

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

In the Matter of)	
)	
JESSE WEARLY)	OAH No. 21-2239-LUI
_____)	Agency No. 21 0990 10

APPEAL DECISION

Docket Number: 21 0990 10

Hearing Date: December 10, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Jesse Wearly

None

CASE HISTORY

The claimant, Jesse Wearly, timely appealed a May 11, 2021 determination which denied Unemployment Insurance (UI) benefits under AS 23.20.379. 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 on December 10, 2021. Mr. Wearly appeared by telephone as did Alecia Allard, the payroll manager for CCI Industrial Services LLC (CCI), his 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

Jesse Wearly established a claim for UI benefits effective December 5, 2020. The Division determined that the claimant was not eligible for UI benefits because he voluntarily left employment without good cause.

Mr. Wearly has been an Alaska oil field worker since 2003. In 2020 he was working as a facilities technician doing pipeline insulation for CCI Industrial Services, LLC (CCI). CCI provides specialized services for facility and infrastructure owners. For two decades CCI has provided asbestos and lead surveys and abatement; pipeline insulation removal, and repair; oil-spill response and technical support; tank and vessel cleaning; operations management; coatings and sandblasting; hazardous waste removal; and industrial cleaning solutions to the North Slope. Mr. Wearly worked a three-and-three rotation beginning September 25, 2020. The pipeline insulation job finished quickly, and he was placed on furlough status with CCI.

While on furlough with CCI, Mr. Wearly was offered a job with NANA Worley LLC (Worley). Worley provides multi-discipline engineering and design, project management, project controls, procurement and construction management to oil and gas, power, and mining industries.

Mr. Wearly resigned from CCI to take the position with Worley. He testified that all oil field workers are required to have clearance badges to travel and work on the North Slope. Hillcorp flies employees to their work sites. An individual can have only one badge at a time, identifying the current employer. There is an application process and delay to obtain updated badges. An employee transferring from one company to another must resign and have that badge de-activated before the employee can receive a badge listing the new employer. There is always a gap in employment as a result.

Ms. Allard testified that Mr. Wearly was a “great employee.” She did not have complete documentation regarding his furlough, but she confirmed his last workday was December 3, 2020 and that oil field employees must resign from a current employer in order to get “new badges” with a new employer. “Employees can be listed only under one employer.” The time needed to get a new travel badge depends on how long it takes for releases to be signed, updated security checks conducted, and computer records updated. CCI has had to wait on clearance badges for employees in the past.

Mr. Wearly applied for unemployment benefits to cover the gap in work between leaving CCI and starting with Worley. The Division denied that request and issued a disqualification on May 11, 2021, concluded Mr. Wearly voluntarily quit CCI without legal good cause.

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).¹ 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.² If the claimant is eligible, the

¹ 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.

² 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.³

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.⁴ 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.”⁵ 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.”

³ 8 AAC 85.010(a)(12).

⁴ 8 AAC 85.010(a)(20).

⁵ 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).⁶

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.”⁷ A compelling reason is “one that causes a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave employment.”⁸ 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.⁹ However, the employee

⁶ 8 AAC 85.095(c).

⁷ *Wescott*, 996 P.2d at 726-28 adopting the BPM criteria.

⁸ *Calvert v. State, Dept. of Labor & Workforce Development, Employment Sec. Div.*, 251 P.3d 990, 1001 (Alaska 2011)(adopting BPD criteria).

⁹ *Id.* at 1002-06.

is “not expected to do something futile or useless in order to establish good cause for leaving employment.”¹⁰ 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.”¹¹

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.¹² 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.”¹³

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

¹⁰ *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).

¹¹ *Id.* at 1002-06.

¹² *Id.*

¹³ *Id.*

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

DECISION

Mr. Wearly established good cause for his voluntary job quit under 8 AAC 85.095(c)(7): he demonstrated that he left CCI to accept a bona fide offer of work that offered better wages, benefits, hours, or other working conditions and the new work did not immediately materialize due to the security and transportation approval process involved not due to his own fault.

Mr. Wearly voluntarily resigned from CCI. He did so for the specific reason listed in 8 AAC 85.095(c)(7): to take a bona fide offer of better employment. The delay in his start date was not his fault, but rather part of a standard security process. The Division erred when it denied his claim.

The Division's May 11, 2021 denial decision is **Reversed**.

DATED January 11, 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. 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 11, 2022, this document was sent to: Jesse Wearly (by mail); CCI Industrial Services LLC (by email). A courtesy copy has been emailed to the DETS UI Appeals Team and DETS UI Technical Team.


Office of Administrative Hearings

¹⁴ Signed electronically to accommodate remote work restrictions due to COVID-19.