BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

CYNTHIA L. CADY
(Claimant)

PRECEDENT
DISABILITY DECISION
No. P-D-54
Case No. D-69-162

DEPARTMENT OF EMPLOYMENT

The Department of Employment appealed from Referee's Decision No. SJ-D-8281 which held that the claimant was not ineligible for disability benefits under section 2626 of the Unemployment Insurance Code from March 8 through March 19, 1969. Written argument was submitted by the department. Although granted the opportunity, the claimant did not submit written argument.

STATEMENT OF FACTS

The claimant became pregnant in late July or August 1968. Medical examinations on October 4 and November 11, 1968 showed the pregnancy apparently progressing normally. On December 7, 1968, however, the claimant was given emergency treatment for bleeding at the Stanford University Hospital, Palo Alto, California, and on December 13, 1968 a pregnancy test was found to be negative so that the claimant's physician concluded that the claimant had had a missed abortion and eventually would pass the products of conception.

While on a skiing trip in Oregon in March 1969, the claimant commenced hemorrhaging and was admitted to a hospital in Ashland, Oregon on March 8, 1969, and transferred to another hospital in Medford, Oregon the same day. On March 9, 1969, the claimant was transferred to a hospital in San Francisco where she remained until March 11, 1969. On March 12, 1969, the claimant was admitted to the Stanford University Hospital where she had blood transfusions and a dilation and curettage on March 14, 1969 for the removal of the fetus, which was estimated to have had a four and one-half months' gestation. The claimant was released from the hospital on March 15, 1969 and returned to work on March 20, 1969.

The claimant filed a claim for unemployment compensation disability benefits with the Department of Employment for the period March 8 through March 19, 1969. The department denied such benefits beginning March 8, 1969 under section 2626 of the code on the ground that the disability was due to illness or injury caused by or arising in connection with pregnancy.

The question before us for consideration is whether the claimant's pregnancy terminated within the meaning of that term in section 2626 of the code sometime in December 1968, when the fetus no longer continued to have life, or on March 14, 1969, when the fetus was surgically removed from the claimant's body.

REASONS FOR DECISION

Section 2626 of the Unemployment Insurance Code provides as follows:

> "2626. 'Disability' or 'disabled' Includes both mental or physical illness and mental or physical injury. 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. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."

Neither the Unemployment Insurance Code nor the authorized regulations pertaining thereto define the term "pregnancy" or the termination thereof. The wording of section 2626 of the code is " . . . any injury or illness caused by or arising in connection with pregnancy. . . ." Such words are broad and inclusive and indicate a legislative intent to make "pregnancy" a distinct exception to the general term "disability."

In Clark v. California Employment Stabilization Commission (1958), 166 Cal. App. 2d 326, 332 P. 2d 716 (hearing denied by Supreme Court), the California District Court of Appeal held that in providing the classification excluding illness or injury arising out of pregnancy from disability covered by the statute, the legislature acted within the scope of its constitutional power and that its action was not arbitrary or unreasonable and was germane to the legislation of which it was a part.

Medical authorities have defined the term "pregnancy" as " . . . the state of the female after conception until the birth of the child." (Stedman's Medical Dictionary, 21st Edition (1966)) and "The condition of being with child; gestation." (Dorland, The American Illustrated Medical Dictionary, 20th Edition (1947))

Judicial authorities have defined the term "pregnancy" in connection with the criminal laws on abortion. The California cases on abortion do not assist us in deciding when pregnancy terminates because under present California statutes on abortion pregnancy of the woman is not material (Rinker v. State Board of Medical Examiners (1943), 59 Cal. App. 2d 222, 138 P. 2d 403 (hearing denied by Supreme Court); and People v. Ramsey (1948), 83 Cal. App. 2d 707, 189 P. 2d 802 (hearing denied by Supreme Court)). Research has failed to disclose any earlier cases dealing with this problem prior to the 1937 amendment of the California Penal Code section on abortion.

In other jurisdictions where "pregnancy" is a material factor under the criminal abortion laws, the courts have generally held that a woman is pregnant from the time of conception until birth of the child or actual expulsion of the fetus and make no distinction between a live or dead fetus. Vitality of the fetus has been considered material only under the particular wording or interpretation of the law or on the question of whether the act was necessary to preserve life (1 Am. Jur. 2d Abortion § 5 Pregnancy and Quickening; 1 C.J.S. Abortion § 6 Pregnancy and Quickening, c. Dead Fetus; Anderson v. Commonwealth (1950), 190 Va. 665, 58 S.E. 2d 72, 16 A.L.R. 2d 942 and notes in 16 A.L.R. 2d 951 and 46 A.L.R. 2d 1400; Territory v. Young (1945), 37 Hawaii 150; Lee v. Metropolitan Life Insurance Co. (1936), 180 S.C. 475, 186 S.E. 376; Wilbanks v. State (1930), 41 Ga. App. 268, 152 S.E. 619; Gray v. State (1915), 77 Tex. Crim. 221, 178 S.W. 337; and Commonwealth v. Surles (1895), 165 Mass. 59, 42 N.E. 502).

Many of these decisions quote with approval and rely upon the very well reasoned decision of the Vermont Supreme Court in State v. Howard (1859), 32 Vt. 380, 78 Am. Dec. 605, where the court held that it was not essential to the terms pregnancy or being "pregnant with child" under the Vermont abortion statute that the embryo should have quickened or that the child should still be alive. The court stated in part at pages 400-403:

". . . The general form of expression 'pregnant with child,' seems to have been used to escape all question of this kind and have it clearly apply to every stage of pregnancy, from the earliest conception; and if so, we see no reason why it should not extend through its entire term, until the actual expulsion of the foetus. For it will not be claimed that, strictly speaking, the pregnancy ceases until this event. We think, therefore, that there is no good ground to claim that the mother, after conception, ceases to be pregnant with the child until its actual expulsion from the uterus."

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". . . And although, in the majority of instances, it [miscarriage] occurs in consequence of the destruction of the life of the foetus, where otherwise it would have been born alive, this is not of the essence of the act any more than the life of the child is necessary to a birth. And it cannot be questioned that a child, brought into the world in the course of nature without life, but at the end of the full period of gestation, may properly enough be said to be born, or still born, or born dead, and that this form of expression is strictly accurate, both in legal and popular language.

"We cannot, therefore, regard the term 'miscarriage' as necessarily implying the continued life of the foetus. . . .'

". . . We think the mother is with child, whether the child be dead or alive, until the actual miscarriage by the expulsion of the foetus. We are aware that some of the text writers upon medical jurisprudence speak of the 'procuring a miscarriage' as the premature destruction of the foetus. This being the mode by which a miscarriage is produced, it may, by a figure of speech, be put for the thing itself in a loose mode of speech. But in careful language we always discriminate between the cause and the consequence. The miscarriage itself is nothing more than the premature expulsion of the foetus, and so the text writers generally speak of it, unless under a figure. The death of the foetus is no more the actual miscarriage than the maturity of the child is the actual birth. Either consequence must follow, and is therefore not identical with its corresponding antecedent."

Under California law, "A child conceived, but not yet born, is deemed an existing person . . . ." (California Civil Code, section 29, and California Penal Code, section 270) As pointed out by the Vermont court, however, the fact that such a "person" ceases to have vitality does not complete the process of pregnancy any more than the full maturity of the child before actual birth, or the passage of the full period of gestation, for even then the child may be stillborn.

In following the reasoning of the Vermont court in Territory v. Young, supra, the Supreme Court of the then Territory of Hawaii stated at page 160:

> "While the term 'with child' similarly as the adjective 'pregnant' ordinarily denotes vitality of the fetus, it also connotes a physical condition following conception and continuing until expulsion or delivery, irrespective of whether the fetus prior to expulsion has lost its vitality so that it could not mature into a living child. The adjective 'pregnant' has been so construed. Nor do the definitions and connotations of the noun 'miscarriage' exclude abortions of feti which prior to expulsion have lost their vitality so that they could not mature into living children. On the contrary, according to its ordinarily accepted meaning it has reference to premature birth, either spontaneous or induced, irrespective of the prior vitality of the fetus."

This board previously held in Disability Decision No. 368 that pregnancy did not terminate within the meaning of section 201 of the Unemployment Insurance Act, now section 2626 of the Unemployment Insurance Code, until the fetus was actually expelled, even though the fetus had ceased to have vitality several months earlier. We have reexamined the authorities in the field and reaffirm our position in this matter. Therefore we hold in the present case that the claimant's pregnancy did not terminate until the fetus was expelled on or about March 14, 1969, and benefits must be denied during the period for which the claimant claimed disability benefits from March 8, 1969 through March 19, 1969.

DECISION

The decision of the referee is reversed. Benefits are denied beginning March 8, 1969 through March 19, 1969 under section 2626 of the code.

Sacramento, California, October 28, 1969.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

LOWELL NELSON

CLAUDE MINARD

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