

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

JACOB S. JACOBSON
(Claimant-Respondent)

PRECEDENT
DISABILITY DECISION
No. P-D-41
Case No. D-68-238

DEPARTMENT OF EMPLOYMENT
(Appellant)

The Department of Employment appealed from Referee's Decision No. SF-D-9090 which held that certain monies received by the claimant constituted wages allocable to the period following February 5, 1968. Written argument has been submitted by the department and the claimant. In addition, written argument was also received from the American President Lines, Ltd., as "a friend of the board."

STATEMENT OF FACTS

Effective May 1, 1968, the claimant filed a first claim for disability benefits with the San Francisco District Disability Office of the Department of Employment. This claim for benefits was disallowed because the only wages reported for the claimant during the period January 1 through December 30, 1967 were \$238.41, reported as wages paid the claimant by the American President Lines, Ltd. The claimant requested that the initial computation be reviewed, contending he had received, in addition to these wages, a gross of \$1,024.91, which should be considered wages. The department determined that this amount was not wages, and therefore held the claimant's claim for benefits invalid.

The claimant regularly earns his livelihood as a seaman. Prior to the onset of his current disability, the claimant signed articles to serve aboard a vessel operated by the employer herein during a voyage which was to begin on or about October 1, 1967. On or about October 17, 1967, while aboard the vessel, the claimant became disabled, was removed from the vessel and was hospitalized. He remained disabled until December 30, 1967, on which date he was found fit for duty by a United States Public Health Service Hospital.

On February 5, 1968 the claimant received, in addition to maintenance, \$1,024.91 designated by the employer as "unearned wages" for the period October 17 to December 30, 1967. It is the contention of the claimant that these "unearned wages" are wages sufficient to establish a valid claim for benefits. It is the contention of the Department of Employment that the amount this claimant received in addition to maintenance does not constitute wages on which a valid claim can be based.

REASONS FOR DECISION

Section 2652 of the Unemployment Insurance Code provides that an individual cannot establish a valid claim unless during his disability base period he has been paid wages for employment by employers of not less than \$300. Section 2610 of the code provides that the disability base period for a claim filed in May of any year shall be the four calendar quarters ended in the next preceding month of December. Thus, in order for the claimant to establish a valid claim effective May 1, 1968, it must be established that he has been paid wages of not less than \$300 during the period January 1, 1967 through December 30, 1967. The question for decision is to decide the status of the "unearned wages" the claimant received from his employer.

Section 926 of the code provides:

"926. Except as otherwise provided in this article 'wages' means all remuneration payable for personal services, whether by private agreement or consent or by force of statute, including commissions and bonuses, and the reasonable cash value of all remuneration payable in any medium other than cash." Section 931 of the code provides:

"931. 'Wages' does not include the amount of any payment made to or on behalf of an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally, or for his employees generally and their dependents, or for a class or classes of his employees, or for a class or classes of his employees and their dependents, on account of retirement, or sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, or death.

"As used in this section 'payment' includes any amount paid by an employer for insurance or annuities, or into a fund to provide for any such payment."

If the "unearned wages" the claimant received were paid to him "under a plan or system established by the employer," then the "unearned wages" would be exempt under section 931 of the code. This is the contention of the Department of Employment; that the unearned wages the claimant received fall within the exemption established by section 931 of the code.

As pointed out in section 542 of the Law of Seaman by Martin J. Norris:

"§542. Wages.--It has long been assumed that a seaman sick or injured in the service of his vessel and without willful misbehaviour on his part is entitled, in addition to maintenance and cure, to wages 'to the end of the voyage.' "

The United States Supreme Court in "The Osceola" (1902), 189 US 158, 175, stated:

"Upon a full review . . . of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:

"1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."

(See also Ferrell v. US (1949) 336 US 511, 519, 69 S. Ct. 707; Rose v. Bloomfield Steamship Company 162 F. Supp 576).

On October 29, 1939 the United States ratified a draft of a convention which resulted from the General Conference of International Labor Organization at Geneva in 1936. Article 5 of this convention reads in part as follows:

"1. Where the sickness or injury results in incapacity for work the shipowner shall be liable -

"(a) To pay full wages as long as the sick or injured person remains on board;

"(b) If the sick or injured person has dependents, to pay wages in whole or in part as prescribed by national laws or regulations from the time when he is landed until he has been cured or the

sickness or incapacity has been declared of a permanent character.

"2. Provided that national laws or regulations may limit the liability of the shipowner to pay wages in whole or in part in respect of a person no longer on board to a period which shall not be less than sixteen weeks from the day of the injury or the commencement of the sickness."

Thus it seems to be established in the law of the United States that a seaman who becomes ill or disabled while in the service of his ship is entitled to wages so long as the voyage continues or until he recovers sufficiently to perform his work. On this basis, the wages received by the claimant from his employer covering the period of his disability from October 17, 1967 to December 30, 1967 constitute wages and were not received because of any "plan or system established by an employer" but were received by force of law. The provisions of section 931 of the code do not apply in this case.

Another issue is presented for decision in this case. The unearned wages which were for the period of the claimant's disability were paid to the claimant on February 5, 1968. The referee allocated the wages to the period following this date. However, section 2657 of the code provides:

"2657. If the remuneration of an individual is not based upon a fixed period or duration of time or if the individual's wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, the wages for any week or for any calendar quarter for the purpose of computing an individual's right to disability benefits shall be determined pursuant to authorized regulations. The regulations shall, so far as possible, secure results reasonably similar to those which would prevail if the individual were paid his wages at regular intervals."

The authorized regulations adopted pursuant to this section of the Unemployment Insurance Code are found in section 2657-1, Title 22, California Administrative Code, and read as follows:

"2657-1. Allocations of Wages Paid at Irregular or Infrequent Intervals. For the purpose of determining a claimant's maximum benefits and weekly benefit amount for disability benefits, when because of the irregular or infrequent intervals of the wage payments, wage records would not

otherwise fairly indicate the claimant's employment during his disability base period, the department shall apportion the amount of such wage payments among the calendar quarters covered by the wages according to the length of employment in each of such quarters."

It appears to us that the unearned wages received by the claimant should be allocated to the period of the claimant's disability because but for his disability he would have received his wages during his period of employment. For this reason and in accordance with section 2657 of the code, we conclude that the unearned wages paid to the claimant should be apportioned to the last calendar quarter of 1967.

DECISION

The decision of the referee is modified. The "unearned wages" received by the claimant are wages for the purpose of establishing a valid claim for disability benefits and are allocated to the fourth quarter of 1967.

Sacramento, California, March 25, 1969.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

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