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

MICHAEL L ROBERTS Claimant and **SHOVEL 1 INC** Employer	**HEARING NUMBER:** 19BUI-04852 **EMPLOYMENT APPEAL BOARD DECISION**

N O T I C E

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: 96.5-3-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. Two 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.

We find in addition that the job offered was for the job the Claimant had been laid off from in February, and that the terms and conditions of that offered job, including its wages, were to be the same as they had been back in February. We find further that both parties understood this throughout their negotiations. All the Claimant's wage credits in his base period are with this Employer.

REASONING AND CONCLUSIONS OF LAW:

In cases of "refusal of suitable work without good cause" we must engaged in a two-step analysis. In such cases, "[b]ased upon the facts found by the department through investigation it shall then be determined whether the work was suitable **and** whether the claimant has good cause for refusal." 871 IAC 24.24(3)(emphasis added).

First the agency must decide if an offer of suitable work is made. If not then the analysis is at an end, and the offer can be refused without consequence. If the offer is suitable, or assumed to be suitable for the purposes of analysis, then the agency must take up the question of good cause. If a Claimant has good cause for refusing a suitable offer then benefits are allowed *even if* the offer was suitable.

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).

Suitable Offer:

Under the regulations of the department a "claimant shall be disqualified for a refusal of work with a former employer if the work offered is reasonably suitable and comparable and is within the purview of the usual occupation of the claimant." 871 IAC 24.24(14)(a). The provisions of Iowa Code section 96.5(3)"b" are controlling in the determination of suitability of work.

Iowa Code section 96.5-3 provides:

> An individual shall be disqualified for benefits:
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> > 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. (1) 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:

(a) One hundred percent, if the work is offered during the first five weeks of unemployment.

(b) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.

(c) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.
(d) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

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

The Employer here offered the Claimant his old job back. We do not find credible that there was any confusion about the terms and conditions of the offer, including the wage. Based on the record evidence the most reasonable inference is that the parties assumed that, as had happened in the past, the Claimant would return from layoff to the same job and that it would be at the same hours and wage rate as before. This is corroborated by the fact that the Claimant asked for a raise – he clearly knew he was being offered his old wage, and now he wanted more. Based on the credible evidence we find that the parties understood that all other job conditions would be the same, that is, the offer was for "having your job back." The offer was therefore "reasonably suitable and comparable" to that former job, and was certainly "within the purview of the usual occupation of the claimant."

The Administrative Law Judge found that the offer was insufficient because terms and conditions were not explicitly discussed. But there is no requirement that the terms be set out explicitly in the offer. Instead, all that is required is that a "bona fide offer of work was made to the individual by personal contact …and a definite refusal was made by the individual." 871 IAC 24.24(1)(a). Here the credible evidence establishes that there was an actual opening, it was for the same job the Claimant had been laid off from, and the Claimant knew this. He thus gave a definite refusal. There was a bona fide offer and the offer was suitable.

Good Cause.

The standard for determining good cause for refusing work does not involve the statutory factors. Those factors are specifically to be applied only "[i]n determining whether or not any work is suitable for an individual…" Iowa Code §96.5(3)(a). Instead on the good cause issue the Supreme Court of Iowa set out the standard, in general terms in *Norland*. "Good cause for refusing work must involve circumstances which are real, substantial, and reasonable, not arbitrary, immaterial, or capricious." *Norland v. IDJS*, 412 N.W.2d 904, 914 (Iowa 1987). Good cause for a refusal of suitable work need not be attributable to the Employer.

Here the Claimant has not testified and so we are left with speculation on why he refused the offer.

The best we have is that it had something to do with wanting more money, and a debt forgiveness. Neither is good cause in this context. One the raise, if denial of a *raise* were good cause for refusing work this would undermine the

carefully crafted wage-rate schedule for suitability set out in the statute. If the offered rate satisfies the minimum statutory requirement to be suitable, a desire for a more-than-suitable wage rate cannot be good cause for refusal. On debt forgiveness, the analysis is similar. If the offer is for enough money to be suitable, a desire for more money (in the form of debt forgiveness) is not good cause. Such a request is not "substantial, and reasonable." *Norland v. IDJS*, 412 N.W.2d 904, 914 (Iowa 1987). The Claimant did not establish good cause for the refusal.

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 it has filed no argument with the Board. We recognize, of course, that until today the Claimant had prevailed and thus has no reason to try to explain the 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. The Claimant may make whatever argument for reopening that the Claimant 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 and may not be extended.

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.
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> 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.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (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 July 16, 2019 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 following May 17, 2019, 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

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Kim D. Schmett

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James M. Strohman

RRA/fnv