

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT**

In the Matter of)
)
KYLE WOOD) OAH No. 21-2220-LUI
) Agency No. 21 0898 03 ER 16
_____)

APPEAL DECISION

Docket Number: 21 0898 03 ER 16

Hearing Date: December 2, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Kyle Wood

None

CASE HISTORY

Kyle Wood filed a claim for Unemployment Insurance (UI) benefits under AS 23.20.379. The Department of Labor approved his claim on April 7, 2021. The employer, Alaska Pacific Powder Company/Orica Mining Services, filed an appeal to contest the determination. The Department of Labor referred the appeal to the Office of Administrative Hearings. Under the agreed terms of referral, an administrative law judge (ALJ) hears and decides the appeal under procedures specific to UI appeals. AS 44.64.060 procedures do not apply.

The matter was heard in a recorded hearing December 2, 2021. Mr. Wood appeared by telephone as did Lisa More, human resources manager for Alaska Pacific Powder Company/Orica Mining Services, the employer.

The issue before the ALJ is the nature of the claimant's separation from work and whether the claimant is disqualified from full employment benefits as a result.

FINDINGS OF FACT

Kyle Wood established a claim for UI benefits effective December 19, 2020. The Division approved his claim. His employer contested the decision and filed an appeal.

Established in 1972, Alaska Pacific Powder Company (Alaska Powder) is a leader in the specialized industry of explosives. Primarily focused in the seismic, mining and construction industries, Alaska Powder is a distributor for a complete line of packaged and bulk explosives, detonating systems, & blasting accessories. It provides top of the line products, technical expertise, and operational and logistical support to their customers. As the largest explosives distributor in Alaska, Alaska Powder has access to the latest explosives technology, supported by technical resources worldwide. Alaska Pacific Powder Company provides its customers with the products

to get the job done and the support personnel to help make blasting operations safe, efficient, and cost effective.¹

To supply its explosives, Alaska Powder contracts with Orica Mining Services (Orica) to operate three mining and manufacturing sites. Orica describes itself as “one of the world’s leading mining and infrastructure solutions providers. From the production and supply of explosives, blasting systems, mining chemicals and geotechnical monitoring to our cutting-edge digital solutions and comprehensive range of services, we sustainably mobilize the earth’s resources.”²

One of those sites is in Salcha, south of Fairbanks, and another is at the Red Dog Mine, outside Kotzebue. Mr. Wood started working as a magazine keeper for Orica in 2016. He was promoted to explosives operations in 2018. He worked the Salcha location. Due to its remote location, weather conditions, and other factors, the Salcha site is extremely hard for Orica to consistently staff.

The mining and manufacture of explosives is highly regulated, including qualifications and required numbers of staff on site. In addition, Orica keeps strict “head counts,” i.e., caps on the number of employees in an area or who are authorized to work certain positions. A person like Mr. Wood, who was an approved operator, has specialized education, training, and experience. Appropriate staffing means that a certain number of operators must be available at each site.

Mr. Wood resigned his position in October 2020. He submitted his resignation to Josiah Kuball, supervisor of the Salcha site. Mr. Wood resigned because he was moving to Florida. He expected his last day at Salcha to be October 26 or 27, 2020.

However, Mr. Kuball asked Mr. Wood if he would remain available as an “on-call” or commuting employee. Mr. Kuball was having trouble finding a new, qualified operator for Salcha and they needed a relief operator at Red Dog. Mr. Wood agreed. Mr. Kuball does not appear to have forwarded this information to the human resources office in Colorado.

Mr. Wood moved to Florida. He credibly testified and records confirmed that he flew back to Alaska to work for Orica in November and December 2020. Mr. Wood’s last shift with Orica ended on December 14, 2020. At that time Mr. Kuball told Mr. Wood his services were no longer needed because his replacement had been found. Mr. Kuball confirmed this information with the human resources office in Colorado via email on December 17, 2020.

Mr. Kuball wrote:

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http://www.oricaminingservices.com/us/en/page/orica_distributors/alaska_pacific_powder_co/alaska_pacific_powder_company

2 <https://www.orica.com/About-Us#.Yd9uwWjMLyQ>

Kyle resigned. He had completed his last hitch at Red Dog on the 15th. We had his last day set as the 31st as a buffer just to prevent any hang up is he couldn't fly out due to weather.

Do I need to do anything to close this out on my end since he is no longer employed with us?

Mr. Wood applied for unemployment effective December 15, 2020. The Division approved his claim. Orica filed an appeal to contest the determination.

At the hearing, the information that Mr. Wood had first resigned in October 2020 but was contracted to continue as a commuting employee was new information to the Orica human resources manager, Ms. More. She testified that Orica did not hire operators who did not live on site. To the best of her knowledge, such employment had never been offered before. She was unaware that Orica had paid to transfer Mr. Wood back and forth from Florida for almost two months. She did not doubt that it had happened and in context Mr. Kuball's email made sense, but when first received, she had interpreted Mr. Kuball's email to mean that Mr. Wood resigned on December 15, 2020 not that he had resigned sometime in the past and then been re-hired.

It was clear from her testimony that Ms. More did not think that Mr. Wood's long-distance rehire was consistent with Orica's policies and procedures. Nor would she have approved it if asked to do so.

Kyle Wood established a claim for UI benefits effective December 19, 2020. The Division approved his claim. Orica contested the decision and filed an appeal.

THE UNEMPLOYMENT INSURANCE BENEFITS ELIGIBILITY FRAMEWORK.

An individual is eligible for unemployment compensation under Alaska labor law if the individual's employment is covered by the Alaska Employment Security Act EASA, AS 23.20.005-535 as implemented in 8 AAC 85.010-842 and detailed in the Department's Benefit Policy Manual (BPM).³ Under those rules the employment and training services division of the Department of Labor and Workforce Development conducts a two-part analysis of each claim filed by an unemployed worker. The first step in the analysis is the "non-monetary determination" of whether the claimant is eligible to for benefits.⁴ If the claimant is eligible, the

³ The BPM fulfills the mandate in 8 AAC 85.360 that the Department "maintain a policy manual interpreting the provisions of AS 23.20 and this chapter." The Alaska supreme court has referred to the BPM as the "Precedent Manual" and looks to the BPM to interpret labor issues. *See, Calvert, supra; Westcott v. State, Dep't of Labor*, 996 P.2d 723 (Alaska 2000). The BPM is divided into eight sections: Able and Available, Evidence, Labor Dispute, Miscellaneous Misconduct, Suitable Work, Total and Partial Unemployment, and Voluntary Leaving with individual subsections addressing specific issues and incorporating recent updates.

⁴ 8 AAC 85.010(a)(14); 8 AAC 85.085.

division conducts the second step and issues a “monetary determination” calculating the benefit amount payable to the claimant.⁵

Eligibility turns on the acts and circumstances surrounding the claimant’s separation from employment. The separation may be due to “discharge” where the employer takes action which results in the separation and the worker does not have a choice in remaining in employment.⁶ A claimant who has been involuntarily discharged by their employer is eligible for full unemployment benefits unless the discharge was for misconduct connected with work as defined in AS 23.20.379(a)(2) and 8 AAC 85.095(d).

“Misconduct connected with work” means discharge for:

- (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; or
- (2) a claimant's conduct off the job, if the conduct shows a willful and wanton disregard of the employer's interest; and either (i) has a direct and adverse impact on the employer's interest; or(ii) makes the claimant unfit to perform an essential task of the job; or
- (3) discharge for an act that constitutes commission of a felony or theft under circumstances defined in 8 AAC 85.095(f).

If the claimant was discharged for misconduct connected with work, the claimant is not eligible for full employment benefits. Instead, the claimant is disqualified under AS 23. 20.379(a) and (b)-- meaning the claimant is disqualified from benefits the first and following five weeks of unemployment and the maximum potential benefit is reduced by three times the weekly benefit amount. However, “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.”⁷ Claimants discharged for those reasons remain eligible for full unemployment benefits.

The work separation may also be due to voluntary decisions or “job quits” by the employee. When the separation is due to a voluntary job quit by the employee, the employee will be disqualified per AS 23. 20.379(a) and (b) unless the employee can demonstrate that the job quit was for “good cause.”

⁵ 8 AAC 85.010(a)(12).

⁶ 8 AAC 85.010(a)(20).

⁷ 8 AAC 85.0895(d)(1).

To determine whether good cause existed for voluntarily leaving suitable work, the factors set out in 8 AAC 85.095(c) are considered:

- (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 individual 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 bona fide offer of work that offers better wages, benefits, hours, or other working conditions; if the new work does not materialize, the reason for the work not materializing must not be due to the fault of the worker; and
- (8) other factors listed in AS 23.20.385(b).⁸

AS 23.20.385(b) establishes a catchall provision under which an employee can demonstrate good cause and retain unemployment eligibility by proving the employee had “a compelling reason for leaving work” and “exhausted all reasonable alternatives to quitting.”⁹ A compelling reason is “one that causes a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave employment.”¹⁰ Typically, to establish good cause under this standard, an employee must give the employer notice of the problem a chance to adjust or correct it before exhaustion of alternatives can be found.¹¹ However, the employee

⁸ 8 AAC 85.095(c).

⁹ *Wescott*, 996 P.2d at 726-28 adopting the BPM criteria.

¹⁰ *Calvert v. State, Dept. of Labor & Workforce Development, Employment Sec. Div.*, 251 P.3d 990, 1001 (Alaska 2011)(adopting BPD criteria).

¹¹ *Id.* at 1002-06.

is “not expected to do something futile or useless in order to establish good cause for leaving employment.”¹² There is “no requirement that a worker’s reasons for leaving work be connected with the work. Either work connected or personal factors may present sufficiently compelling reasons.”¹³

AS 23.20.385 provides that suitability of work depends on a wide range of factors, including whether wages, hours, or other conditions of work are substantially less favorable than prevailing conditions in the locality; the degree of risk to the claimant’s health, safety, and morals; the claimant’s physical fitness for the work; the distance of the work from the claimant’s residence and any “other factor that would influence a reasonably prudent person in the claimant’s circumstances.” Although suitability of work may not be presumed it need not be examined in all cases.¹⁴ Suitability of work must be examined if the worker objects to the appropriateness of wages or other “conditions of work, the worker specifically raises the issue of suitability of work; or facts appear during the investigation that put the Department on notice that wages or other conditions of work maybe substantially less favorable than prevailing conditions for similar work in the locality.¹⁵

EXCERPTS OF RELEVANT PROVISIONS OF LAW

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

- 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

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

- (b) 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

¹² *Id.* at 1004. (“An employer’s limited authority or expressed refusal to accommodate an employee can establish that requesting an adjustment to work conditions would be futile: ‘[i]f the employer has already made it known that the matter will not be adjusted to the worker’s satisfaction, or if the matter is beyond the power of the employer to adjust, then the worker is not expected to perform a futile act.’ ”)(internal citation omitted).

¹³ *Id.* at 1002-06.

¹⁴ *Id.*

¹⁵ *Id.*

(2) to accept suitable work when offered to the insured worker.

DECISION

Mr. Wood was discharged by Orica: the evidence demonstrated that the company rehired him as a temporary employee to cover a gap in available operators then laid him off from that position when the shortage was resolved. Because the discharge was not for misconduct connected with work, Mr. Wood is eligible for unemployment benefits. The Division did not err.

The first issue to be resolved in this case is the nature of Mr. Wood's separation from Orica. The evidence in this case established that Mr. Wood resigned from his full-time employment in October 2020. However, the evidence also established that he was rehired as a temporary employee to provide coverage at Salcha and Red Dog to maintain required staffing levels until replacements could be found. Once staffing was established, he was discharged from that temporary employment. His separation was a discharge not a voluntary job quit as defined by law in this circumstance.

The second issue, whether Mr. Wood is eligible for unemployment benefits, turns on whether his discharge was for misconduct connected with the work. Unless his discharge was for that reason, he is eligible. There was no allegation that Mr. Wood was discharged for misconduct. To the contrary, Orica records indicate he is eligible for rehire and was considered a good employee.

There appears to have been initial confusion caused by Mr. Kuball's abbreviated email to Ms. More and the unusual nature of Mr. Wood's temporary employment. That confusion was explained at the hearing. On the evidence presented, Orica did not demonstrate that the Division erred.

ORDER

The Division's May 7, 2021 approval determination is **Affirmed**.

DATED January 13, 2022.

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Carmen E. Clark
Administrative Law Judge

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.

¹⁶ Signed electronically to accommodate remote work restrictions due to COVID-19.

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.

CERTIFICATE OF SERVICE

I certify that on January 13, 2022, this document was sent to: Kyle Wood (by mail); Lisa More, Orica Mining Services (by email); TALX UCM Services Inc (by mail). A courtesy copy has been emailed to the DETS UI Appeals Team.


Office of Administrative Hearings



*Alaska Department of Labor and Workforce Development
Appeals to the Commissioner _*

Please read carefully the enclosed Appeal Tribunal decision. Any interested party (claimant or the Division of Employment and Training Services [DETS]) may request that the Commissioner accept an *appeal* against the decision (AS 23.20.430-435 and 8 AAC 85.154-155).

A Commissioner appeal must be filed within 30 days after the Appeal Tribunal decision is mailed to a party's last address of record. The 30-day period may be extended for a reasonable time if the appealing party shows that the appeal was late due to circumstances beyond the party's control.

A Commissioner appeal must be in writing and must fully explain your reason for the appeal. You or your authorized representative must sign the appeal. All other parties will be sent a copy of your appeal. Send Commissioner appeals *to the Commissioner's Hearing Officer* at the address below.

A Commissioner appeal is a matter of right if the Appeal Tribunal decision reversed or modified a DETS determination. If the Appeal Tribunal decision did not modify the DETS determination, the Commissioner is not required to accept the appeal. If the appeal is accepted, the Commissioner may affirm, modify, or reverse the Appeal Tribunal decision. The Commissioner may also refer the matter back to the Appeal Tribunal for another hearing and/or a new decision. The Commissioner will issue a written decision to all interested parties. The Commissioner decision will include a statement about the right to appeal to Superior Court.

Any party may present *written argument* to the Commissioner stating why the Appeal Tribunal decision should or should not be changed. Any party may also request to make an *oral argument*. Written argument and/or a request for oral argument should be made when you file an appeal or immediately after you receive notice that another party filed an appeal. You must supply a written argument or a request for oral argument promptly, because neither will likely be considered after the Commissioner issues a decision.

**ALASKA DEPARTMENT OF LABOR
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