

**APPEAL TRIBUNAL DECISION**

**Docket number:** 20 1681 **Hearing date:** November 24, 2020

**CLAIMANT: EMPLOYER:**

ANDREW MARTIN SERKA'S WELDING & FABRICATION LLC

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Andrew Martin None

#### CASE HISTORY AND FINDINGS OF FACT - TIMELINESS

The claimant filed an appeal against an August 10, 2020 determination that denied benefits under AS 23.20.379 on the grounds that the claimant voluntarily quit suitable work without good cause. The Division mailed the determination to the claimant’s address of record on August 11, 2020. The claimant’s appeal was filed on September 21, 2020, giving rise to the issue of the timeliness of the claimant’s appeal.

The claimant did not receive the determination within the 30-day appeal period. He has had problems recently receiving mail at his address. He did receive a notice that his benefits had been overpaid benefits, but the notice did not say why he was overpaid. The claimant got a second notice of overpayment on September 21, 2020 and he called the Division and he learned about the determination in this matter. His appeal was taken that day.

#### PROVISIONS OF LAW - TIMELINESS

**AS 23.20.340 provides in part;**

(e) The claimant may file an appeal from an initial determination or a redetermination under (b) of this section not later than 30 days after the claimant is notified in person of the determination or redetermination or not later than 30 days after the date the determination or redetermination is mailed to the claimant's last address of record. The period for filing an appeal may be extended for a reasonable period if the claimant shows that the application was delayed as a result of circumstances beyond the claimant's control.

(f) If a determination of disqualification under AS 23.20.360, 23.20.362, 23.20.375, 23.20.378 ‑ 23.20.387, or 23.20.505 is made, the claimant shall be promptly notified of the determination and the reasons for it. The claimant and other interested parties as defined by regulations of the department may appeal the determination in the same manner prescribed in this chapter for appeals of initial determinations and redeterminations. Benefits may not be paid while a determination is being appealed for any week for which the determination of disqualification was made. However, if a decision on the appeal allows benefits to the claimant, those benefits must be paid promptly.

**8 AAC 85.151 provides in part;**

1. An appeal may be filed with a referee, at any employment center, or at the central office of the division and, if filed in person, must be made on forms provided by the division. An appeal must be filed within 30 days after the determination or redetermination is personally delivered to the claimant or not later than 30 days after the date the determination or redetermination is mailed to the claimant’s last address of record. The 30-day time period will be computed under Rule 6 of the Rules of Civil Procedure. However, the 30-day period may be extended for a reasonable time if the claimant shows that the failure to file within this period was the result of circumstances beyond his or her control.

#### CONCLUSION - TIMELINESS

An appellant has the burden to establish some circumstance beyond the appellant’s control prevented the timely filing of the appeal.

*Once a notice has been properly mailed to an individual's last known address, the Department has discharged its "notice" obligation. The appellant's asserted failure to receive the notice does not establish cause for an extension of the appeal period. Andrews, Com. Dec. 76H-167, Oct. 8, 1976; aff'd Andrews v. State Dept. of Labor, No. 76-942 Civ. (Alaska Super. Ct. 1st J.D., April 13, 1977). There is a rebuttable presumption that a notice placed in the mail will be timely delivered. Rosser, Com. Dec. 83H-UI-145, June 15, 1983.*

The claimant has overcome the presumption that the determination was delivered to him in a timely manner, which is a circumstance beyond his control. When the claimant did get a notice that he was overpaid, he took prompt action to contact the Division and file an appeal.

#### DECISION - TIMELINESS

The claimant’s appeal from the notice of determination issued on August 10, 2020 is **ACCEPTED** as timely filed.

#### CASE HISTORY - SEPARATION

The determination issued August 10, 2020 denied the claimant’s benefits under Alaska Statute 23.20.379. The issue before the Appeal Tribunal is whether the claimant voluntarily quit suitable work without good cause.

#### FINDINGS OF FACT – SEPARATION

The claimant began work for the employer in January 2020. He last worked on March 27, 2020. At that time, he worked full time as a fabricator.

On his last day of work, the claimant told the owner he was concerned about his exposure to the COVID-19 virus while working in the business. The claimant’s concerns stemmed from seeing the owner’s son, who lives in the owner’s home but did not work at the business, at a gathering of about 50 people which the claimant drove by. The claimant’s girlfriend has medical issues which make her more susceptible to complication of the COVID-19 virus. The owner denied that his son was attending such gatherings. The claimant asked the owner if it would cause a problem for the business if he left the work. The owner told the claimant his leaving would not cause a problem because business was slow.

The owner provided personal protective equipment for employees, followed social distancing guidelines and encouraged staff to take care regarding the pandemic.

#### PROVISIONS OF LAW - SEPARATION

**AS 23.20.379 provides in part:**

(a) An insured worker is disqualified for waiting-week credit or benefits for the first week in which the insured worker is unemployed and for the next five weeks of unemployment following that week if the insured worker...

1. left the insured worker's last suitable work voluntarily without good cause....

**8 AAC 85.095 provides in part:**

(c) To determine the existence of good cause under AS 23.20.379(a)(1) for voluntarily leaving work determined to be suitable under

AS 23.20.385, the department will consider only the following factors:

(1) leaving work due to a disability or illness of the claimant that makes it impossible for the claimant to perform the duties required by the work, if the claimant has no other reasonable alternative but to leave work;

(2) leaving work to care for an immediate family member who has a disability or illness;

(3) leaving work due to safety or other working conditions or an employment agreement related directly to the work, if the claimant has no other reasonable alternative but to leave work;

(4) leaving work to accompany or join a spouse at a change of location, if commuting from the new location to the claimant’s work is impractical; for purposes of this paragraph, the change of location must be as a result of the spouse’s

(A) discharge from military service; or

(B) employment;

(5) leaving unskilled work to attend a vocational training or retraining course approved by the director under AS 23.20.382, only if the claimant enters the course immediately upon separating from work;

(6) leaving work in order to protect the claimant or the claimant’s immediate family members from harassment or violence;

(7) leaving work to accept a bonafide offer of work that offers better wages, benefits, hours, or other working conditions; if the new work does not materialize, the reasons for the work not materializing must not be due to the fault of the worker;

(8) other factors listed in AS 23.20.385(b).

**AS 23.20.385(b) provides, in part:**

(b) In determining whether work is suitable for a claimant and in determining the existence of good cause for leaving or refusing work, the department shall, in addition to determining the existence of any of the conditions specified in (a) of this section, consider the degree of risk to the claimant's health, safety, and morals, the claimant's physical fitness for the work, the claimant's prior training, experience, and earnings, the length of the claimant's unemployment, the prospects for obtaining work at the claimant's highest skill, the distance of the available work from the claimant's residence, the prospects for obtaining local work, and

other factors that influence a reasonably prudent person in the claimant's circumstances.

#### CONCLUSION - SEPARATION

A discharge is “a separation from work in which the employer takes the action which results in the separation, and the worker does not have the choice of remaining in employment." 8 AAC 85.010(20). Voluntary leaving means a separation from work in which the worker takes the action which results in the separation, and the worker does have the choice of remaining in employment. Swarm, Com. Dec. 87H-UI-265, September 29, 1987. Alden, Com. Dec. 85H-UI-320, January 17, 1986.

The claimant took the action that ended the employment relationship when he asked if the employer would be inconvenienced by his leaving the work. That the employer was not inconvenienced does not change that the claimant initiated the separation and does not establish that the claimant was laid off. The claimant voluntarily quit the work and the Tribunal will consider if he had good cause to do so.

Regulation 8 AAC 85.095(c) provides seven reasons that the Department will consider when determining good cause for voluntarily leaving work. The claimant in this matter did not leave work for one of the allowable reasons. The regulation also directs the Department to consider the suitability of the work as laid out in AS 23.20.385(b).

In Missall, Com. Dec. 8924740, April 17, 1990, the Commissioner of Labor summarized Department policy regarding what constitutes good cause for voluntarily leaving work. The Commissioner held, in part:

*The basic definition of good cause is 'circumstances so compelling in nature as to leave the individual no reasonable alternative.' (Cite omitted.) A compelling circumstance is one 'such that the reasonable and prudent person would be justified in quitting his job under similar circumstances.' (Cite omitted). Therefore, the definition of good cause contains two elements; the reason for the quit must be compelling, and the worker must exhaust all reasonable alternatives before quitting.*

The claimant quit because he observed the owner’s son, who lived with the owner and did not work at the business, at a large outdoor gathering. The claimant was concerned for his girlfriend who may be susceptible to complications of the virus. The claimant did not dispute that the owner provided personal protective equipment and followed social distancing guidelines. The fact that a family member of the owner was at an outdoor gathering does not establish that the claimant was placed at significant risk in the workplace. The owner’s son did not work in the business and appropriate actions were taken to keep workers safe in the workplace. The claimant’s concerns do not establish that the work was unsuitable or that he had a compelling reason to leave work.

The Tribunal cannot conclude that the claimant had good cause to voluntarily leave suitable work. The penalties of AS 23.20.379 are appropriate.

#### DECISION - SEPARATION

The determination issued on August 10, 2020 is **AFFIRMED.** Benefits remain **DENIED** for the weeks ending April 4, 2020 through May 9, 2020. The three weeks remain reduced from the claimant’s maximum benefits. The claimant may not be eligible for extended benefits under AS 23.20.406-409.

#### APPEAL RIGHTS

This decision is final unless an appeal is filed in writing to the Commissioner of Labor and Workforce Development **within 30 days** after the decision is mailed to each party.

The appeal period may be extended only if the appeal is delayed for circumstances beyond the party’s control. A statement of rights and procedures is enclosed.

Dated and mailed on December 3, 2020.

Rhonda Buness, Appeals Officer