

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

DEBORAH HARRINGTON
(Claimant)

KELLY SERVICES
(Self-Insurer)

PRECEDENT
DISABILITY DECISION
No. P-D-469
Case No. D-89-340

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. S-DC-15757

The voluntary plan insurer appealed from the decision of the administrative law judge which reversed the voluntary plan's denial of coverage and held that the voluntary plan was liable for the payment of benefits. The case is before the Appeals Board for review under section 2712 of the Unemployment Insurance Code.

STATEMENT OF FACTS

The employer contracts with various businesses to provide temporary help. The claimant registered with the employer in May 1987 to do light industrial and production work. After a couple of short assignments, she was put on a long-term job beginning in February 1988 and lasting approximately one year. Thereafter, she was called to work by the employer in June 1989 and put on a short-term production job which was completed on June 28, 1989.

The claimant performed no work for the above employer or for any other employer thereafter. On July 6, 1989, the claimant suffered a fall and broke her leg. Screws were surgically inserted and repair of ligament damage was accomplished on July 18, 1989. As of the date of hearing, the claimant still was wearing a cast up to her knee, and screws had not yet been removed from the broken bone.

The claimant was called by the above employer for another assignment on July 7, the day after she suffered the fracture, but told them she could not work because of the injury. The employer has placed her file in abeyance until the claimant notifies the employer that she has been released by her doctor to return to work.

The voluntary plan provides for termination of coverage when the employer/employee relationship ends. It contends that the relationship ended in the present case on June 28 when the claimant's assignment was completed. The voluntary plan also provides that coverage will end on the 15th day after a layoff or a leave of absence without pay. The insurer insists that the claimant was not on a layoff from the employer and was not on a leave of absence. A layoff is not defined in the voluntary plan.

On March 17, 1989 the Department adopted emergency regulation, Title 22 California Code of Regulations, section 3254-3. The employer insists that the regulation is not valid and therefore cannot control.

REASONS FOR DECISION

Section 2626 of the Unemployment Insurance Code provides that an individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his-regular or customary work.

Sections 3251 and 3254 of the code provide that an employer may provide disability benefit coverage for its employees by way of a voluntary plan provided that the rights afforded to the covered employees are greater than those provided under the state disability plan.

Section 3253 of the code provides that an individual shall not be entitled to benefits from the state disability fund for a disability which commenced while the claimant is covered by a voluntary plan.

Section 3263 of the code provides that an employee who has ceased to be covered by an approved voluntary plan shall, if otherwise eligible, become entitled to benefits from the state disability fund.

Section 2712 of the code provides that whenever an individual is entitled to disability benefits but there is a dispute whether such benefits are payable from the state disability fund or from one or another voluntary plan, benefits shall be paid to the individual, pursuant to authorized regulations, from the source against which his claim was first filed, at not less than the state disability fund rate, pending the determination of the dispute. The Appeals Board may prescribe by regulation the time, manner, method, and procedure through which such disputes may be determined by administrative law judges and the Appeals Board. If it is finally determined that the benefits should have been paid from one of said sources other than the one which paid the benefits, reimbursement shall be promptly made from the state disability fund or the voluntary plan, as the case may be, and the claimant shall be promptly paid the accumulated excess, if any, to which he is entitled. Reimbursement shall also be made to the extent of actual liability for benefits from one to another of the above-mentioned sources when it is determined that benefits have been paid in error from one source which should have been paid from another.

In the present case, the voluntary plan insurer contends it is not responsible for coverage of the claimant's disability claim because its employment relationship with the claimant terminated on June 28, 1989 when the claimant completed her last assignment. Therefore, pursuant to provisions of the voluntary plan, coverage terminated on that date and prior to the commencement of the claimant's disability on July 6, 1989. We agree.

In Precedent Decision P-D-455, this Board held that the employment relationship between a temporary employment agency and its temporary on-call employees terminates when such an employee is laid off upon completion of an assignment and has no definite recall date. We noted that the termination of coverage provision in the voluntary plan of disability insurance in that case, which is identical to the one in this case, was drawn verbatim from section 3254-2 of Title 22, Code of Regulations, as it existed prior to March 17, 1989.

Effective March 17, 1989, the termination provisions of sections 3254-2 of Title 22, Code of Regulations, were deleted and incorporated in a new section 3254-3. That section now provides in pertinent part:

"(a) Coverage under a voluntary plan may be terminated prior to commencement of a period of disability by any one of the following conditions."

* * *

"(5) Termination of the employer-employee relationship. Except when subdivision (b) of this section applies, 'termination of the employer-employee relationship' means that employment ceases with no mutual expectation or intention to continue the working relationship. Reasons for termination of the employer-employee relationship include, but are not limited to, separation, dismissal, resignation, and retirement."

* * *

"(6) Leave of absence without pay or a layoff without pay if the leave or layoff extends for a period of more than fifteen (15) full days before the period of disability commences. Except when subdivision (b) of this section applies, 'leave of absence' and 'layoff' mean that something other than a permanent termination of the employment relationship is indicated at the time an individual's work comes to an end, or the employment ceases because of factors beyond the employee's or the employer's control. A leave of absence from work is granted by the employer for many reasons. Reasons for a layoff include, but are not limited to, the following:

- (A) Temporary disciplinary action.
- (B) Lack of work. The term 'lack of work' indicates termination of employment because the commodity or activity provided by the business is no longer in sufficient demand to require the services of the individual, however the individual would be subject to recall if more work developed; or because an on-call employee who accepts temporary assignments is laid off at the completion of an assignment with the expectation that another assignment will be provided in the future."

* * *

"EXAMPLE 3, Layoff on On-Call Employee. C works through a temporary employment agency. For the past two years C has been working 'pretty steady' on assignments provided by this agency. There have been periods of employment and indefinite periods of unemployment. C completes an assignment and is laid off without pay until such time as another assignment may be available. On the fifteenth day following the last day of work C is severely injured in a motorcycle accident and files a disability claim with the voluntary plan.

"A day is defined in Section 125-1 of these regulations as the 24-hour period beginning at midnight and ending the following midnight. Therefore, a disability which occurs on the 15th day after leaving work is not one that occurred more than 15 full days after the last day worked. Disability benefits are payable under the voluntary plan."

In its final statement of reasons issued pursuant to the regulatory adoption process, the Department stated its purpose in issuing the new regulation. The Department cited P-D-455 and then stated:

"The inclusion in this regulation of the Department's specific definitions for 'termination of the employer-employee relationship' and 'layoff without pay' will restore the Department's intent that all employees covered by a voluntary plan who are laid off without pay retain coverage under the voluntary plan for a period of fourteen days... ."

It is clear that the new section 3254-3 of Title 22, Code of Regulations, was issued in part to overturn the decision in Precedent Decision P-D-455. The question is whether or not it does so.

The law provides that this Board is an autonomous body which provides for the impartial and independent review of appeals and petitions taken from actions by the Employment Development Department (code sections 401 et seq., 1221 et seq., 1328, and others).

The Board is vested with the authority to designate certain of its decisions as precedents (code section 409). The Director of the Employment Development Department is controlled by the Board's precedents except as modified by judicial review (code section 409). Sections 409.2 and 410 of the code provide the exclusive means by which a precedent decision may be reviewed.

Voluntary plans for the payment of disability benefits are subject to approval by the Employment Development Department (code sections 3251 et seq.).

Sections 305 and 306 of the code provide the Department may adopt, amend, or repeal regulations as are reasonably necessary to enforce its functions. We do not question the Department's authority in this regard. This general authority cannot, however, be used as a vehicle to overcome the specific and exclusive means of relief from precedent decisions of this Board as found in section 409. It is a well-established principle of law that the rule-making power granted to an agency may not be so exercised as to alter or amend a statute or enlarge or impair its scope (Whitcomb Hotel v. California Employment Commission (1944), 24 Cal. 2d 753; First Industrial Loan Co. v. Daugherty (1945), 26 Cal. 2d 545; Morris v. Williams (1967), 67 Cal. 2d 733). However, it appears that is precisely what the Department has attempted here by using sections 305 and 306 directly to overcome a precedent decision of this Board and thereby defeat the strictures of section 409.

Accordingly, we hold that section 3254-3 of Title 22, Code of Regulations, is invalid insofar as it is inconsistent with Precedent Decision P-D-455.

As in Precedent Decision P-D-455, the claimant in this case was employed by a temporary employment agency. Her temporary assignment was terminated by the employer's client on June 28, 1989, and the claimant had no other assignment immediately available. Therefore, the employment relationship terminated on June 28, 1989, before the commencement of the claimant's disability on July 6, 1989. Accordingly, the Voluntary Plan is not liable for coverage of the period of disability beginning on the latter date.

DECISION

The decision of the administrative law judge is reversed. The voluntary plan is not liable for coverage of the claim for disability benefits. The state disability fund is liable for the payment of benefits under section 2712 of the code.

Sacramento, California, May 10, 1990.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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LORETTA A. WALKER
Concurring and Dissenting
Separate Opinion Attached

CONCURRING AND DISSENTING OPINION

I respectfully disagree with portions of the conclusion my colleagues have drawn from the facts in this case.

I dissented in Precedent Decision P-D-455, a case issued by the Board on May 7, 1987. I think that the general reasoning in that dissent remains sound, and I express that dissenting opinion once again.

I observe further that in the matter now before the Board both the claimant and the temporary services agency contemplated the continuation of the employment relationship. The claimant acknowledged in her testimony that after her last day of work on June 28, 1989 she expected either to call the employer, or to be called, about other work. When the employer learned that she had been injured eight days later on July 6, her employment file was held out pending her recovery from her injuries; the employer did not treat her inability to work as a separation from employment. Thus the continuation of the employment relationship in this context is consistent with the realities of the marketplace.

Voluntary plan employers have a responsibility to their ongoing workers, and they cannot avoid it just because of the fortuitous timing of a disabling accident or illness. Both the claimant and the employer in this case thought she still had a job. For policy reasons I would therefore hold that the voluntary plan should remain on this risk.

I do however support that position of my colleagues' decision which reaffirmed the Board's vested authority to designate selected decisions as precedents and to have those precedents followed and enforced by the Department.

LORETTA A. WALKER