

### APPEAL TRIBUNAL DECISION

**Docket number:** 20 2074 **Hearing date:** February 25, 2021

**CLAIMANT: EMPLOYER:**

MARCAS KENSINGER CORE PAVING & EXCAVATING LLC

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Marcas Kensinger Melissa Callaway

Billy Callaway

#### CASE HISTORY

The claimant timely appealed a November 3, 2020 determination which denied benefits under Alaska Statute 23.20.379. The issue before the Appeal Tribunal is whether the claimant voluntarily quit suitable work without good cause or was discharged for misconduct connected with the work.

#### FINDINGS OF FACT

The claimant began work for the employer on May 25, 2020. He last worked on July 3, 2020. At that time, he worked full time as a truck driver.

The employer had concerns about the claimant’s performance after several incidents early in his tenure. The claimant loaded a piece of equipment improperly on a trailer. The claimant delivered a load of the wrong material to a customer. The claimant did not unlock the brakes on a trailer a drug the trailer. The claimant drove with a flat tire, which caused all the truck’s rear wheels to be replaced. The employer was also unhappy about the claimant’s attendance as he was 5-10 minutes late several times a week. On July 1, 2020, the claimant did not show up at work and did not call the employer.

On his last day, July 3, 2020, the claimant parked the truck and went home, then the employer attempted to move the truck and found it inoperable. Two mechanics who examined the truck told the employer that pins had sheared off a flywheel, which was uncommon and could only be caused by bad clutching.

The employer sent the claimant a message that there was no work for him on July 5, 2020 because the truck was inoperable. On July 8, 2020, the employer sent the claimant a text message and an email message advising him that he was terminated because the employer could not afford more breakdowns.

The claimant held that it did take him some time to get used to the manual clutch in the employer’s truck because he was experienced driving trucks with automatic transmissions, so he did ride the clutch at times. The claimant recalled telling the employer that he was not experienced with driving manual transmissions before he started driving the truck.

#### PROVISIONS OF LAW

**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....

(2) was discharged for misconduct connected with the insured worker's last work.

**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).

(d) "Misconduct connected with the insured worker's work" as used in

AS 23.20.379(a)(2) means

(1) a claimant's conduct on the job, if the conduct shows a willful and wanton disregard of the employer's interest, as a claimant might show, for example, through gross or repeated negligence, willful violation of reasonable work rules, or deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee; willful and wanton disregard of the employer's interest does not arise solely from inefficiency, unsatisfactory performance as the result of inability or incapacity, inadvertence, ordinary negligence in isolated instances, or good faith errors in judgment or discretion....

**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

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.

While the Division held that the claimant voluntarily quit work, the claimant and the employer agreed that the claimant did not quit the work, he was discharged on July 8, 2020 when the employer sent him messages to that effect. The Tribunal will consider if the discharge was for work-related misconduct.

The claimant was discharged after a final incident where the employer discovered damage to the truck driven by the claimant. The claimant told the employer that he did not have experience driving a truck with a manual transmission. He admitted he did ride the truck’s clutch while he was getting used to it.

The Tribunal does not dispute an employer’s right to discharge a worker who fails to meet its standards. However, not all performance failures constitute misconduct.

*The meaning of the term misconduct is limited to conduct evincing such willful disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has a right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute. Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1041) from Lynch, Com. Rev. No. 82H-UI-051, March 31, 1982.*

The claimant in this case caused damage to the employer’s truck because he was not experienced. The employer did not establish that the damage was caused deliberately or that the claimant willfully disregarded the employer’s interests.

The Tribunal finds the claimant was discharged for reasons other than misconduct. The penalties of AS 23.20.379 are not appropriate.

#### DECISION

The determination issued on November 3, 2020 is **REVERSED** and **MODIFIED.** Benefits are **ALLOWED** under as 23.20.379(a)(2) for the weeks ending July 18, 2020 through August 22, 2020, if otherwise eligible. The three weeks are restored to the claimant’s maximum benefits. The determination will not interfere with the claimant’s eligibility 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 March 2, 2021.

Rhonda Buness, Appeals Officer