

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

JOHN J. PERANO
(Claimant)

PRECEDENT
DISABILITY DECISION
No. P-D-160
Case No. D-73-251

The claimant appealed from that portion of Referee's Decision No. S-D-2248 which held that the claimant was in receipt of wages or regular wages and ineligible for disability benefits for the period June 10, 1973 through June 16, 1973 under section 2656 of the Unemployment Insurance Code and liable for the disability benefits which had been paid for that period as provided in section 2735 of the code. The decision also held that the claimant was not ineligible under section 2656 of the code thereafter beginning June 17, 1973 through July 14, 1973 and reduced the previously assessed overpayment of disability benefits through July 10, 1973 accordingly.

STATEMENT OF FACTS

The claimant had been employed for more than 20 years as a maintenance man by a forest products company in Martell, California. The claimant became unable to work and was hospitalized beginning April 13, 1973 for a condition diagnosed as partial right pneumothorax, diabetes mellitus, and bronchial asthma. The claimant remained disabled through August 12, 1973, after which the claimant apparently returned to work until he left work for his previously scheduled vacation for the four-week period beginning September 3, 1973.

The claimant established a disability benefit period with the Department beginning April 13, 1973, with a potential maximum award of basic disability benefits of \$2,730, payable at the rate of \$105 a week or \$15 a day. The claimant was paid basic disability benefits at this rate in the total amount of \$1,335 through July 10, 1973. The Department ceased the payment of such benefits thereafter because of information received from the employer that the claimant on June 10, 1973 had been paid vacation pay in the total amount of \$995 for 200 hours of vacation. The employer also reported that the claimant

last worked on April 12, 1973 and earned \$358.20 for his last full week of work excluding wages paid for overtime. The claimant's usual hourly rate of pay and his usual weekly hours are not set forth in the record before us.

The Department determined that the claimant was ineligible for benefits under section 2656 of the code because of the receipt of full wages in the form of vacation pay for the five-week period beginning June 10, 1973 through July 14, 1973. The Department also notified the claimant of an overpayment of \$465 for the basic benefits which had been paid beginning June 10, 1973 through July 10, 1973. The claimant appealed from these notices of determination and overpayment to a referee whose decision is before us in this present appeal.

The collective bargaining agreement between the claimant's employer and the claimant's labor union provided in pertinent part as follows:

"ARTICLE 11 - VACATIONS

"Each employee shall be granted vacation with pay, subject to the following terms and conditions:

"(a) Vacation Base Year

"The vacation base year shall be the period of time from June 1 through May 31 each year, both dates inclusive, which vacation base year shall be controlling for purposes of determining vacation and vacation pay eligibility.

"(b) Vacation Time and Pay Eligibility

"For vacation eligibility purposes only, 'Compensable hours' shall include, as paid during the vacation base year, all hours actually worked; hours paid or allowed for Holiday, Jury Duty, Funeral Leave and Call Time Pay; and paid Vacation hours, excluding the 'Additional Vacation Pay Increment' hours." (emphasis added)

* * *

"3. Employees Having Five or More Years of Continuous Employment

"The following Vacation Time Taken and Additional Vacation Pay increment formulas [emphasis added] shall apply to all qualified employees who on or before May 31 have attained five (5) or more years of continuous employment as defined in Section (g) of this Article:

a. Full Vacation Entitlement

"For all such employees who have qualified for a full vacation by reason of having 1200 or more compensable hours during the vacation base year, the following formula shall apply:

"For the period of June 1, 1972 through May 31, 1974.

Years of Continuous Employment	Vacation Time Taken Hrs.	Additional Vacation Pay Increment	Total Hrs. of Vacation Payment
5 thru 9 yrs.	80 (2 wks.)	40	120
10 thru 19 yrs.	120 (3 wks.)	40	160
20 or more yrs.	160 (4 wks.)	40	200"

* * *

"(c) Vacation Rate of Pay

"The vacation rate of pay for an hourly paid employee shall be his regular classified straight time rate of pay in effect on May 31 including any applicable shift differential for an employee regularly assigned to a swing or graveyard shift. . . ."

* * *

"6. All vacation pay shall be paid by separate check. The Additional Vacation Pay Increment Hours to which employees with five (5) or more years of continuous service are entitled shall be paid at the time the eligible employee receives payment for the first and second weeks of vacation."

Article 11 also contained express conditions as to when vacations could be scheduled and when payment of vacation pay should be made. Because the agreement for the first time permitted vacations on a staggered basis, the vacation schedule times were allotted in April 1973, but the vacation payments were made to all of the employees on or about June 10, 1973 rather than in accordance with any express provisions in the agreement. The

claimant had performed 1,200 hours of service in the vacation base year before his disability began.

The questions before us are whether the claimant received any wages or regular wages from his employer and, if so, to what period of time and in what amount or amounts should they be allocated.

REASONS FOR DECISION

Section 2656 of the Unemployment Insurance Code provides as follows:

"An individual eligible to receive disability benefits who receives wages or regular wages from his employer during the period of his disability shall be paid disability benefits for any day in an amount not to exceed his maximum daily amount which together with the wages or regular wages does not exceed for such day one-seventh of his weekly wage, exclusive of wages paid for overtime work, immediately prior to the commencement of his disability."

Our first problem is with respect to whether the vacation pay received by the claimant constituted wages under section 2656 of the code. As pointed out by the referee, effective March 4, 1972, the California Legislature added section 1265.5 to the Unemployment Insurance Code (Stat. 1971, c. 1272, p. 2492, § 1) as follows:

"Notwithstanding any other provision of this division, payments to an individual for vacation pay which was earned but not paid for services performed prior to termination of employment, or commencement of unemployment caused by disability, as the case may be, shall not be construed to be wages or compensation for personal services under this division and benefits payable under this division shall not be denied or reduced because of the receipt of such payment." (Emphasis added)

Subsequently the California Legislature amended section 1265.5 of the code (Stats. 1972, c. 864, p. 1533, § 6, urgency, eff. August 14, 1972) as follows:

"Notwithstanding any other provision of this division, payments to an individual for vacation pay, sick pay, or holiday pay which was earned but not paid for services performed prior to termination of employment, shall not be construed to be wages or compensation for personal services under this division and benefits payable under this division shall not be denied or reduced because of the receipt of such payment." (Emphasis added)

The operative effect of this amendment was set forth in section 7 of Statutes 1972, c. 864, p. 1537, as follows:

"The provisions of Section 1265.5 of the Unemployment Insurance Code as amended by this act shall be operative only with respect to payments of vacation pay, sick pay and holiday pay made on or after January 1, 1973. The provisions of Section 1265.5 of the Unemployment Insurance Code as in effect prior to the amendments made by this act shall remain applicable to payments of vacation pay made prior to January 1, 1973."

Because there was no termination of the employment relationship during the claimant's spell of disability, his vacation pay in 1973 constituted wages for consideration under section 2656 of the code.

Our next problem is of a factual nature due to the employer's report that the claimant earned \$358.20 for his last full week of work excluding wages paid for overtime (about \$9 an hour on a 40-hour-a-week basis) but was paid \$995 vacation pay for 200 hours (about \$5 an hour). If \$358.20 is accepted as the claimant's weekly wage, the \$995 vacation pay when allocated upon a four- or a five-week basis would not make the claimant ineligible for his \$105-a-week disability benefits, since the difference between the \$358.20 and the vacation pay divided by four or five weeks results in a wage loss in excess of the disability benefit amount. However, we are unable to ascertain from the record what the claimant's usual hourly rate of pay was or his usual weekly hours and what would cause the differences in amounts under the employer-union agreement. Ordinarily, we would remand this case to a referee for additional hearing in order to obtain further evidence to clarify these factual issues. In the present case we will not do so because the legal issues may be resolved as set forth below.

As a general rule, the employer has the inherent authority to designate a vacation period for its employees and to allocate any vacation payment. This right may be limited by a collective bargaining agreement, in which case, generally, the allocation must be in accordance with the terms of the agreement. Vacation payments will be allocated to the extent possible to the period when a vacation actually is taken. Where, under a collective bargaining agreement, the claimant is entitled to "vacation pay" but not to a vacation, such a payment is considered to be a payment in lieu of vacation and a bonus allocable to the period when earned.

In the present case, although the claimant was paid the vacation pay on June 10, 1973 while he was off work because disabled, his vacation had then been scheduled to begin September 3, 1973 and in fact the claimant did begin his vacation as scheduled. We do not consider the mere fact that the claimant was paid on June 10, 1973 determinative of the allocation issue when all other employees were paid their vacation pay at the same time without regard to their vacation schedules. In our opinion the referee correctly allocated the vacation pay for the four weeks to the period when the claimant actually began his previously scheduled four-week vacation.

With respect to the additional vacation pay increment, however, since the agreement did not provide for any vacation time off for the 40 hours' vacation pay increment allowed, it is our opinion that such additional vacation payment constituted a payment in lieu of vacation and a bonus allocable to the period when earned. Vacation pay should not be allocated to a period in excess of the maximum period of actual vacation allowed under the agreement.

Therefore, disability benefits may not be denied under section 2656 of the code because of the claimant's receipt of vacation pay, including the additional vacation pay increment, during the claimant's spell of unemployment and disability beginning April 13, 1973 through August 12, 1973. The overpayment of \$465 which was assessed must be set aside. Disability benefits are payable through August 12, 1973 provided the claimant is otherwise eligible.

DECISION

The decision of the referee is modified. The claimant was not ineligible for disability benefits under section 2656 of the code during his period of disability. The overpayment is set aside. Benefits are payable through August 12, 1973 provided the claimant is otherwise eligible.

Sacramento, California, March 12, 1974

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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