1253.1 to the code precludes our continuing to apply a realistic approach in deciding whether the facts in a particular case show that a claimant's activities did not in any way impair his availability for work or did not reduce or jeopardize his opportunities for employment.

We emphasize that each case must be decided on its own facts, and cannot be decided on the basis of any fixed or inflexible rule. This is

particularly so in the area of availability for work, which is so much a subjective determination based upon the readiness, willingness, and ability of the individual to accept suitable work in a labor market. The so-called "lost work opportunity" concept is only one factor to be considered in the realistic approach we should take in deciding cases of this kind. We regard Benefit Decisions Nos. 6581, 6620, 6625, and 6645 as proper application of the realistic approach, whether based on lost opportunity concept or simply the proposition that the claimants' activities did not in fact render them unavailable for work.

For such reasons, we are compelled to dissent from the decision of the majority in this case. In so doing, we are not holding that the claimant was available for work. We simply do not have the necessary facts in this record upon which we may render a decision.

LOWELL NELSON

DON BLEWETT