

BEFORE THE

STATE OF WISCONSIN

LABOR AND INDUSTRY REVIEW COMMISSION

In the matter of the
unemployment benefit claim of

JOHN H. KABACINSKI, Employee

Hearing No. 89-601811 MW

Involving the account of

SEE ENCLOSURE AS TO TIME
LIMIT ON FURTHER APPEAL.

CORNWELL PERSONNEL ASSOCIATES, LTD., Employer

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On November 24, 1989 the Commission issued its decision in the above-captioned matter modifying and affirming the decision of the Administrative Law Judge and allowing benefits. Subsequently, on December 4, 1989, the Commission received a letter from the employer objecting to the decision. This letter was treated as a request that the Commission exercise its jurisdiction under section 108.09 (6)(b), Stats., to set aside its decision within 28 days after the issuance thereof, for further consideration and the taking of further action. On December 7, 1989, the Commission's general counsel wrote to the employer indicating that the Commission had concluded that the matter had been appropriately decided and declined to exercise its jurisdiction to reconsider the matter under section 108.09 (6)(b), Stats. On December 13, 1989, the Commission received a second letter from the president of the employer objecting to the original decision.

Considering that the points raised by the employer in its letters warranted a more formal response, the Commission set aside its original decision, and reconsidered the matter. Having reconsidered the matter, the Commission now makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The employer operates a temporary help service. The employe first worked for the employer on November 30, 1988. He was assigned to a position as a turret lathe operator at Western Products, working a shift from 6:55 a.m. until 3:25 p.m. Monday through Friday. His initial pay rate was \$5.50 per hour and he received a subsequent raise to \$6.00 per hour.

Prior to his hire by the employer, the applicant was interviewed by an agent of the employer, Cathy Schultz. In that interview, the employe told Schultz that the lowest wage he would accept was \$5.00 to \$5.50 per hour. Notwithstanding his insistence on these terms of employment, the employer

agreed to and did enter into an employment relationship with the employe. By virtue of the formation of this employment relationship after the employe indicated that he would not accept work paying less than \$5.00 per hour, the terms of the employment contract between the employer and the employe were such that the employe would not be assigned work paying less than \$5.00 per hour.

The employe's assignment at Western Products ended on Friday, February 3, 1989. Pursuant to the employer's rules, the employe next contacted the employer on Monday, February 6, 1989, to obtain a subsequent assignment. At that time, he was offered an assignment as a general laborer paying \$4.00 per hour. He declined the assignment on the grounds that the wages were too low. In so doing, he reminded the personnel assistant who made the offer to him that, when he was first hired, he had informed the employer that the lowest pay he would accept was \$5.00 to \$5.50 per hour.

On Wednesday, February 8, 1989, the employe telephoned the employer to inquire about other assignments. At that time he was offered a position as a general laborer at \$4.50 per hour. The employe felt the pay was too low, and he rejected the offer.

On Friday, February 10, 1989, the employe again contacted the employer to inquire about possible assignments. At that time he was offered a job as a punch press operator or machine operator, on the third shift, paying \$5.00 per hour. The employe did not want to work third shift, and he refused the offer.

The first issue presented for decision is whether the employe voluntarily terminated his employment with the employer. The employe was required to contact the employer immediately upon completion of an assignment, or be considered to have voluntarily quit. After the employe's assignment ended on Friday, February 3, 1989, the employe next contacted the employer on Monday, February 6, 1989. In the absence of any evidence as to what the term "immediately" meant under the employer's policies, it cannot be concluded that the employe failed to properly contact the employer upon a termination of his assignment, when the assignment ended with the end of work on a Friday and the employe contacted the employer on the following Monday. However, the employe was also required to accept assignments given to him by the employer or be considered to have voluntarily terminated his employment. When the employe refused the assignment which was offered him on Monday, February 6, 1989 (week 6), he effectively quit his employment. His subsequent refusal to accept assignments of work on February 8, 1989 and February 10, 1989 were refusals of offers of new employment.

The next issue presented for decision is whether the employe's voluntary termination of employment on February 6, 1989 should result in a finding of ineligibility for benefits. Section 108.04 (7)(a), Stats., provides that an employe who voluntarily terminates his work with an employing unit will be ineligible to receive benefits until certain requalifying conditions are met. However, section 108.04 (9), Stats., provides, in relevant part:

"Benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

* * *

"(b) If the wages, hours (including arrangement and number) or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality."

This provision is potentially applicable in any case in which there is a refusal to accept "new work". "New work" is not limited to situations in which an offer of employment is made to a person by an employer for whom the person has never worked, or with whom the person previously worked in an employment relationship that has been severed. "New work" can be found to exist even in a continuing employment relationship, where there is an offer by an individual's present employer of an assignment with different duties from those the employe has agreed to perform in the existing contract of employment or different terms or conditions of employment from those in the existing contract of employment. If the duties, terms, or conditions of the work offered by an employer are consistent with the existing contract between him and the worker, the offer is not of new work. On the other hand, if the duties, terms, or conditions of the work offered by an employer are not consistent with the existing contract between him and the worker, the offer is of a new contract of employment and is, therefore, "new work" within the meaning of the labor standards provision. Piotrowski v. Continents Travel Agency, (LIRC, September 30, 1988); see, Unemployment Insurance Program Letter No. 984, Department of Labor, September 20, 1968. In this case, the contract of employment between the employer and the employe had as one of its central terms the understanding that the employe would not be obliged to accept work paying less than \$5.00 per hour. The offer of an assignment to the employe on February 6, 1989 paying only \$4.00 per hour was an offer of employment the terms and conditions of which were not anticipated by the initial contract of employment. It was therefore an offer of "new work", and the labor standards provision was thus potentially applicable to the employe's refusal of that offer of "new work".

When the employe was offered work on February 8 and February 10, 1989, the employment relationship had been severed, and consequently those offers also related to "new work", such that the labor standards provision was potentially applicable.

In the employe's labor market area, work similar to that which the employe was offered on the occasions at issue here pays from \$3.35 to \$25.00 per hour. The median wage offered for such similar work is \$8.75 per hour, and the average wage offered is \$9.15 per hour. 92 percent of similar jobs in the employe's labor market pay \$5.00 per hour or more. Furthermore, in the employe's labor market, 83 percent of the similar jobs are on the first shift while only 5 percent are on the third shift.

The wages for the assignments offered the employe on February 6 and February 8, 1989 were substantially less favorable to the individual than those prevailing for similar work in the locality, within the meaning of section 108.04 (9)(b) Stats. The wages that would have been paid for those two offered assignments were lower than the wages paid for 92 percent of the similar jobs in the employe's labor market. Additionally, the "wages, hours (including arrangement and number) or other conditions of the work offered" in the assignment offered the employe on February 10, 1989 were substantially less favorable to the individual than those prevailing for similar work in the locality, within the meaning of section 108.04 (9)(b), Stats., both because of the wages, which were lower than the wages for 82 percent of the similar jobs in the employe's labor market, and because of the shift of that assignment (third shift), which was characteristic of only 5 percent of the similar work in the employe's labor market.

The Commission therefore finds that in week 6 of 1989, the employe voluntarily terminated his employment with the employer within the meaning of section 108.04 (7)(a) of the Wisconsin Statutes, but that, by virtue of section 108.04 (9)(b) of the Wisconsin Statutes, the employe is not disqualified from receiving benefits. The Commission further finds that in week 6 of 1989, the employe failed, with good cause, to accept an offer of work, within the meaning of section 108.04 (8)(a) and (9)(b) of the Wisconsin Statutes.

DECISION

The Appeal Tribunal Decision is affirmed. Accordingly, benefits are allowed, if the employe is otherwise qualified.

Dated and mailed

January 18, 1990

110-CD1002

/s/

Keyin C. Potter, Chairman

/s/

Carl W. Thompson, Commissioner

MEMORANDUM OPINION

In its petition for Commission review, the employer argues that the employe voluntarily terminated his employment. The Commission agrees. The Administrative Law Judge erred as a matter of law in concluding that the employe's employment with the employer ended with the end of the employe's assignment on February 3, 1989. In these circumstances, the employment relationship continued when, immediately following the end of an assignment, the employer made the employe an offer of a further assignment, and the employe declined that offer. At that point, the employment relationship was severed by the employe's refusal to accept further employment.

The employer argues that the employe should be disqualified from receiving benefits by virtue of his voluntary termination of employment because the criteria of section 108.04 (7)(f), Stats., were not met in respect to the offer of employment made to the employe on February 6, 1989. Section 108.04 (7)(f), Stats., provides that the disqualifying effect of a voluntary termination of employment shall not apply if the employe terminates his or her work because of a transfer by his or her employing unit to work paying less than two-thirds of his or her immediately preceding wage rate. The employer is correct that section 108.04 (7)(f), Stats., would not apply in these circumstances. However, the applicability of that subsection is not the only issue here. Section 108.04 (9)(b), Stats., relating to the wages, hours and other conditions of work of a position, is always potentially relevant, since the section provides generally that benefits shall not be denied to any otherwise eligible individual for refusing to accept new work under the conditions there specified. When an employe voluntarily terminates his employment by refusing to accept a transfer to new work, the disqualifying effect of the voluntary termination of employment which would normally take place by virtue of section 108.04 (7)(a), Stats., will not take place if the new work to which the employe was transferred is substandard under section 108.04 (9)(b), Stats. This was the situation here. The assignment which the employe was offered on February 6, 1989 was one of general labor, and the testimony at hearing established that the wages accompanying that assignment were substantially less favorable to the individual than those prevailing for similar work in the locality. Thus, the voluntary termination of employment has no disqualifying effect.

Similarly, the work which the employe was offered and refused on February 8, 1989 and February 10, 1989 was substandard under section 108.04 (9)(b), Stats. The work offered the employe on February 8, 1989 was work as a general laborer paying \$4.50 per hour, and this wage was, according to the labor market analyst's testimony, less than what 92 percent of the jobs in general labor paid. The job the employe was offered on February 10, 1989, as a punch press operator, was nonprevailing in that it was on the third shift and paid only \$5.00 per hour. According to the labor market analyst, only 5 percent of the similar work in the locality was performed on third shift, and 82 percent of the similar work in the locality paid at least \$6.00 per hour.

(The employer contended that the employe was offered a second position on February 10, 1989, which he also declined. However, this testimony was hearsay. The witness for the employer who testified at the hearing, Jeff Wein, did not actually make the offer of this job to the employe, but was merely reporting that another employe of the employer, Kim Larson, had done so. Since the employer did not produce Kim Larson as a witness to testify that she in fact made this job offer to the employe, and since the employe denied that this job was offered to him, the Commission cannot conclude that the offer was made.)

The employer argues that the labor standards provision would not be applicable to the refusal of an assignment occurring on February 6, 1989 since, at that time, there was a continuing employment relationship and the employe was simply refusing a new assignment within that continuing employment relationship. Thus, the employer asserts, "new work" within the meaning of the labor standards provision cannot be found to exist in the context of a continuing employment relationship, but only where there has been a severance of the employment relationship and a new employment relationship is offered.

For the reasons discussed above, the Commission concludes that the offer of an assignment made in this case on February 6, 1989 was an offer of "new work". A contract of employment between an employe and an employer always exists. The contract can be either written or oral. The contract describes the employe's duties and the terms and conditions under which they are performed. Those terms and conditions include the wages or the range of wages which it is anticipated the employe will receive for the work to be performed. When an employer proposes to an employe to change something touching upon the duties, terms, and conditions of the employment relationship, in a fashion inconsistent with the intent of the parties in the employment relationship they initially formed, the employer is, in legal contemplation, offering a new employment contract which constitutes "new work" under the labor standards provision. This has long been the view of the United States Department of Labor in connection with its role in administering the conformity of state unemployment insurance acts with the provisions of section 3304 (a)(5)(b) of the Federal Unemployment Tax Act, which requires that all state unemployment insurance acts contain a provision substantially equivalent to that found in Wisconsin's Labor Standards Provision; UIPL No. 984, September 20, 1968. The Department and the Commission have also long accepted this view of the meaning of the phrase "new work" in the labor standards provision.

The Commission finds it unnecessary to determine whether, as a general matter, all offers of new assignments in the context of employment with a temporary help agency either will or will not constitute "new work". In this particular case, the specific facts mandate a conclusion that "new work" was offered. The employe testified credibly and without contradiction that, in his interview for employment, he indicated that he would not be willing to accept assignments to work paying less than \$5.00 per hour. (The contrary indication in the record, in the testimony of Jeff Wein, is hearsay, since he was not present at the interview but was merely reciting what he had obviously been

told about it by the interviewer; as such, it cannot form the basis for a finding of fact). When the employer agreed to enter into an employment relationship with the employe notwithstanding his indication that he would not accept assignments to job paying less than \$5.00 per hour, that became a term and condition of his employment. A subsequent offer of an assignment at a wage of \$4.00 per hour must be construed as an offer of a new contract of employment, since the assignment was not within the intendment of the original contract of employment. In this case, therefore, the offer was of "new work".

PAMELA I. ANDERSON, COMMISSIONER (dissenting):

I am unable to agree with the result reached by the majority herein and I dissent.

I find that the use of the category of general labor with wages from \$3.35 to \$25 is so broad as to be meaningless. The employe's last job for the employer was a turret lathe operator where he was paid \$5.50 in the beginning and later \$6.00 per hour.

The employer offered the employe three different jobs with wages varying because they were different kinds of work. While the employe had earned more money when he had worked for Briggs and Stratton as a machine operator, that job had ended in September of 1988. The employe was past his canvassing period and was already required to lower his sights when he took his job with this employer.

When looking at the labor standards provision what we are really asking is, are the wages appropriate for this type of work and are they substantially less favorable to this individual with his skill levels, experience and other relevant circumstances. The majority finds that the wages are not prevailing so they do not feel the need to look at the question of whether this is substantially less favorable to the individual. Based on the totality of the record, I would find that the offers of work were not substantially less favorable to this individual.

For these reasons, I would dissent.

/s/

Pamela I. Anderson, Commissioner