

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

MANUEL GARCIA

Claimant

and

ADVANCE SERVICES INC

Employer

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HEARING NUMBER: 16B-UI-00949

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.4-3, 96.5-3A

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Administrative Law Judge's findings of fact are adopted by the Board as its own with the exception of the final sentence of the findings of fact. In lieu of that sentence the Board makes the following findings:

The rate of pay offered was \$11 per hour for 40 hours a week or \$440 per week. The Claimant's average weekly wage in his high quarter was \$169.15. The Claimant declined the position because the Claimant was planning of moving to Texas.

REASONING AND CONCLUSIONS OF LAW:

Refusal Of Suitable Work: Iowa Code section 96.5-3-a provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

- (1) One hundred percent, if the work is offered during the first five weeks of unemployment.
- (2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.
- (3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.
- (4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

Where the claimant actually refuses work, as opposed to not applying for work, the refusal of suitable work question involves whether the work was "suitable" and, if so, whether the refusal was for "good cause". In *Pohlman v. Ertl Co.*, 374 N.W.2d 253 (Iowa 1985) the Supreme Court placed the burden of proof on good cause on the claimant. Subsequently in *Norland v. Iowa Department of Job Service*, 412 N.W.2d 904, 910 (Iowa 1987) the Court ruled that the employer had the burden of proving suitability of the offer. On the issue of suitability the Employer has a burden of putting on a *prima facie* case. The Claimant has a burden to identify the suitability factors at issue, at least as to some of them. *Norland v. IDJS*, 412 N.W.2d 904, 911 (Iowa 1987). If the employer proves that a suitable offer was made and refused, then the claimant can avoid disqualification by showing that the refusal was for good cause. Suitability of an offer is a fact issue that must be resolved "in light of those facts peculiar to each given case." *Norland v. IDJS*, 412 N.W.2d 904, 912 (Iowa 1987). "The question of good cause, like that of suitability, is a fact issue within the discretion of the department to decide." *Norland v. IDJS*, 412 N.W.2d 904, 914 (Iowa 1987).

Given the wage rate, and the nature of the work the Employer has shown that a suitable offer of work was made on December 10. The Claimant now has the burden of proving that he had good cause for turning down. The Claimant has made it difficult on himself by neither appearing at hearing nor even submitting argument on appeal. Yet even when a party with the burden of proof fails to appear at hearing it is still possible for that party to carry its burden of proof through evidence introduced by the opposing party or through review of the file. *See Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1, 3 (Iowa 2005)(In finding that claimant, who did not appear, had proved good cause for her quit the Court holds that the “fact that the evidence was produced by [the employer]”). Here that evidence shows not that the Claimant had moved to Texas but rather that he “was moving.” This is consistent with the Claimant being in Iowa at the time of the offer. This being the case we cannot, without a lot more from the Claimant on why he was planning to move, conclude that he had good cause for moving rather than taking the job. The geographic location excuse does not apply because the evidence fails to show that the Claimant had actually moved to Texas at the time of the offer. Accordingly the Claimant is disqualified for refusal of suitable work.

Note to Claimant: The procedural aspects of this case are a little odd. The Claimant did not attend the hearing. We do not know if the Claimant had a legally sufficient excuse for not attending since he has filed no argument with the Board. We recognize, of course, that until today the Claimant had not been required to pay back benefits and thus did not chose to explain her absence at hearing. We point this out now so that the Claimant is explicitly aware of the ability to apply for rehearing of today’s decision within 20 days of issuance of today’s decision, *including* in the count weekends and holidays. The Claimant may make whatever argument for reopening that he thinks appropriate, and this would include argument explaining why the Claimant failed to attend the hearing. We are not saying the argument would necessarily prevail, only that we would consider it. We do caution that the 20-day deadline for applying for rehearing is not flexible.

No Repayment Of Overpayment: Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

871 IAC 23.43(3) Rule of two affirmances.

- a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
- b. However, if the decision is subsequently reversed by higher authority:
 - (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
 - (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
 - (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer’s account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

DECISION:

The administrative law judge's decision dated February 22, 201 is **REVERSED**. The Employment Appeal Board concludes that the Claimant is disqualified for refusing suitable work. Accordingly, he is denied benefits until such time the Claimant has worked in and was paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible.

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman

RRA/fnv