

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

FRANK S. KJAR
(Claimant)

WEB SERVICE
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-445
Case No. 85-5744

EMPLOYMENT DEVELOPMENT DEPARTMENT

The Department appealed from the decision of the administrative law judge which held that the claimant was not ineligible for unemployment insurance benefits under section 1256.5 of the Unemployment Insurance Code commencing December 16, 1984.

STATEMENT OF FACTS

The claimant was employed as an electric motor repairman for a period of ten months. He was discharged by his employer for reporting to work under the influence of alcohol on October 16, 1984.

The claimant filed a claim for benefits effective February 24, 1985, and the employer filed a timely protest thereto, citing the claimant's having been under the influence while on the job. In an interview with the Department on March 13, 1985, the claimant stated he had been drinking prior to reporting to work on October 16 and that he had been sent home from work on that date. He also indicated he had been taking valium during the same time frame.

On March 27, 1985, the Department issued a determination and ruling in which it held the claimant was disqualified from receiving benefits under section 1256 of the code and the employer's reserve account was relieved of charges under sections 1030 and 1032 of the code. There was no determination issued with respect to section 1256.5 of the code.

The claimant appealed in a timely manner, on April 12, 1985, and in an interview with the Department on April 16, 1985, the claimant admitted that he was under the influence of intoxicants on his last day of work, that he knew he had an irresistible compulsion to take drugs, and that he had completed a rehabilitation or detoxification program. The local office of appeals issued a notice of hearing giving the date, place and time of the appeal hearing and the issues to be inquired into: to wit, sections 1256 and 1030-1032. No determination on the issue arising under section 1256.5 of the code was issued subsequent to the interview of April 16, 1985.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides that an individual who is discharged for misconduct connected with her or his work is disqualified from receiving unemployment compensation.

Section 5037, Title 22, California Administrative Code, provides that an administrative law judge shall consider only those issues of a determination which are appealed or are noticed by the office of appeals:

"If there is a related issue arising directly from the determination, the administrative law judge shall inform the parties of his or her intention to consider the related issue and of their right to request a continuance as to said issue Evidence shall not be taken on a related issue, nor a decision issued thereon, unless a knowing and informed waiver is obtained from all parties."

The use of the word "shall" in the regulation means that the provisions contained therein are mandatory and not merely advisory (People v. Allied Architects' Association of Los Angeles, 201 Cal. 428, 257 Pac. 511, 514). The record before us is devoid of any announcement by the administrative law judge that he was considering another issue and no waiver was obtained from the parties. Accordingly, the administrative law judge lacked jurisdiction to hear and decide the issue arising under section 1256.5 of the code. Furthermore, only the director may issue a determination under section 1256.5. The administrative law judge on his or her own cannot decide that matter.

We will therefore consider whether the claimant was discharged for misconduct.

In Jacobs v. California Unemployment Insurance Appeals Board (1972), 25 Cal.App. 3d 1035, 102 Cal.Rptr. 364, the court held that misconduct in reference to section 1256 of the code requires some volitional act by the claimant. Where the facts show the claimant did not act volitionally, the claimant's behavior cannot be said to be wilful or wanton. As a result, misconduct cannot be established under the tests imposed by Maywood Glass Company v. Stewart (1959), 170 Cal.App. 2d 719, 339 Pac. 2d 947. In the appeal before us, the evidence establishes that the claimant had an irresistible compulsion to drink and this condition caused the behavior for which he was discharged by the employer.

Under the circumstances, it must be held that the claimant was not discharged for misconduct within the meaning of section 1256 of the code because his conduct was not volitional. This being the case, the employer's reserve account cannot be relieved of charges under sections 1030-1032 of the code. However, the evidence which supports this result also suggests that the Department should have issued a determination under section 1256.5 of the code, either following the March 27 interview or, certainly, the April 16 interview.

Section 1256.5 of the code provides in part that a claimant shall be disqualified from receiving benefits if the director finds that he was discharged from his most recent work for

- 1) chronic absenteeism due to intoxication;
- 2) reporting to work while intoxicated;
- 3) using intoxicants on the job;
- 4) gross neglect of duty while intoxicated; or where the claimant otherwise left work for reasons caused by an irresistible compulsion to use or consume intoxicants.

As can be seen from the content of the interview of March 13, the Department was put on notice that the claimant had been drinking prior to reporting to work on October 16, 1984, and that he had been sent home by the employer. The employer stated as much in its protest. We believe this information was sufficient to trigger the issuance of a determination on the 1256.5 issue at that time. Certainly such a determination should have been issued following the April 16 interview. Failure to have done so unfortunately will require a duplication of effort by the Department and quite likely an additional hearing, both of which should have been unnecessary.

On February 27, 1984, the Department issued Field Office Directive No. 84-24 in which it set forth its rules for implementing the provisions of section 1256.5 of the code. It is stated therein that "Where the separation from work is due to reasons caused by an irresistible compulsion to use or consume intoxicants, both sections 1256 and 1256.5 are to be applied."

If it is conceded that evidence of an irresistible compulsion to consume intoxicants is not discernible in the March 13 interview, there cannot be any doubt of it with respect to the April 16 interview. At this point a reconsidered determination should have been issued pursuant to section 1332 of the Code.

DECISION

The decision of the administrative law judge is modified. The claimant is not disqualified from receiving benefits under section 1256 of the code. The employer's reserve account is subject to charges. Benefits are payable provided the claimant is otherwise eligible. The issue arising under section 1256.5 of the code is referred to the Department.

Sacramento, California, May 6, 1986.

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