

### APPEAL TRIBUNAL DECISION

**Docket number:** 20 1713 **Hearing date:** December 1, 2020

**CLAIMANT:**

KIANNA KING

**CLAIMANT APPEARANCES: DETS APPEARANCES:**

Kianna King None

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

The claimant filed an appeal against a June 8, 2020 determination that denied benefits under AS 23.20.379 on the grounds that the claimant refused suitable work. The Division mailed the determination to the claimant on June 9, 2020. The claimant’s appeal was filed on September 24, 2020, giving rise to the issue of the timeliness of the claimant’s appeal.

The claimant did not receive the determination under appeal. The determination, along with a statement of overpayment was sent to the claimant’s mother’s Post Office box. The claimant had her own mailing address at that time and she is sure she provided that address to the Division. The record does not indicate what address the claimant provided to the Division or when she changed her address.

The claimant’s mother paid the small overpaid amount and did not tell the claimant about the determination. The claimant’s mother told her about a second statement of overpayment she received, which was larger, and the claimant promptly contacted the Division and learned of the determination. She filed her appeal 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 was certain she had provided the Division with her correct address and not her mother’s address. The record does not reflect when the claimant provided any address to the Division. The claimant has overcome the presumption that the mail was delivered to her timely, and thus her delayed appeal was due to circumstances outside her control.

#### DECISION - TIMELINESS

The claimant’s appeal from the notice of determination issued on June 8, 2020 is **ACCEPTED** as timely filed.

#### CASE HISTORY – WORK REFUSAL

The determination issued June 8, 2020 denied the claimant’s benefits under Alaska Statute 23.20.379. The issue before the Appeal Tribunal is whether the claimant refused suitable work.

#### FINDINGS OF FACT – WORK REFUSAL

The claimant established a claim for unemployment insurance benefits effective April 5, 2020. The claimant was laid off due the effects of the COVID-19 pandemic on March 23, 2020. The employer told the claimant she could not return to her position as a server, because the claimant is not of legal age to serve drinks and the employer did not have sufficient staff to have other servers handle drinks for the claimant’s customers.

On Friday, May 22, 2020, the claimant’s supervisor contacted the claimant and asked her to return to work has a hostess that weekend. The claimant was out of town at the time. She told the supervisor she could not work that weekend, because there had been no notice, but she would be back in town on Monday and would accept hostess shifts. The claimant recalled that she discussed the pay cut, work hours and her pregnancy with the supervisor, but she only told the supervisor she could not work that weekend because she was not able to get to the work due to the short notice and that she was out of town.

The claimant contacted the supervisor on June 9, 2020 to see if she was on the schedule to work. She contacted the supervisor again on June 19, 2020. She then contacted the manager, and she was scheduled to work on about June 25, 2020.

#### PROVISIONS OF LAW – WORK REFUSAL

**AS 23.20.379. Voluntary quit, discharge for misconduct, and refusal of work.**

1. An insured worker is disqualified for waiting-week credit or benefits for a week and the next five weeks of unemployment following that week if, for that week, the insured worker fails without good cause
2. to apply for available suitable work to which the insured worker was referred by the employment office; or
3. to accept suitable work when offered to the insured worker.

**AS 23.20.385. Suitable work.**

(a) Work may not be considered suitable and benefits may not be denied under a provision of this chapter to an otherwise eligible individual for refusing to accept new work under any of the following conditions:

(1) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;



(2) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;



(3) if, as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining a bona fide labor organization.



(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.

**8 AAC 85.410. Suitable work.**

(a) The director shall determine that work is suitable for a claimant if the work is in the claimant's customary occupation, or is work for which the claimant has training and experience.

(b) To determine if the wages, hours, or other conditions of work offered to a claimant are substantially less favorable to him than those prevailing for similar work in the locality, the following standards apply:

(1) similar work is work which is similar in the operations performed, the skill, ability and knowledge required, and the responsibilities involved. A judgment of similar work will not be based on job title, hours of work, wages, permanency of the work, unionization, employee benefits, or other conditions of work;

(2) the locality of the work offered to a claimant is the area surrounding the offered work and is comprised of those establishments which normally use the same labor supply for work similar to the offered work;

(3) the prevailing wages, hours, or other conditions of work are those under which the greatest number of workers are employed in similar work in the locality; however, if the greatest number of workers employed at the same rate is not at least one-third of the total employed, then the prevailing rate will be expressed as the weighted average of the total number of rates;

(4) a condition of work offered to a claimant is not substantially less favorable than that prevailing for similar work in the locality if the difference between the condition of the offered work and the prevailing condition is minor or technical, or would have no adverse effect on the claimant. Wages for work offered to a claimant are substantially less favorable than those prevailing if the offered rate is less than 90 percent of the prevailing rate.

**8 AAC 85.420. Refusal of suitable work.**

1. A claimant will be disqualified under AS 23.20.379(b) for refusing suitable work without good cause, or for a failure to apply for suitable work to which he was referred by the employment office, if the offer of work or referral to work was properly made. An offer of work or referral to work is properly made if

(1) a job opening exists at the time the offer is made or the referral given;

(2) the claimant understands that he is receiving an offer or referral, unless an offer of work is not made by the employer because of claimant actions which cause the employer to withhold an offer of employment;

(3) the claimant is given sufficient information concerning the conditions of the job, including duties, location of the work, hours of work, wages, working conditions, equipment needed, and union requirements, if any, to determine the suitability of the offer or referral; and

(4) the claimant, upon accepting a referral, is given adequate information concerning where and how he should apply.

(c) Refusal of an offer of work includes

(1) refusal of a job offer from an employer or from an agent of the employer having authority to hire;

(2) action by the claimant which causes the employer to withhold a job offer; or

(3) after acceptance of a job offer, a failure to report to work on the first scheduled day of work.

#### CONCLUSION – WORK REFUSAL

The claimant in this case did not return to work immediately when called by the employer because it was short notice and she was not available immediately because she was out of town. She accepted the new work the employer was offering her, with different duties, work hours and a cut in pay, and she continued to call the employer until she was placed on the schedule.

The Tribunal concludes the claimant did not refuse an offer of suitable work, she delayed the start date of the work because she was out of town.

Whether the claimant was available for work as required under AS 23.20.378 while traveling out of town in the week ending May 23, 2020 does not appeal to have been addressed by the Division. That matter is remanded to the Division for investigation and determination if warranted.

#### DECISION – WORK REFUSAL

The determination issued on June 8, 2020 is **REVERSED**. Benefits are **ALLOWED** under as 23.20.379 for the weeks ending May 23, 2020 through June 27, 2020, if the claimant is otherwise eligible.

The three weeks are not reduced from the claimant’s available benefits. The determination will not interfere with the claimant’s eligibility for extended benefits.

The matter of the claimant’s availability for work in the week ending May 23, 2020 is **REMANDED** to the Division for fact finding and possible determination.

#### 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 9, 2020.

Rhonda Buness, Appeals Officer