

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

MARY K CRESSWELL
(Claimant)

FIRST INTERSTATE BANK
(Self-Insurer)

PRECEDENT
DISABILITY DECISION
No. P-D-463
Case No. D-88-00223

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. LA-DC-31592

The Department appealed from the decision of the administrative law judge which held that effective February 16, 1988, the State Disability Fund, rather than the voluntary plan insurer, would be liable for payment of disability insurance benefits to which the claimant was entitled because of injuries she sustained on February 5, 1988.

STATEMENT OF FACTS

The claimant had worked for the employer for approximately seven and one-half years when, because of her pregnancy, she took an unpaid leave of absence. She last worked on November 11, 1987. She was certified by her doctor as being disabled, because of her pregnancy, beginning November 16, 1987. The claimant's obstetrician indicated that the claimant would be disabled as a result of the pregnancy and delivery through February 15, 1988 and could return to work on February 16, 1988. The voluntary plan assumed the responsibility to pay the claimant disability benefits for the period the claimant was disabled because of her pregnancy.

On February 5, 1988, the claimant was involved in an automobile accident in which she sustained serious injuries to her neck, back, and shoulders. As a result of these injuries, the claimant could not return to work on February 16, 1988. Consequently, she filed an additional disability insurance benefits claim with the voluntary plan. The voluntary plan referred this claim to the Department, contending that the state fund was responsible for disability insurance payments under this later claim and that the claimant was not

covered by the voluntary plan when she was injured on February 5, 1988. By letter dated April 11, 1988, the Department declined the referral from the voluntary plan.

Paragraph VI of the employer's approved self-insured voluntary plan provides as follows:

"TERMINATION OF INDIVIDUAL EMPLOYEE COVERAGE

An employee's coverage will terminate:

- A. On the date of termination of employment by termination of the employer-employee relationship; or on the fifteenth day following a leave of absence without pay or layoff without pay;
- B. On the date the employee ceases to be an eligible employee;
- C. As of the beginning of the next calendar quarter following the date the employee has given written notice of his or her intention to withdraw from the plan;
- D. On the date of termination of the plan."

The Department argues that the voluntary plan remains "on the risk" to provide disability insurance benefits to the claimant because the disabling injuries suffered by the claimant on February 5, 1988 are part of a continuous period of disability beginning November 16, 1987 when the claimant was unable to continue working because of her pregnancy. The Department cites section 3253 of the Unemployment Insurance Code and section 3254-2(b), Title 22, Code of Regulations, in support of this position. Further, the Department asserts that Precedent Decision No. P-D-397 no longer applies in circumstances as are present in the instant case because the law has changed with respect to the entitlement to disability insurance benefits because of pregnancy.

The employer relies upon the provisions of its voluntary plan and upon Precedent Decision No. P-D-397 to support its position that it is not responsible for disability payments due to the claimant as a result of her injury of February 5, 1988.

REASONS FOR DECISION

Section 2626 of the Unemployment Insurance Code provides that an individual shall be deemed disabled on any day in which, because of his or her physical or mental condition, he or she is unable to perform his or her regular or customary work. Subsection (a) includes in the definition of disability or disabled, illness or injury, whether physical or mental, including any illness or injury resulting from pregnancy, childbirth, or related medical condition.

Section 3253 of the Unemployment Insurance Code provides that:

"Except as provided in this part, an employee covered by an approved voluntary plan shall not be entitled to benefits from the disability fund for disability which commenced while he is covered by the voluntary plan. The Director of Employment Development shall prescribe authorized regulations to allow benefits to individuals simultaneously covered by one or more approved voluntary plans and the disability fund."

Subdivision (d) of section 3254-2, Title 22, Code of Regulations, provides in pertinent part that:

"An employee covered by a voluntary plan shall be eligible for benefits under the plan with respect to any uninterrupted period of disability which commences while he or she is covered. For the purpose of this subdivision, a period of disability shall be deemed to commence while an employee is covered by a voluntary plan if at the time coverage attaches such employee is, or thereafter during coverage becomes, unable to perform the regular or customary duties of his or her employment under the voluntary plan because of his or her physical or mental condition notwithstanding the fact that benefits may not be immediately payable under the voluntary plan. Coverage under a voluntary plan may be terminated upon the withdrawal of an employee from the plan or the termination of his or her employment. Employment shall be deemed terminated by a termination of the employer-employee relationship or by a leave of absence without pay or a layoff without pay if the leave or layoff extends for a period of more than two weeks

before the disability commenced except that a voluntary plan may extend its benefits for a longer period after separation from work (emphasis added)."

Section 2608 of the Unemployment Insurance Code provides that "disability benefit period" means the continuous period of unemployment and disability beginning with the first day of filing a claim for disability benefits.

In Precedent Decisions Nos. P-D-68 and P-D-391, the Appeals Board held a claimant who established a disability benefit period and during the period of disability became further disabled because of a second unrelated condition was not entitled to establish a new disability period.

Section 2712 of the code provides in pertinent part that when a dispute arises between the voluntary plan and the state fund regarding who must pay an eligible individual, benefits will be paid from the source against whom the claim was filed, pending resolution of the dispute by the Appeals Board.

In Precedent Decision No. P-D-397, the claimant left her job on a pregnancy leave of absence without pay. Her child was born, following a normal pregnancy, seven weeks later. On the date of delivery, the claimant had a tubal ligation, a voluntary decision, unrelated to her pregnancy disability. The Board held that the voluntary plan could not deny coverage for the pregnancy. Section 2626.2(c) of the code (which has since been repealed) clearly established that it was the intent of the legislature to provide six weeks of benefits for a normal pregnancy. The state fund provided benefits under these circumstances and the voluntary plan could provide no less. The termination of coverage provisions in the voluntary plan were, in this instance, invalid. However, the decision also found that as the tubal ligation was non-pregnancy related, the termination of coverage provisions of the contract applied with regard to the tubal ligation. The voluntary plan was not on the risk therefore, for non-pregnancy disabilities occurring 15 days after the claimant takes an unpaid leave of absence.

In Precedent Decision No. P-D-416, the claimant quit her job while pregnant but not disabled. Section 2626.2(c) of the code had been repealed in 1979 and currently, pregnancy is treated in the same manner as any other disability under the Unemployment Insurance Code. As the claimant was not disabled when she quit her job, the termination of coverage provisions of the voluntary plan applied and the employer's voluntary plan was no longer responsible for coverage. The Board held when the claimant's pregnancy became disabling,

the state fund is on the risk. Precedent Decision No. P-D-416 overruled Precedent Decision No. P-D-397 to the extent that it was inconsistent with Precedent Decision No. P-D-416.

The salient facts in this case are not in dispute. The claimant went on an unpaid leave of absence due to her pregnancy on November 14, 1987. She was scheduled to return to work on February 16, 1988. However, on February 5, 1988 she was in an automobile accident, causing her injuries and further delaying her ability to return to work. There was no question that the claimant remained eligible for disability insurance benefits after February 16, 1988 under section 2626 of the code. The issue in this case is whether the state fund or the voluntary plan is liable for disability benefits paid to the claimant as a result of her injuries of February 5, 1988.

We agree with the Department that there is one continuous period of disability in the instant case. The date the claimant sustained her injuries in the automobile accident, February 5, 1988, was within the initial period of disability established for the claimant's pregnancy. This Board has held before in Precedent Decisions Nos. P-D-68 and P-D-391 that the claimant could not establish a new period of disability. We note, however, that in these decisions the Board has dealt with the "continuous period of disability" issue in the context of the question of a claimant's substantive eligibility for disability insurance benefits. Whether the state fund or the voluntary plan is "on the risk" is an entirely different matter.

Section 3253 of the code states, "An employee covered (emphasis added) by an approved voluntary plan" is not paid by the state fund "for a disability which commenced while he is covered (emphasis added) by the voluntary plan." While the voluntary plan was responsible for making disability insurance benefit payments to the claimant pursuant to her disability for pregnancy at the time she was injured on February 5, we conclude that the claimant was not, as of that date, "covered" by the plan.

The voluntary plan in this case contains a provision terminating coverage on the fifteenth day following a leave of absence without pay. We see no reason why that portion of the voluntary plan should not take effect in this case. We allowed similar termination of coverage clauses to take effect in Precedent Decisions Nos. P-B-397 and P-D-416. We note at this point that Precedent Decision No. P-D-416 overruled P-D-397 only insofar as P-D-397 was inconsistent with P-D-416. However, that portion of P-D-397 upholding the validity of the termination provision of a voluntary plan, where subsequent to 15 days after the claimant was on an unpaid leave of absence,

she became disabled for reasons not related to the pregnancy, is not overturned and is applicable to the instant case.

Additionally, the Department's own regulation, section 3254-2, Title 22, Code of Regulations, cited above, is consistent with the termination of coverage provisions of the voluntary plan, stating, "Coverage under a voluntary plan may be terminated upon . . . termination of his or her employment. Employment shall be deemed terminated by . . . a leave of absence without pay or a layoff without pay if the leave or layoff extends for a period of more than two weeks before the disability commenced." Accordingly, we conclude, as the administrative law judge did in this case, that the employer's voluntary plan is responsible for providing disability insurance benefits through February 15, 1988, the last day the claimant was unable to work because of her pregnancy. Thereafter, the liability for disability insurance benefits belongs to the state fund.

DECISION

The decision of the administrative law judge is affirmed. The voluntary plan is liable for disability benefits paid to the claimant through February 15, 1988. Beginning February 16, 1988, the state disability fund is liable for disability benefits paid to the claimant.

Sacramento. California, January 19, 1989.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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