BEFORE THE

STATE OF WISCONSIN

LABOR AND INDUSTRY REVIEW COMMISSION

In the matter of the
unemployment benefit claim of

GARY L BRYANT. EMPLOYE

Hearing No. 93601651MW

SEE ENCLOSURE AS TO TIME LIMIT ON FURTHER APPEAL.

Involving the account of

CORNWELL PERSONNEL ASSOCIATES LTD, EMPLOYER

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On January 5, 1993, the Department of Industry, Labor and Human Relations (the department), issued an initial determination finding that the employe did not voluntarily terminate his employment with the employing unit but instead the employe had been laid off indefinitely as of December 8, 1992 (week 50). The employer timely appealed. A hearing was scheduled on March 11, 1993 before an administrative law judge. On March 25, 1993, the administrative law judge issued his appeal tribunal decision, affirming the department's initial determination, finding that the employe did not voluntarily terminate his employment with the employing unit in week 50 of 1992 and further finding that in week 50 of 1992, the employe failed to accept an offer of suitable work, within the meaning of section 108.04 (8)(a), Stats., but that the wages, hours or other conditions of that work were substantially less favorable to the employe than those prevailing for similar work in the labor market. Accordingly, the administrative law judge found the employe eligible for benefits as of week 50 of 1992, if otherwise qualified. The employer timely petitioned the commission for review of the appeal tribunal decision.

Based upon the law, records and evidence in this case, the commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time of hearing, the employe had worked approximately eight months on various assignments provided by the employer, a temporary employment service. On December 8, 1992 (week 50), the employe completed a two day assignment for the employer. On that day a representative of the employer stated to the employe that he was being placed on a seven day definite layoff. On December 11, 1992 (week 50), another representative of the employer offered the employe a new assignment as a laborer. The new assignment guaranteed only eight hours for the first day and would pay $4.50 per hour. The employe's previous assignment had paid $4.75 per hour. The employe informed the employer that he could not take the assignment that day, December 11, 1992, because he had a previously scheduled job interview. The employer told the employe that he was refusing continued employment during the seven day definite layoff and that the employer would treat the separation as a quit.

The employe did not appear at the hearing. Based upon the employer's testimony, the administrative law judge found that the employe's failure to accept the assignment on December 11, 1992, did not represent a quit but rather a failure to accept a new offer of work. The administrative law judge reasoned that there could be no assurance that the layoff would last only seven days. The underlying premise of the administrative law judge's decision was that the employe was in effect on an indefinite layoff and that any job offer or recall

to work would be "new work" under Allen Bradley Company v. ILHR Department, 58 Wis. 2d 1 (1973). However, in view of a recent development in departmental policy the commission respectfully reverses the appeal tribunal decision and formally adopts the policy stated herein concerning employment relationships between employes and temporary help agencies.

On May 5, 1993, the department announced that beginning immediately it would consider the employment relationship to continue for temporary help agencies when, at the end of any assignment, the employe is notified that the temporary help agency will have an assignment for the employe within seven days. In other words, the employer must assure the employe that it will provide another assignment which will begin within seven days of the end of the earlier assignment. The temporary help agency need not specifically identify the assignment but merely indicate that one will become available to begin by a "date certain" within seven days of the end of the most recent assignment. UC Benefits Manual, Volume 3, Part 7, Chapter 1, page 80; UCD 93-28 and 93-28 supp. 1. The commission has carefully reviewed this policy and believing it sound formally adopts it as its own and retroactively applies it to the case at hand.

Therefore, the employe was placed on a definite seven day layoff beginning December 8, 1992 (week 50). On December 11, during this definite layoff, the employer offered the employe an assignment for that day with potentially longer employment. The employe refused the job assignment because he had a previously scheduled job interview that day. The employer contends that the employe quit by refusing this assignment. However, not every refusal of an assignment

within this definite layoff period will constitute a quit pursuant to section 108.04 (7)(a), Stats. Since the employment relationship continues throughout the seven day period, the employe must affirmatively show that he intends to sever the employment relationship before the commission will find a voluntary termination. The commission reiterates well established law that when an employe shows intent to leave employment and indicates such intention by word or manner of action, or by conduct inconsistent with the continuation of the employe-employer relationship, it must be held to constitute a voluntary termination. Nottelson v. ILHR Dept., 94, Wis. 2d 106, 119 (1980).

In this instance, the commission cannot conclude that the employe evinced such intent to sever the employment relationship. The employe's refusal of the one day assignment is based entirely on his desire to attend a previously scheduled job interview. The employe believed that the employment relationship still continued and under the newly adopted policy the employment relationship during the definite 7-day layoff remains a continuing one.

Therefore, since the employment relationship continues, the next level of inquiry is whether this available work on December 11, 1992 can serve to limit the employe's benefits. Section 108.04 (1)(a), Stats., may serve as a disqualification and/or limitation of the employe's benefits for the day(s) which the employe refused to work. Section 108.04(1)(a), Stats., provides that:

> "An employe's eligibility for benefits shall be reduced for any week in which the employe is with due notice called on by his or her current employing unit to report for work actually available within such week and is unavailable for, or unable to perform, some or all such available work. For purposes of this paragraph, the department shall treat the amount that the employe would have earned as wages for that week in such available work as wages earned by the employe and shall apply the method specified in sec. 108.05 (3)(a) to compute the benefits payable to the employe. The department shall estimate wages that an employe would have earned if it is not possible to compute the exact amount of wages that would have been earned by the employe."

Here the assignment was for eight hours of work at $4.50 per hour. Had the employe accepted the assignment he could have earned $36 in wages.

The commission therefore finds that in week 50 of 1992, the employe was placed on a seven day definite layoff. The commission further finds that the employe did not sever the employment relationship during this definite seven day layoff period on December 11, 1992 (week 50) when he refused the job assignment. The commission additionally finds that the employe's benefits for week 50 of 1992 shall be reduced pursuant to section 108.04 (1)(a), Stats., as he was called upon by his current employer with due notice to report for work actually available.

DECISION

The appeal tribunal decision is modified and as modified, is affirmed. Accordingly, the employe is eligible for benefits as of week 50 of 1992, if he is otherwise qualified. The department shall calculate the benefits due for week 50, taking into account the available work that the employe refused on December 11, 1992, in accordance with this decision.

Dated and mailed

November 10, 1993

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/s/
Pamela I. Anderson, Chairman

/s/
Richard T. Kreul, Commissioner

/s/
James R. Meier, Commissioner

MEMORANDUM OPINION

The commission believes that the policy stated above serves to address an important concern surrounding temporary help employment and, therefore retroactively applies the policy to the case at hand.

Like the department, the commission agrees that the employment relationship between the temporary help agencies and its employes is unique; so unique that it mandates special treatment. All interested participants are fully aware that in the temporary help industry it is common for employes to be assigned to a series of assignments at different locations with different duties, wages and conditions. Additionally, it is common for these assignments to end with little or no notice to either the employe or the employer. In many instances, both the employe and the temporary agency fully intend to continue the employment relationship but the short notice that an assignment ends with often requires a short time to pass before the employer is able to send the employe to the next assignment. In view of these unique conditions and contingencies the commission believes that the employment relationship can continue between an employe and a temporary help agency even when an assignment ends.

The commission therefore will treat temporary help agency employment relationships in the following manner. The commission will consider the employment relationship to continue when at the end of an assignment the employe is notified that the temporary help agency will have assignments for the employe within seven days. The employer need not specifically identify the assignment but merely indicate that one will be available to begin by a date certain within seven days of the end of the most recent assignment. If during that seven days the designated assignment becomes unavailable but the employer can clearly identify another assignment to begin by a date certain within the next seven days, the employment relationship will be continued for that length of time. If for any reason this second assignment becomes unavailable to the employe by the date certain the employment relationship will be considered to have been terminated at that time due to lack of work. Any subsequent offer of work to the employe by the temporary help agency is an offer of new work under sec. 108.04 (8), Stats.

However, the commission parts company with the department's remaining policy. The commission is unwilling to conclude that when an employe is given notice that an assignment will be available within seven days and refuses that assignment the employe is automatically considered to have voluntarily terminated the employment relationship. Instead, the commission will look at the employe's refusal to determine whether the employe has in fact evinced an intent to sever the employment relationship. If the employe evinces an intent to quit and in fact severs the employment relationship, exceptions to the quit disqualification must be examined. However, if the employe's refusal of the assignment does not evince an intent by the employe to quit, the employment relationship continues. Section 108.04 (1)(a), Stats., is applicable during this continued employment relationship and may serve to disqualify an employe or limit an employe's benefits.