

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0579

Reversed ~ Revocada
No Disqualification ~ No Descalificación

PROCEDURAL HISTORY: On January 29, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant failed without good cause to accept an offer of suitable work (decision # 110550). Claimant filed a timely request for hearing. The Office of Administrative Hearings (OAH) scheduled a hearing for March 22, 2018. On March 22, 2018, claimant failed to appear at the hearing and ALJ Meerdink issued Order No. 18-UI-105741, dismissing claimant’s request for hearing due to his failure to appear. On March 26, 2018, claimant filed a request to reopen the hearing on decision # 110550. On April 19, 2018, ALJ Monroe conducted a hearing, and on April 27, 2018, issued Order No. 18-UI-108307, canceling Order No. 18-UI-105741 and concluding claimant showed good cause to reopen the hearing and that OAH should set a hearing regarding the merits of decision # 110550. Order No. 18-UI-108307 became final on May 17, 2018, no appeal having been filed. On May 17, 2018, ALJ Monroe conducted a hearing on the merits of decision # 110550 and on May 24, 2018, issued Order No. 18-UI-110046 affirming decision # 110550 and concluding that claimant failed without good cause to accept an offer of suitable work. On May 31, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant had worked in production, general labor and janitorial work in the past. Claimant had a welding certification and had been working as a welder for the last ten years.¹ Claimant earned \$20 per hour working as a welder.

¹ Claimant’s response to an important question by the ALJ – “I understood from [the Department’s witness] that you also had some . . . previous work experience in production. Is – is that correct?” – was inaccurately translated as explained below:

Claimant’s actual response in Spanish: “¿Producción? Tal vez sí, o sea, hace muchos años que trabajaba en producción, pero los últimos años han sido welding.” Audio recording at 57:24 to 57:35.

Correct translation: “Production? Maybe yes, that is, many years ago I worked in production, but the last few years have been welding.”

Translation made by the interpreter: “Uh, well, production, yes. I did a lot, uh, perhaps a lot of years that I’ve worked in production. But, uh, the production has been welding.” Transcript at 12.

(2) On May 15, 2018, claimant filed an initial claim for benefits. Claimant told the employer he was seeking work as a welder.

(3) On June 1, 2017, the employer's staff coordinator called claimant and offered claimant work for one day, with the possibility of future work, at Purlin Mill doing entry-level work as a shop helper for \$13.00 per hour. Claimant refused the work because he was seeking welding work and the job paid less than welding work. Exhibit 1.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant refused an offer of work from the employer with good cause.

ORS 657.176(2)(e) requires a disqualification from unemployment insurance benefits if an individual failed without good cause to accept suitable work when offered. OAR 471-030-0038(6)(a) (January 11, 2018) defines "good cause" as "such that a reasonable and prudent person, exercising ordinary common sense, would refuse to * * * accept suitable work when offered by the employer." Factors to consider when determining whether work is "suitable" include, in pertinent part, "the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual." ORS 657.190.

In a job refusal case, the employer must first establish that it made claimant an offer of work and that he refused it, thus making a *prima facie* showing that claimant was not entitled to benefits.² Only if the employer meets that burden does the burden then shift to claimant to show the offer of work was not suitable, or that he had good cause to refuse the offer.³

In Order No. 18-UI-110046, the ALJ concluded that the employer made a *prima facie* showing that claimant refused a *bona fide* job offer, and that the work was not unsuitable because, although claimant's customary occupation was welding, "he has also worked in production, janitorial services, and general labor, and the work required of a shop helper in a steel mill is, more likely than not, consistent with the range of prior work experience that claimant described to the employer and the Department." The ALJ therefore found the offered work was suitable because it was compatible with claimant's prior experience and based on the other factors provided by ORS 657.190.⁴

The employer asserted that it offered claimant work on June 1 for one day of work as a shop helper at Purlin Mill for \$13 per hour, and that claimant refused the offer. The employer did not know what date the work was to be performed, testifying that the client "needed one day help . . . between . . . May 9th, '17 and August 11th, '17." Transcript at 9. Claimant did not recall with certainty having received the offer, what information was given to him about the work, or refusing it. Without providing claimant the time the work was to occur, the employer failed to show by a preponderance of the evidence that its offer of work was valid.

² *Alaska Tanker Co. v. Employment Dept.*, 185 Or App (2003).

³ *See Vail v. Employment Division*, 30 Or App 365 (1977).

⁴ Order No. 18-UI-110046 at 3-4.

Even if the record showed that the offer of work was valid, the outcome of this decision would remain the same because claimant has shown by a preponderance of the evidence that the work the employer offered him was not suitable. Claimant did not assert that work as a shop helper would pose a risk to his health, safety or morals, or that the work was too far from his residence. At issue here is whether the work was consistent with claimant's physical fitness and prior training, experience and prior earnings. The Department asserted that the shop helper work was suitable because "the job is entry level [and claimant had] done labor work in the past." Transcript at 6. Although claimant had prior experience in production work, which might be consistent with work as a shop helper, claimant's prior training was as a certified welder, he had ten years of experience as a welder, and his prior earnings as a welder were \$20 per hour. Thus, his prior training, experience and earnings were consistent with someone working as a welder for \$20 per hour, and inconsistent with someone working as a shop helper for 35 percent less than his prior earnings. Moreover, the record does not show that claimant had been unemployed so long, or that the prospect of securing local work as a welder was so poor, that claimant should consider work similar to work he had done "many years ago" for a lower wage to be suitable. Because the work offered was not suitable, claimant had good cause to reject the employer's offer of work, and is not disqualified from the receipt of benefits for doing so.

DECISION: Order No. 18-UI-110046 is set aside, as outlined above. *La Orden de la Audiencia 18-UI-110046 se deja a un lado, de acuerdo a lo indicado arriba.*⁵

J. S. Cromwell and S. Alba;
D. P. Hettle, not participating.

DATE of Service: July 6, 2018

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. See ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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NOTA: *Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records*

⁵ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete. *Esta decisión revoca una decisión de audiencia que negaba los beneficios. Por favor tenga en cuenta que puede tomar el Departamento de varios días a dos semanas para pagar los beneficios atrasados.*

Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. *Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.*