

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

PATRICK H. MALONE
(Claimant-Appellant)

PRECEDENT
BENEFIT DECISION
No. P-B-48
Case No. 68-5353

M/V AZOREANA
(Employer-Respondent)

The claimant appealed from Referee's Decision No. SD-4832 which held that the claimant was not available for work and did not meet the eligibility requirements of section 1253(c) of the Unemployment Insurance Code for four weeks beginning October 13, 1968 through November 9, 1968. Written argument was submitted on behalf of the claimant and the Cannery Workers and Fishermen's Union of San Diego. No written argument has been submitted on behalf of the Department of Employment or the employer.

STATEMENT OF FACTS

The claimant has been employed for two and one-half years as the chief engineer of the commercial fishing boat M/V Azoreana. The last trip for the boat during the calendar year 1968 was for 60 days ending in July. Thereafter, the boat was in the shipyard at San Diego for overhaul and it was to remain there until sometime after January 1, 1969.

Where the owners of commercial fishing boats have a fleet of boats, they generally employ a port engineer who takes over the responsibility of working with the shipyards while the boats are undergoing repair. The chief engineers on such boats merely submit their lists of necessary repairs and have no further work on or responsibility for the boat, but leave this to the port engineer and the shipyards. The owners of the M/V Azoreana did not have a port engineer so that the claimant was responsible for working out repair plans with the shipyard engineers, checking to see the repairs were being made as contracted for, inspecting gauges and valves, and making minor repairs not covered by the contract.

After making the initial arrangements for the repairs, the claimant left San Diego on October 17, 1968 for a vacation to visit relatives in Boston, Massachusetts. He returned to San Diego on November 7, 1968. During the time he was away the claimant could have been reached by telephone in any emergency and the claimant telephoned the skipper "to find out how things were doing." One of the owners was standing by while the repairs were being made. The assistant engineer checked the boat and the progress of the repairs while the claimant was away from San Diego.

When the claimant returned, he filed with the Department of Employment claims for unemployment Insurance on Form DE 2063F, Notice of Reduced Earnings, for the four weeks beginning October 13 through November 9, 1968, in connection with a previously established benefit year. Benefits were denied by the department on the ground that the claimant was not available for work during the four-week period he was on vacation. The claimant testified that probably he could have worked for someone else during this period as he had substantially completed his duties in connection with the repair. However, he still had a job and owners frown on the acceptance of other work as they feel the person is still with the boat. The claimant did not expect any pay for the period the boat was being repaired but he thought that he might receive a bonus at the end of the year for staying with the boat. The sale of the fish caught during the last trip out ending in July 1968 did not cover expenses and the 13- or 14-man crew had to each pay \$160 to make up the cost of food and fuel, etc., used on the trip. Before that, however, the boat had had a "pretty good year."

Counsel for the claimant and the union contends in written argument that claimant was totally unemployed within the meaning of section 1252.1 of the code and that, because of the special legislation with respect to commercial fishermen, section 1253(c) of the code is entirely inconsistent with such special legislation and is not applicable to the claimant's circumstances where his employment relationship with his regular employer had not terminated.

The representative of the department at the hearing testified that under the law and authorized regulations there appeared to be no limitation on how many times an individual could submit Form DE 2063F, Notice of Reduced Earnings, but that individuals submitting such claims were required to be available for other suitable work, which the claimant was not because of his absence from the area.

The questions before us for consideration are:

1. Was the claimant totally, part-totally or partially "unemployed" within the meaning of section 1252, 1252.1 or 1252.2 of the code, and
2. If "unemployed" was the claimant, as a commercial fisherman, required to meet the eligibility requirements of section 1253(c) of the code?

REASONS FOR DECISION

Section 1251 of the Unemployment Insurance Code provides that unemployment compensation benefits are payable from the Unemployment Fund to "unemployed" individuals who are "eligible" under part 1 of the code. Individuals are "unemployed" if they meet the requirements of sections 1252, 1252.1 and 1252.2 of the code or, for the limited purpose of filing a "valid claim," section 1276. Section 1252.2 of the code, which provides for the filing of claims by commercial fishermen as "partially unemployed individuals," has no application to the facts of the present case as it is limited to individuals "in the act of catching or attempting to catch fish." Sections 1252 and 1252.1 provide in pertinent 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, and other forms of short-time work. . . .

"1252.1. With respect to individuals hired as commercial fishermen a 'totally unemployed individual' means an individual who, during a particular week, while still attached to his employer from the standpoint that there did not occur any severance of the employer-employee relationship, earned no wages and performed no services because his employer's boat was tied up for one or more of the following reasons:

* * *

"(d) Boat is laid up for repairs."

An "unemployed" individual is "eligible" for benefits with respect to any week only if he meets the requirements of section 1253 of the code, or comes within the exceptions set forth in sections 1253.1 and 1253.2 (not here applicable) which eligibility requirements cannot be amended administratively (24 Ops. Cal. Atty. Gen. 81). Section 1253(c) of the code provides:

"1253. An unemployed individual is eligible to receive unemployment compensation benefits with respect to any week only if the director finds that:

* * *

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

In deciding whether the claimant was "unemployed" and, if "unemployed," whether he was required as a commercial fisherman to meet the availability for work requirements of the code, a brief review of some of our prior decisions and legislative changes is pertinent. Historically, commercial fishermen have had difficulty in establishing that they are "unemployed," whether totally, part-totally, or partially, because of their contingent method of compensation and the resulting lack of any definite relationship between hours of work and earnings, which may vary from day to day, week to week, and from season to season, and at times be in an inverse ratio (Benefit Decisions Nos. 4156, 5011, 5066, 5999, 6456, 6490 and 6494). In 1953, the Director of Employment amended the regulation on partial unemployment to attempt to cover the commercial fishermen's situation of unascertainable normal customary hours of full-time work. In Regulation Decision No. 19, issued on December 18, 1953, we held that such proposed amendment to the regulations was unreasonable, improper and invalid under existing law.

In 1957, the California Legislature added section 145 to the general definitions in the Unemployment Insurance Code to provide a definition with respect to commercial fishermen as partially unemployed individuals. In 1959, section 145 of the code was amended to delete a cutoff date and section 1252.1 was added to the code with respect to commercial fishermen as totally unemployed individuals. In 1961, section 145 was renumbered 1252.2 and it and section 1252.1 were amended to redesignate the subdivisions by alphabetical rather than numerical symbols. Neither of these sections with respect to commercial fishermen has been amended since.

On the other hand, section 1253.1 was added to the code in 1959 and section 1253.2 was added in 1965 as exceptions to the availability for work requirements of section 1253(c) of the code. In 1961, section 1253 (c) of the code was amended, without change in its availability for work requirement, to separately state and redefine the search for work requirement in subsection (e) of section 1253 by the same California Legislature which last amended the provisions on commercial fishermen as set forth above. In view of this legislative history, we cannot conclude that the legislature intended for commercial fishermen, permitted to file claims as "totally unemployed" or "partially unemployed" individuals under section 1252.1 or 1252.2 of the code, to be exempt from the eligibility requirements of code section 1253(c).

Section 1253(c) of the code applies to claimants who are "unemployed under the Unemployment Insurance Code, whether totally, part-totally or partially; it does not require that the claimant's employment relationship with his regular employer, be severed. Even a partially employed individual who is "unemployed" within the meaning of the code must meet the availability for work requirements of section 1253(c), including commercial fishermen (Benefit Decisions Nos. 5011, 5066, 5974, 6171 and 6358). Although there may be no limit to the number of times an individual may submit Form DE 2063F, Notice of Reduced Earnings, the authorized regulations provide that individuals submitting such claims for two successive pay periods during which they have performed no services for their regular employer with respect to which wages were payable must register for work and thereafter file continued claims for benefits (22 Cal. Adm. Code 1326-8; Benefit Decisions Nos. 5678 and 6300).

Counsel in contending that the claimant was a "totally unemployed individual" within the meaning of section 1252.1 of the code must necessarily assume that the claimant "earned no wages and performed no services because his employer's boat was . . . laid up for repairs." If one assumes the claimant was not required to perform services for his regular employer so that the claimant was "unemployed," it is not inconsistent to require that the claimant be available for other suitable work in order to be eligible for unemployment benefits for any particular week. On the other hand, if the claimant was required to perform services for his regular employer during a particular week, then the claimant would not be "unemployed" at all under the express language of section 1252.1 of the code and ineligible to claim benefits for that week on that ground alone without regard to whether he met any other eligibility requirement of the code (Benefit Decisions Nos. 6601 and 6662).

In the present case, the evidence established that the claimant performed no substantial duties for his regular employer during the four weeks involved in this appeal. Although the claimant might receive a bonus for the year 1968, he had not received any wages for the period the boat was laid up for repairs by the time he filed his claim. On these facts we conclude that the claimant was a "totally unemployed individual" within the meaning of section 1252.1 of the code, and also met the requirements for being "unemployed" set forth in section 1252 of the code (Benefit Decision No. 5066) for the four weeks in question because he performed no services for his regular employer.

However, we further conclude that although the claimant was "unemployed" he did not meet the eligibility requirements of section 1253(c) of the code. The claimant's travel was for the purpose of visiting relatives and to vacation and was unrelated to any search for work. The claimant was in effect holding himself available for work only with his regular employer who had no appreciable work for the claimant during this period (Benefit Decisions Nos. 3997 and 6498). Therefore, benefits must be denied under section 1253(c) of the code on the ground that the claimant was not available for work during the four weeks involved in this appeal.

DECISION

The decision of the referee is affirmed. Benefits are denied under section 1253(c) of the code for the four-week period beginning October 13, 1968.

Sacramento, California, August 12, 1969.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

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