



APPEAL TRIBUNAL DECISION

Docket number: 24 0283 **Hearing date:** June 19, 2024

CLAIMANT:

JILL MACKENZIE
[REDACTED]

EMPLOYER:

TIDES LLC
[REDACTED]

CLAIMANT APPEARANCES:

Jill Mackenzie

EMPLOYER APPEARANCES:

Shawn Bass

CASE HISTORY AND FINDINGS OF FACT - TIMELINESS

The claimant filed an appeal against a June 27, 2023 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 June 28, 2023. The claimant's appeal was filed on April 2, 2024, giving rise to the issue of the timeliness of the claimant's appeal.

The claimant did not receive the Division's determination because she had relocated before it was mailed. The claimant did not change her address with the Division when she moved because she had stopped filing for benefits in February 2023. The claimant re-opened her claim for benefits in December 2023. She provided an updated mailing address and claimed benefits for a few weeks. The claimant did not receive benefits and she recalled getting a letter telling her she was not eligible for benefits so she stopped filing certifications.

The claimant received a notice by mail on or about April 2, 2024 that advised the her she was required to repay overpaid benefits. The claimant contacted the Division immediately and was advised of the determination in this matter. The claimant filed her late 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;

- (b) 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.

In Llanes, Com. Dec. 20-0005, April 1, 2020, the Commissioner of the Department of Labor and Workforce Development held:

We agree the claimant is responsible from the date he became aware of the determination because he was not currently filing for benefits when the determination was issued, and thus not under obligation to keep the division apprised of his current address or be held responsible for division mail.

The claimant was no longer filing for benefits at the time the Division mailed the determination in this matter. As in Llanes, she was not obligated to keep the Division apprised of her mailing address while she was not claiming benefits. The claimant filed

her appeal promptly upon learning of the determination. The Tribunal finds the claimant's delay in filing her appeal was due to circumstances beyond her control.

DECISION - TIMELINESS

The claimant's appeal from the notice of determination issued on June 27, 2023 is **ACCEPTED** as timely filed.

CASE HISTORY - SEPARATION

The determination issued June 27, 2023 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.

FINDINGS OF FACT - SEPARATION

The claimant interviewed for a position with the employer in advance of relocating to Juneau. The claimant understood from the interview that the employer would create a new position to best use the claimant's skills. The claimant attended a videoconference orientation for about four hours on January 3, 2024. During the orientation it became apparent that the claimant would be expected to provide direct care to clients which would include lifting clients, helping them get out of cars, carrying groceries and doing household cleaning such as scrubbing bathtubs.

After the meeting, the claimant called the owner and told him that she had believed the job would be only administrative-type work. The claimant has a medical condition for which she is under care by a doctor. The condition causes joint issues for which the claimant had recently had shoulder surgery. The claimant told the owner she was unable to perform the duties described so she would not begin work for the employer as planned.

The employer held in the hearing that all employees in the business are expected to perform some direct care services so the work would not be suitable for a worker who could not meet the physical needs of that part of the job. Neither the claimant nor the employer could recall what job the claimant had initially applied for.

The claimant held that she was unaware that she was paid for the four-hour orientation as she was not expecting and did not receive a check.

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....
 - (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 - SEPARATION

The claimant in this case learned during orientation for a new job that duties were going to be required of her that she was unable to perform because of a longstanding medical condition. The employer agreed that any job the claimant was hired for would have physical requirements.

The Alaska Supreme Court held, in Westcott:

[P]hysical ability does not necessarily establish work-suitability in the case of a worker with an existing health problem since -- according to the department's policy manual -- '[i]f accepting work is detrimental to the claimant's health, or if the claimant's health or physical condition prevent the claimant's performing the work, there is no issue under [the waiting-week disqualification] statute.' 'Suitability' is thus an inquiry that encompasses more than short-term physical capability. A claimant may be 'capable' of performing a particular job and yet be 'unsuited' for it. As we stated in *Lucas v. Anchorage Police and Fire Retirement Board*, 'although someone...is not suited for work...he [may] nonetheless [be] capable of performing it'.... To find suitability[,] the hearing officer was required to consider not only Westcott's 'physical fitness' for the job, that is, whether he was capable of performing roustabout work, but also any detriment that the work might cause to Westcott's undisputed physical impairment, club feet....

Cases in other jurisdictions support this distinction, between capability and suitability. For example, in *Israel v. Bally's Park Place, Inc.*, a closely analogous case, a New Jersey appellate court reversed the denial of benefits to a casino employee whose work environment threatened her recovery from alcoholism. The court held that Israel qualified for benefits even though her physician had released her back to work.

Westcott v. State Department of Labor, 996 P.2d 723 (Alaska, February 18, 2000).

The claimant in this case had not been advised to quit work by a physician. However, she knew physical demands of the job being described were not within her capability due to her chronic medical condition, for which she had recently had surgery. The Tribunal concludes that the work was not suitable for the claimant due to the physical requirements and her medical condition.

The provisions of AS 23.20.379(a)(1) require disqualification of a claimant's benefits she if leaves suitable work without good cause. If a claimant leaves unsuitable work, she is not required to show good cause for quitting. A disqualification is not in order in this case.

DECISION - SEPARATION

The determination issued on June 27, 2023 is **REVERSED**. Benefits are **ALLOWED** for the weeks ending January 7, 2023 through February 11, 2023, 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 June 24, 2024.



Rhonda Bunes, Appeals Officer