

New York State Department of Labor

A-750 300 Series

A-750-300

Index 1640C-1

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE
APRIL 18, 1942

INTERPRETATION SERVICE - BENEFIT CLAIMS
VOLUNTARY LEAVING

Advancement, lack of opportunity for

Appeal Board Case Number 6539-41

VOLUNTARY LEAVING- LACK OF ADVANCEMENT (SECTION 506.2 OF LABOR LAW)

No prospects for advancement and preference for other work did not constitute good cause for voluntarily leaving employment.

Referee's Decision: Initial determination disqualifying claimant for voluntarily leaving employment without good cause is sustained. (10/28/41)

Appealed By: Claimant.

Findings of Fact: Claimant, twenty-five years of age, attended a city college for four and one-half years at which he was enrolled for a night course in accounting. For three and one-half years he was employed as a shipping clerk during the daytime, receiving \$18.00 a week for a forty-hour week. He voluntarily left this employment contending that the wages were inadequate; that there were no prospects for advancement; and that he was desirous of obtaining work in the accounting field. Claimant was of the opinion that his services as a shipping clerk were worth \$25.00 per week. He did not request an increase in salary or have any other prospects of employment at the time of his separation from employment.

Appeal Board Opinion: The primary reasons advanced by claimant for his separation from employment were that he was desirous of obtaining work in the accounting field and that there were no prospects of advancement at the employer's establishment. His immediate cause for leaving was that the wages were not commensurate with the work performed. It does not appear that the wages paid to claimant were substantially less favorable than those prevailing for similar work in the locality. However commendable claimant's efforts to better himself might be, none of the reasons advanced by claimant for leaving his job constitute good cause.

Decision: The initial determination disqualifying claimant for voluntarily leaving his employment without good cause is sustained. Decision of the referee is affirmed. (1/19/42)

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

APRIL 30, 1942

INTERPRETATION SERVICE - BENEFIT CLAIMS

TOTAL OF PARTIAL UNEMPLOYMENT

Compensation without work

Matter of Skutnick, 268 App. Div. 357

Appeal Board Case Numbers 6435-41; 6437-41; 6438-41

TOTAL OR PARTIAL UNEMPLOYMENT - BACK PAY AWARD PERIOD (SECTION 502.10 OF
LABOR LAW)

Total unemployment did not exist during the period for which "back pay" awards were made by the National Labor Relations Board.

Referee's Decision: Initial determinations holding that claimants were not totally unemployed during the period for which awards for back pay were made are sustained. (10/7/41)

Appealed By: Claimants.

Findings of Fact: On March 17, 1941 the union, of which claimants were members called a strike in the employer's establishment. The strike was terminated and settled two days later and all of the employees were rehired with the exception of the claimants and a few others. The union filed charges with the National Labor Relations Board alleging unfair labor practices in unlawfully discharging these employees and demanding their reinstatement with back pay for the period of their unemployment. Pending negotiations which followed and late in March 1941 claimants filed applications for benefits certifying to total unemployment weekly thereafter and receiving benefits in varying amounts. On July 8, 1941 an agreement was made between the employer and claimants' union under the terms of which claimants were reinstated on July 15, 1941 and were given checks in amounts approximating 80 per cent of the wages lost by them during the periods of their unemployment. In making such payments the employer deducted social Security contributions and also paid unemployment contributions thereon into the Unemployment Insurance Fund. The local office made a determination that claimants were not totally unemployed during the period in question and were not entitled to the benefits received.

Appeal Board Opinion: Claimants contend that the monies paid by the employer were in the nature of a gift and not in the nature of back wages and that the company, in arriving at the settlement figures, took into account the monies collected by claimants in unemployment insurance benefits. We believe that the referee correctly concluded that the cash awards received by claimants represented wages in excess of \$3 per week during the periods of their certified unemployment and that they cannot be deemed to have been totally unemployed for such periods. In similar cases where awards have been made to unlawfully discharged employees in amounts intended to recompense them for wages they would have otherwise earned, it has been held that such payments constitute wages. (Matter of Tonra, 283 NY 186; Matter of McCoy, 262 App. Div. 790) Since unemployment insurance contributions are payable on the cash awards and may provide a basis for the payment of benefits to the claimants in the following year, such amounts cannot be regarded other than "wages" for the purpose of this

appeal. The fact that the unemployment insurance benefits received by the claimants may have influenced the amounts of the cash awards or the claimants' willingness to accept them does not alter our conclusion.

Decision: Claimants were not totally unemployed during the periods in question. The initial determinations of the local office are sustained. Separate orders are to be entered in each case. The decision of the referee is affirmed.

A-750-306

Index No. 750A.1

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICE OFFICE

April 30, 1942

INTERPRETATION SERVICE- BENEFIT CLAIMS
DETERMINATION OF BENEFITS
AVAILABILITY AND CAPABILITY

Evidence of

Appeal Board Case. No. 6427-41

CAPABILITY -RECEIPT OF WORKMEN' S COMPENSATION

Receipt of workmen's compensation did not constitute proof of incapability for employment where there was satisfactory evidence to the contrary.

Referee's Decision: Initial determination suspending claimant's benefit for incapability as of April 1, 1941 is modified. Claimant was capable of employment on June 18, 1941. (10/8/41)

Appeal by: Claimant

Findings of Fact: Claimant, fifty-six years of age, was employed for fifteen years as a longshoreman. Claimant suffered an injury to his leg on October 18, 1940 and collected workmen's compensation benefits at the rate of \$25.00 per week from October 18, 1940 to January 30, 1941, \$15.00 per week from January 30, 1941 to March 25, 1941 and \$10.00 per week from March 26, 1941 to June 18, 1941. Claimant filed an application for unemployment insurance benefits on April 1, 1941 but failed to report as instructed on April 18, 1941. He refilled on April 25, 1941 and certified to weeks of total unemployment until July 11, 1941. On August 13, 1941 the local office issued an initial determination suspending claimant's benefit rights as of April 1, 1941 on the ground that he was physically incapable of employment and charged the claimant with an overpayment of \$80.00 in benefit checks for the compensable period from the week ending May 9, 1941 to the week ending July 11, 1941. Claimant requested a hearing and the referee ruled that he was capable of employment as of June 18, 1941. The report of claimant's physical condition by a physician on the medical staff of the Bureau of Workman's Compensation dated March 25, 1941 disclosed that claimant was able to resume work in March 25, 1941. The report of the claims department of claimant's employer stated that claimant had an earning capacity after January 30, 1941.

Appeal Board Opinion: The medical evidence submitted to this Board establishes that claimant was able to resume work on March 25, 1941. On the basis of this evidence, we hold that claimant was capable of employment throughout his reporting period at the local office. The

suspension by the local office of claimant's benefit rights because he was incapable of employment was improper.

Decision: Initial determination of the local office suspending claimant's benefit rights because he was incapable of employment is overruled. Decision of the referee is modified accordingly. (2/9/42)

A-750-310

Index 735B.1

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

May 4, 1942

INTERPRETATION SERVICE - BENEFIT CLAIMS
DETERMINATION OF BENEFITS
AVAILABILITY AND CAPABILITY

Appeal Board Case No. 5923-41

AVAILABILITY -MOVING TO VICINITY WHERE NO PLACEMENT OPPORTUNITY IN USUAL OCCUPATION EXISTS.

Voluntary leaving of employment to live at summer resort where placement opportunities were non-existent constituted unavailability because of temporary withdrawal from the labor market.

Referee's Decision: Initial Determination suspending claimant's benefit rights for unavailability is sustained. (7/14/41)

Appeal by: Claimant

Findings of Fact: Claimant, an operator at dresses, filed for benefits on May 6, 1941. The local office on May 15, 1941, imposed a suspension effective the original date of claimant's filing by reason of unavailability. Claimant's husband owns a summer resort hotel at South Fallsburg, New York. Prior to claimant's moving to South Fallsburg, she maintained a residence in New York City. Claimant's husband gave up his apartment and moved his family to South Fallsburg. Claimant gave up her job and went to live with her family. Claimant's husband claims claimant was to assist him in the hotel. Claimant denies this.

Appeal Board Opinion: The Referee having made proper findings of fact and conclusions of law, the Board adopts said findings of fact and conclusions of law as the findings of fact and conclusions of law of the Board. There is no placement opportunity for claimant's usual occupation in the vicinity where claimant moved. From the credible evidence in this case, it was found that claimant quit her job in April 1941, prior to her moving to South Fallsburg, and that she thereby removed herself from the labor market for the period of her sojourn at South Fallsburg.

Decision: Local Office suspension of claimant's account by reason of unavailability is upheld. Claimant had voluntarily removed herself from the labor market by quitting her job in April 1941 and moving to South Fallsburg. Decision of the Referee is affirmed. (10/10/41)

NEW YORK STATE DEPARTMENT OF LABOR
 UNEMPLOYMENT INSURANCE DIVISION
 ADJUDICATION SERVICES OFFICE

MAY 4, 1942

INTERPRETATION SERVICE - BENEFIT CLAIMS
 REFUSAL OF SUITABLE EMPLOYMENT

Distance

Appeal Board Case Number 6599-41

REFUSAL TO ACCEPT AN OFFER OF EMPLOYMENT - DOUBLE CARFARE
(SECTION 506.1 OF LABOR LAW)

The necessity for paying double carfare was not good cause for the refusal of suitable employment.

Referee's Decision: Initial determination disqualifying claimant for refusing to accept an offer of suitable employment is sustained. (10/23/41)

Appealed By: Claimant.

Findings of Fact: Claimant, a beautician, filed an application for benefits on June 3, 1941. She last earned \$18.00 a week plus commission. On August 26, 1941 she was referred to two job openings in beauty salons located in the general vicinity of her residence. Claimant refused to accept such referrals or to visit the prospective places of employment on the ground that the traveling distance from her home was too great and because transportation would necessitate double carfare. She made no effort to inquire into the conditions of employment or wage opportunities in such establishments. Both establishments were above the average and the offered salaries commensurate with claimant's former wages. To reach one of the establishments from her home would require about twenty-five minutes of traveling time, carfare seven cents. The traveling time to the other would be a maximum of forty minutes with a ten cent carfare.

Appeal Board Opinion: The wages, hours and working conditions offered at the two job openings in question are substantially the same as those prevailing for similar work in the locality where claimant resides. The places of employment were not at an unreasonable distance from claimant's home. The conditions sought to be imposed by claimant in connection with prospective employment are unreasonable. Under the circumstances of this case, claimant did not have good cause for her refusal to accept the offers of employment.

Decision: Claimant refused without good cause to accept an offer of employment for which she is reasonable fitted by training and experience. The local office determination is sustained. Decision of the referee is affirmed. (1/30/42)

ADJUDICATION SERVICES OFFICE

June 20, 1942

INTERPRETATION SERVICE – BENEFIT CLAIMS

VOLUNTARY LEAVING

Grievances – Discrimination

Appeal Board Case No. 6849-42

VOLUNTARY LEAVING – DISCRIMINATORY ENFORCEMENT OF COMPANY RULE
(SECTION 506.2 OF LABOR LAW)

Discriminatory enforcement of company rule constituted good cause for voluntary leaving of employment.

Referee's Decision: Initial determination disqualifying claimant for voluntarily leaving employment without good cause is sustained. (1/14/42)

Appealed By: Claimant

Findings of Fact: Claimant was one of twenty-two employees employed in the engineering department of a hotel. During October 1941, the chief engineer posted a notice to the effect that the employees would be docked fifteen minutes' pay for every lateness of one minute to fifteen minutes, and one-half hour pay for every lateness from 16 minutes to thirty minutes. Claimant was late from one to four minutes on a few occasions, and his pay was reduced accordingly. Other employees in the same department, although late, were not penalized by the chief engineer. On December 3, 1941, the chief engineer ordered claimant, who was the payroll clerk, to refund a penalty previously imposed on a fellow employee. When claimant protested the refund, demanding similar treatment for himself, he was severely reprimanded by the department chief and claimant's demand for refund was refused. Claimant thereupon resigned.

Appeal Board Opinion: Had the rule relating to tardiness been impartially enforced within claimant's department, he would have had no grievance. However, the manner of enforcement of the penalties amounted to discrimination against claimant and created reasonable grounds for dissatisfaction on his part.

Decision: Under these circumstances, claimant voluntarily left his employment with good cause. The initial determination is overruled. The decision of the referee is reversed. (4/6/42)

A-750-324

Index 1735A-1

NEW YORK STATE DEPARTMENT OF LABOR

UNEMPLOYMENT INSURANCE DIVISION

ADJUDICATION SERVICES OFFICE

JUNE 20, 1942

INTERPRETATION SERVICE - BENEFIT CLAIMS

VOLUNTARY LEAVING

Wages, Increase refused

Appeal Board Case Number 6592-41

VOLUNTARY LEAVING- REFUSAL OF WAGE INCREASE COMMENSURATE WITH
ADDITIONAL DUTIES (SECTION 506.2 OF LABOR LAW)

Employer's failure to fulfill repeated promises of salary increase, commensurate with additional duties, constituted good cause for voluntary leaving of employment.

Referee's Decision: Initial determination disqualifying claimant for voluntary leaving of employment without good cause is sustained. (10/8/41)

Appealed By: Claimant.

Findings of Fact: Claimant was employed as a clerical worker for ten years starting at an initial salary of \$14.00 a week which was raised after ten years of service to \$15.00 a week. Prior to June 3, 1941, claimant was requested to take over the duties of another employee who was paid at the rate of \$19.00 per week. On June 3, 1941, claimant requested an increase of \$4.00 to equal the amount paid to the former employee performing the same duties. Claimant was promised a \$4.00 increase for the week ending June 7, 1941. On June 6, 1941, claimant was informed that she would receive her increase on June 14, 1941. Claimant again failed to receive her increase as promised. Then she vigorously protested the repeated broken promises of an increase, claimant was advised that she might leave. Thereupon claimant left and filed an application for benefits on June 17, 1941.

Appeal Board Opinion: Claimant's testimony which was clear and convincing, established that the employer failed to keep repeated promises of the increase, commensurate with her added duties. Under the circumstances of this case, we believe that claimant was justified in leaving her employment.

Decision: Claimant's leaving of her employment was with god cause. The initial determination of the local office is overruled. The decision of the referee is reversed. (2/16/42)

A-750-326

Index No. 750A.2

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICE OFFICE

August 17, 1942

INTERPRETATION SERVICE-BENEFIT CLAIMS
DETERMINATION OF BENEFITS
AVAILABILITY AND CAPABILITY

Evidence of

Appeal Board Case No. 6748-42

CAPABILITY- WORKMEN'S COMPENSATION AWARD FOR TOTAL DISABILITY

Workmen's Compensation award for permanent total disability, while creating a strong presumption of physical inability to work, was not conclusive on question of capability within the meaning of the Unemployment Insurance Law.

Referee's Decision: Initial determination suspending claimant's benefit rights as of the date of her registration for benefits because of unavailability for and incapability of unemployment is sustained. (12/6/41)

Appealed by: Claimant

Findings of Fact: Claimant was employed from November 1933 to September 21, 1940 as a saleslady in a department store. During such employment and in February 1937 claimant suffered a serious eye injury. She filed a claim for Workmen's Compensation in 1937 and on May 24, 1939 the Industrial Board affirmed the award of the referee for 7½ per cent loss of vision of claimant's both eyes. The award amounted to \$12.03 per week plus \$500 for a serious facial disfigurement. A report of the medical examiner of the Workmen's Compensation Bureau dated January 23, 1940 states that by reason of claimant's diminution of vision, claimant is permanently, totally disabled. Claimant, however, was advised that she may continue to work. Claimant left her employment prior to September 23, 1940, and on that date another hearing was held before the Workmen's Compensation Board, pursuant to claimant's request for a rehearing of her claim. An award was thereafter rendered canceling all previous awards and adjudging claimant to be permanently and totally disabled and awarding her benefits at the rate of \$15 per week. Claimant filed an application for unemployment insurance benefits on September 30, 1940. She reported regularly thereafter and certified weekly to her total unemployment until she exhausted her benefit rights on January 23, 1941. Claimant received thirteen benefit checks in the amount of \$169 during the benefit year. On April 1, 1941 claimant filed an application for benefit for the new benefit year. Her former employer reported that claimant had been adjudged totally disabled by the Workmen's Compensation Bureau. On the basis of the information received from the Bureau of Workmen's Compensation, the local office issued an initial determination to the effect that claimant was unavailable for an incapable of employment from the date of her original filing on September 30, 1940, demanded repayment of the \$169 in benefits previously collected by claimant and suspended payment of her benefits on the April 1, 1941 filing. Claimant is a widow, sixty-two years of age and has had four years of high school and some schooling in stenography at business college. For a number of years her work has been as a saleslady. Claimant contends that she was at all time ready, willing and able to work. She admits that she could no longer work full time at her former job because it became too strenuous and caused dizziness and headaches. She stated that she could work as a saleslady for only several hours a day. Her physician testified that claimant was capable of performing light work, provided the work did not entail the use of her eyes to any great extent. He stated that she could work only brief periods of time at position which required continuous use of normal vision for detail work.

Appeal Board Opinion: The basis of the initial determination of incapability in this case was the Workmen's Compensation Bureau award to claimant for permanent total disability. We cannot accept the contention that such an award for permanent total disability operates to automatically bar a claimant from benefits. While we agree that an award of that nature raises a strong presumption of physical inability to work, we do not believe, that it can be considered conclusive on the question of capability for work within the meaning of the Unemployment Insurance Law. The determination of capability is a question to be decided on the evidence and the fact as present in each particular case. We take notice of the fact that in workmen's compensation cases any permanent disability in excess of 80 per cent is adjudged to be a permanent total disability for the purposes of a compensation award. It cannot be denied that in many such cases there may remain to the workman powers of labor which are of some value in the labor market. It is significant to note that with respect to the instant claimant she continued to work at her usual occupation for more than six months after the medical examiner had reported to the Workmen's Compensation Bureau that, in his opinion, claimant was permanently totally disabled. Whether the claimant possessed powers of labor to such a degree as to constitute capability for work within the meaning of the Unemployment Insurance Law must be measured in the light of the tests previously laid down by us. With respect to the period for which claimant has collected benefits, there is sufficient testimony in the record to resolve the doubts in the claimant's favor. Although the evidence tends to show that claimant loss of

vision was a progressive condition, it does not appear that her physical condition had changed appreciably during the period from September 30, 1940 to January 23, 1941. The credible evidence establishes that during that period she continued to have powers of labor which were of some value in the labor market. We believe that she was still capable of performing some light work during that period and that there was a reasonable possibility that such work was obtainable. We accordingly hold that during the period for which claimant has collected benefits, she was capable of work and she is entitled to the benefits she received. However, with respect to the period following claimant's filing of April 1, 1941, we hold that claimant was not available for or capable of work. After a consideration of all the evidence we are of the opinion that claimant failed to establish that she was capable of work at that time. Taking into consideration the progressive nature of her eye condition, the passage of time and all the attendant circumstances, we reach the conclusion that claimant's physical condition at that time was such that she was not available for and capable of work within the meaning of the Unemployment Insurance Law.

Decision: Claimant was available for and capable of work during the period September 21, 1940 to January 23, 1941. Claimant was unavailable for and incapable of employment during the period commencing April 1, 1941 and her benefit rights were, properly suspended for that period. The initial determination of the local office is modified. The decision of the referee is modified accordingly. (5/11/42)

A-750-329

Index No. 775.3

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICE OFFICE

August 17, 1942

INTERPRETATION SERVICE – BENEFIT CLAIMS
DETERMINATION OF BENEFITS
AVAILABILITY AND CAPABILITY
Total of partial Unemployment
Self Employment

Appeal Board Case No. 6855-42

TOTAL OF PARTIAL UNEMPLOYMENT – SELF EMPLOYMENT DURING SLACK SEASON
(SECTION 522 OF LABOR LAW)

Claimant was not regarded as totally unemployed during slack season where his past employment history indicated that during such slack season he devoted substantially all of his time to the conduct of an enterprise in which he had a large investment.

Referee's Decision: Initial determination holding that claimant was not totally unemployed during his reporting period at the local office is sustained. (12/30/41)

Appeal By: Claimant

Findings of Fact: Claimant, a presser in the garment industry, filed an application for benefits on April 30, 1940. He certified intermittently to weeks of total unemployment up to and including the week of December 16, 1940. He accumulated three weeks of waiting period and five

compensable weeks. Claimant collected \$75 in benefit checks during his reporting period. On November 24, 1941 the local office learned that claimant in the past fourteen years had a half interest in a grocery store which was operated by a partnership consisting of claimant and his brother. Thereupon and on said date the local office issued an initial determination suspending claimant's benefit rights on the grounds that claimant was not totally unemployed during his reporting periods at the local office and made demand for repayment of \$75 in benefit checks. Claimant requested a hearing on this issue. It appeared that claimant is employed as a presser in the garment industry during approximately eight months of the year. His hours of work in this employment average forty-two hours a week. He does not work on Saturday. The slack season in this industry extends over a period of four months in the year. While employed at his regular occupation, claimant works in the grocery store an hour or two every day and all day on Saturday. During slack seasons in the garment industry, claimant customarily worked about six and a half-hours per day in the grocery store. Claimant's earnings as a presser were deposited to the account of the grocery business. Each partner drew a certain salary a week and divided the profits equally at the end of the fiscal year. Claimant's share of the profits in the grocery store for 1940 amounted to \$1,789.87. Claimant invested about \$4,000 in this enterprise. His brother devoted all of his time to the grocery store and claimant's wife also works in the store but during the period that claimant collected benefits she did not work there.

Appeal Board Opinion: The evidence establishes that during slack seasons in the garment industry, claimant customarily devoted substantially all of his time to the conduct of an enterprise in which he had a large investment. It appears that during the period for which he collected benefits, claimant had relieved his wife of the duties in the store, which she had performed on his behalf. He thereby rendered himself unavailable for other employment at least until such time as he was to resume his employment in the garment industry. Claimant states that he was willing to accept an offer of employment during the slack seasons in the garment industry. This contention must be viewed in the light of the evidence. For the past fourteen years, claimant, during the slack seasons, has devoted substantially all of his time to the grocery store. The presence of either the claimant or his wife was necessary to the conduct of the enterprise. Since claimant chose to take the place of his wife during the slack seasons in his trade, he cannot be considered as available for employment during such periods within the meaning of the Unemployment Insurance Law. We hold, therefore, that claimant was not available for employment or totally unemployed during his reporting period at the local office.

Decision: The initial determination of the local office, charging claimant with an overpayment of benefit checks is sustained, on the ground that claimant was not available for employment or totally unemployed during his reporting period at the local office. The decision of the referee is affirmed. (5/11/42)

A-750-334

Index 1650B-5

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

August 17, 1942

INTERPRETATION SERVICE – BENEFIT CLAIMS
VOLUNTARY LEAVING OF EMPLOYMENT

Wage increase refused

Appeal Board Case No. 6442-41

VOLUNTARY LEAVING – REFUSAL OF PROMISED WAGE INCREASE (SECTION 506.2 OF LABOR LAW)

Employer's failure to fulfill promise to increase salary constituted good cause for voluntary leaving of employment where co-workers in the same establishment received considerable more for the same work.

Referee's Decision: Initial determination disqualifying claimant for voluntary leaving of employment without good cause was sustained. (10/9/41)

Appeal By: Claimant

Findings of Fact: Claimant, an experienced Marrow machine operator, was employed by the employer from April 1, 1940 to June 3, 1941. When claimant commenced working for this employer, she received \$14.00 a week. Prior thereto her earnings had been \$18 to \$20 per week with other concerns. Claimant asked for an increase of \$2.00 per week, after a period of fourteen months. The employer promised her an increase of \$1.00 but failed to do so, whereupon claimant left her employment. Other Marrow machine operators in employer's establishment earned as high as \$40 per week.

Appeal Board Opinion: Claimant was an experienced Marrow machine operator. Prior to her employment with this employer she had received at least \$18 per week with other concerns. Claimant worked continuously with the employer for fourteen months without receiving an increase despite the fact that other operators in the establishment received considerably more. The employer failed to keep his promise of an increase for claimant. Under all the circumstances, claimant had good cause to voluntarily leave her employment.

Decision: Claimant voluntarily left her employment with good cause. The decision of the referee is reversed. (2/11/42)

A-750-336

Index No. 1040-2

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

August 25, 1942

INTERPRETATION SERVICE – BENEFIT CLAIMS
HEARINGS AND APPEALS Rules for appeal

Appeal Board Case No. 6868-42

HEARINGS AND APPEALS – JURISDICTION OF REFEREE TO MODIFY INITIAL DETERMINATION (SECTION 530 OF LABOR LAW)

Referee had jurisdiction to change the reason for withholding benefits stated in the initial determination where the issues were related and when the same state of facts could lead to more than one reason for denying benefits.

Referee's Decision: Claimant temporarily removed herself from the labor market and was unavailable for employment as of the date of the filing of her application. (12/19/41)

Appeal By: Claimant

Findings of Fact: Claimant in contemplation of marriage, requested and received a two months' leave of absence from her employer commencing June 15, 1941. Claimant filed an application for benefits on July 16, 1941 and reported intermittently thereafter. She was married on June 24, 1941. During September 1941, claimant visited her employer and although her fellow employees were working at the time, she did not ask for employment. No offer of employment was made to her by the employer. On these facts, the local office issued an initial determination disqualifying claimant for refusal of employment, effective September 9, 1941, the approximate date of claimant's visit to her employer. The referee modified this initial determination and held that claimant temporarily removed herself from the labor market as of June 15, 1941, and that claimant returned to the labor market on September 5, 1941.

Appeal Board Opinion: It is the contention of the claimant that the referee had no jurisdiction to determine that she was unavailable for employment as of the date of the filing of her application. Claimant argues that since the local office made no initial determination as to her availability at the time of the filing of her application, the referee was without power to act. We do not agree with the contentions of the claimant. Undoubtedly, the local office has sole jurisdiction to make an initial determination on any issue arising between it and the claimant. However, where the issues are related and when the same state of facts may lead to one conclusion or another and the local office reaches an erroneous conclusion, the referee has jurisdiction to modify the determination of the local office. Obviously, the state of facts giving rise to the initial determination of the local office as the claimant's refusal of an alleged offer of employment involved claimant's availability. The record clearly discloses that claimant received no offer of employment on September 9, 1941 and the referee correctly so found. Claimant admits that at the time she filed the application she had taken a leave of absence for two months and that she had no intention of working. Although the two months had expired, claimant made no effort to return to employment. Employment was available to the claimant with her former employer during the period of claimant's registration. Under the circumstances, the conclusion is inescapable that claimant voluntarily removed herself from the labor market at the time of her separation from employment. However, the evidence is insufficient to sustain the finding that claimant returned to the labor market on September 5, 1941. We believe that on that issue the local office should have the opportunity of making an initial determination.

Decision: Claimant temporarily removed herself from the labor market as of June 15, 1941 and was unavailable for employment from that date. The matter is referred to the local office for an initial determination as to the time of claimant's return to the labor market. The initial determination of the local office is modified accordingly. The decision of the referee is modified accordingly. (4/24/42)

A-750-337

Index No. 1280-8

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

August 25, 1942

INTERPRETATION SERVICE – BENEFIT CLAIMS
REFUSAL OF SUITABLE EMPLOYMENT

Distance

Appeal Board Case No. 6530-41

REFUSAL TO ACCEPT OFFER OF EMPLOYMENT – REASONABLE DISTANCE
(SECTION 506.1 OF LABOR LAW)

Necessity of walking eight blocks to an from work was not good cause for refusing to accept employment for which claimant was fitted by training and experience.

Referee's Decision: Initial determination disqualifying claimant for refusal to accept suitable employment was sustained. (10/20/41)

Appeal By: Claimant

Findings of Fact: On April 10, 1941, the date that claimant filed an application for benefits, the local office offered her a job as a statistical clerk with an employer located in Yonkers, New York. The wages offered were \$80.00 a month. Claimant contacted the prospective employer but refused to accept the job, advancing as her reason that it was a hardship for her to travel from her residence to the employer's establishment. Claimant, who is twenty-seven years of age, resides in Yonkers about a mile from the prospective employer's establishment. The nearest bus station from which she could be transported to the employer's place of business is about six blocks from her home. She was required to walk this distance to reach the bus station. The bus traveled a distance of about eight blocks and stopped at a station located about two blocks from the employer's establishment. Claimant was required to walk these additional blocks to reach the employer's establishment. The bus fare from claimant's residence to the employer's place of business is five cents each way. Claimant was required to walk the same number of blocks returning to her residence.

Appeal Board Opinion: The evidence discloses that claimant would be required to walk a distance of eight blocks each way, going to an returning from the employer's establishment. We do not believe that walking this distance each day is a hardship that would justify claimant in refusing to accept the offer of employment. We hold, therefore, that the local office properly disqualified claimant for refusing to accept an offer of employment.

Decision: The initial determination disqualifying claimant for refusing to accept an offer of employment is sustained. Decision of the referee is reversed. (4/24/42)

A-750-339

Index No. 1245-2

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

August 25, 1942

INTERPRETATION SERVICE – BENEFIT CLAIMS
REFUSAL OF SUITABLE EMPLOYMENT
Working conditions

Appeal Board Case No. 6976-42

REFUSAL TO ACCEPT OFFER OF EMPLOYMENT – WORKING CONDITIONS –
ADVERSELY AFFECTING HEALTH NOT ESTABLISHED (SECTION 506.1 OF LABOR LAW)

Belief based upon conjecture and not fact that work would adversely affect health was not good cause for refusing to accept employment for which claimant was reasonably fitted by training and experience.

Referee's Decision: Initial determination disqualifying claimant for refusing to accept suitable employment is overruled. (2/10/42)

Appeal By: Industrial Commissioner

Findings of Fact: Claimant, twenty year of age and a high school graduate, worked for seven months assembling and cleaning switches and carburetor parts for an automobile company, at which she earned thirteen dollars a week. She also worked a few weeks as a substitute cashier during the summer vacation. She did not have any other employment experience. In May 1941 claimant left her employment as an assembler allegedly because the odor of the lacquer and tar used in connection with her work made her sick. She filed an application for benefits on September 17, 1941. On November 17, 1941 the local office referred claimant to a job as a packer in an establishment which assembled cardboard window advertising material. Claimant, without contacting the prospective employer, refused this referral because of her belief that the odor of the printer's ink might adversely affect her health. She did not object to the wages offered by the prospective employer. No printing work was done in the establishment of the proffered employment. The printing work was done elsewhere. The job did not require any experience and the employer was willing to hire a beginner.

Appeal Board Opinion: Claimant was not justified in refusing to accept the referral in question. Her belief that the odor of printer's ink would be present in the establishment of the employer and that it might adversely affect her health was purely conjectural and not based on fact. We believe claimant had a duty to contact the prospective employer and to test the conditions of employment in order to ascertain whether the type of materials used in the establishment was such as would cause her discomfort. Her summary refusal of the job offer leaves us no alternative but to sustain the local office determination.

Decision: The local office determination disqualifying claimant on the ground that she refused to accept a referral to employment is sustained. The decision of the referee is reversed. (5/18/42)

A-750-342

Index No 710.1

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE
September 28, 1942

INTERPRETATION SERVICE-BENEFIT
CLAIMS
AVAILABILITY AND CAPABILITY
Evidence of

Appeal Board Case No. 7074-42

AVAILABILITY - CORPORATE OFFICER

Claimant's duties as president of and financial interest in a new corporation prevented him from accepting other work and thus rendered him unavailable Employment.

Referee's Decision: Initial determination suspending claimant's benefit rights for unavailability is overruled. (3/10/42)

Appeal by: Industrial Commissioner.

Findings of Fact: Claimant filed application for benefits on September 5, 1941. For three years preceding this application claimant worked as a construction foreman for his brother-in-law. Claimant's regular occupation was that of ornamental plasterer. Subsequent to the aforesaid application and on November 6, 1941, claimant and another plasterer by trade organized a corporation for the purpose of engaging in business as plasterer contractors. Claimant was the president and the other party secretary of the corporation. Four shares of stock were issued by the corporation, of which claimant's wife held two and the other party's wife the remaining two shares. The husbands and wives were also the directors of the corporation. There were no other stockholders in the corporation. The claimant and the other party borrowed \$600 from a bank, which was used as the initial capital of the corporation. Claimant signed corporate checks. Both the claimant and the other plasterer were active in the affairs of the corporation. Claimant solicited construction jobs and estimated the contract price for the work. The other party performed services in connection with the construction work and took charge of the office. At the date of the hearing before the referee on January 30, 1942, the corporation had completed four construction jobs. Neither officer received any salary from the corporation. It was agreed that the profits of the corporation were to be divided between them. The corporation did not show any profits. Claimant submitted his resignation to the corporation, which he later retracted advancing as a reason for the retraction the fact that he did not want to relinquish his right to sign corporate checks because of his personal liability to the bank. Claimant contended that, despite his interest in the corporation, he was ready and willing to accept an offer of employment during his reporting period.

Opinion: In overruling the local office determination, the referee held that claimant's duties as president of the new corporation did not prevent him from accepting work in his regular line. This decision is contrary to the facts in the case and at variance with the established principles enunciated by this Board on this subject. The record shows that claimant entered into a new enterprise in which he had a substantial interest. The corporation immediately began to do business and claimant admitted that he devoted his time and effort to its affairs. It was necessary that he do so in order to protect his investment. In Appeal Board Case No. 5768-41 we stated that the test of availability for employment in these situations is "Whether the enterprise is of such a nature that it requires the continuous attention of the claimant and thus removes him from the labor market."

Applying this test to the circumstances in this case, we hold that claimant was unavailable for employment during the period in question. It is immaterial that the claimant drew no compensation from the corporation for his services. (See Appeal Board Case No. 1372-39)

Decision: The initial determination of the local office suspending claimant's benefit rights on the ground that as an officer of a corporation he was not available for employment is sustained. The decision of the referee is reversed. {6/30/42}

A-750-347

Index No. 1660B-3

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

September 28, 1942

INTERPRETATION SERVICE – BENEFIT CLAIMS
VOLUNTARY LEAVING

Appeal Board Case No. 7302-42VOLUNTARY LEAVING – COMPENSATED OVERTIME (SECTION 506.2 OF LABOR LAW)

Resigning rather than comply with employer's request to work overtime which was usual and reasonable and for which claimant was compensated did not constitute good cause for voluntary leaving of employment.

Referee's Decision: Initial determination disqualifying claimant for voluntary leaving of employment without good cause under circumstances showing a withdrawal from the labor market is modified to the extent that claimant voluntarily left her employment with good cause but under circumstances showing a withdrawal from the labor market. (5/1/42)

Appeal By: Claimant

Findings of Fact: Claimant was employed as a bookkeeper for about ten years by a bank, her regular hours of employment being between 8:45 a.m. and 4:45 p.m. Because of the pressure of business during the middle of the month, claimant was required to work overtime, for which she was paid time and a half. On August 19, 1941, claimant resigned for the reason that she did not desire to work overtime. Upon receiving assurance that in the future she would be permitted to perform her duties within the regular hours, she was persuaded by her superior to withdraw this resignation. On December 15, 1941, due to a continuation of the condition regarding the overtime, claimant again tendered her resignation, giving as a reason for leaving on this occasion that she contemplated marriage. Claimant did in fact marry on December 27, 1941, but actively sought employment with other banks and commercial firms.

Appeal Board Opinion: Claimant has advanced no satisfactory reason for voluntarily leaving her employment. There is no evidence that the overtime requested by claimant's employer was unusual or unreasonable. The record, however, is barren of any proof which would indicate that claimant contemplated withdrawing from the labor market. On the contrary, the record reveals that claimant applied for a position with other banks as well as with commercial firms. Under these circumstances, there was no withdrawal from the labor market.

Decision: Claimant voluntarily left her employment without good cause, but did not withdraw from the labor market. The initial determination of the local office and the decision of the referee was modified. (7/6/42)

A-750-350

Index No. 1535-1

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

November 1, 1942

INTERPRETATION SERVICE – BENEFIT CLAIMS
CLAIMS, REGISTRATION, REPORTING AND
CERTIFICATION
Misrepresentation

Appeal Board Case No. 7306-42

MISREPRESENTATION – CONCEALMENT OF TRUE REASON FOR TERMINATION OF
EMPLOYMENT (SECTION 507 OF THE LABOR LAW)

Deliberately misrepresenting the reason for separation from employment in order to obtain benefits constituted wilful misrepresentation.

Referee's Decision: Initial determinations disqualifying claimant for voluntarily leaving employment with good cause but under circumstances indicating a withdrawal from the labor market and finding that claimant wilfully made a false statement in order to obtain benefits were overruled. (5/5/42)

Findings of Fact: On January 30, 1942 claimant filed an application for unemployment insurance benefits. On February 27, 1942 the employer advised the local office that claimant voluntarily left her employment due to pregnancy. On March 6, 1942 claimant was called in for an interview at the local office relative to this information. At that time she signed a statement which in part read as follows;

"I did not leave the job voluntarily but was laid off January 30, 1942. I make this statement deliberately with the foreknowledge that a misstatement to collect benefits constitutes a misdemeanor. I am now in the seventh month of pregnancy."

On the same day the local office again communicated with the claimant's employer to make further inquiry with respect to the circumstances of claimant's leaving and on March 9, 1942 the employer reiterated his previous information to the local office that claimant voluntarily left her employment due to pregnancy. Before leaving her job claimant requested her employer that he consider her laid off. It appears that the employer consented to do so. Claimant did not dispute that she left her employment voluntarily. She contended that had the employer refused to report her as being laid off, she would have continued working in the establishment. Her work was of a sedentary nature at which she could remain seated. Claimant left her employment in reliance on the employer's alleged promise that he would report her as being laid off. Claimant was in her sixth month of pregnancy when she terminated her employment on January 30, 1942. She was familiar with the law and knew that she would be disqualified in the event that she voluntarily left her employment without good cause. Claimant denied that she withdrew from the labor market. She testified that it was embarrassing to work with her co-employees in the establishment due to her pregnant condition and that she preferred working elsewhere.

Appeal Board Opinion: The referee overruled the initial determination made by the local office. His decision is not warranted on the record. Claimant left her job because of the advanced stage of her pregnancy. Her duties were of a sedentary nature and she could have continued working for some time after her separation. The determination that claimant voluntarily left her employment with good cause but under circumstances indicating a withdrawal from the labor market was amply sustained. With respect to the initial determination that claimant made a wilful misrepresentation to obtain benefits, we hold that the action of the local office must be sustained. The basis of the charge is that claimant, by misrepresenting the reason for her separation from her last employment, sought to obtain benefits to which she was not entitled. It is clear in this case that claimant deliberately falsified with a desire to draw benefits in violation of the statute and with full knowledge of the consequences of her act. Her purpose was frustrated by her unsuccessful attempt to prevail upon her employer to report her as laid off. We find no mitigating circumstances in favor of the claimant. The penalty must therefore be upheld.

Decision: The initial determinations of the local office that claimant voluntarily left her employment with good cause but under circumstances showing a withdrawal from the labor

market and that she made a wilful false statement to obtain benefits are sustained. The decision of the referee is reversed. (7/24/42)

A-750-352

Index No. 1650C-2

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

November 18, 1942

INTERPRETATION SERVICE – BENEFIT CLAIMS
VOLUNTARY LEAVING OF EMPLOYMENT

Disciplinary action – Reprimand

Appeal Board Case No. 7464-42

VOLUNTARY LEAVING – JUSTIFIABLE REPRIMAND (SECTION 506.2 OF LABOR LAW)

Justifiable criticism of work was not good cause for voluntary leaving of employment.

Referee's Decision: Initial determination disqualifying claimant for voluntary leaving of employment without good cause is sustained. (6/22/42)

Appeal By: Claimant

Findings of Fact: On March 17, 1942 claimant, an experienced packer of china and glassware, was employed by a corporation doing business as a wholesale jobber of china and glassware. On the day that claimant was employed the employer showed the claimant just how he wanted his articles packed. After about three weeks of claimant's employment and after the employer's customers received various cartons of merchandise previously packed by the claimant, the employer began to receive complaints from customers with respect to breakage of merchandise. Several times after receiving said complaints, the employer requested claimant to pack the cartons tight. On April 24, 1942, after the claimant had been employed for about five weeks, the employer noticed that several cartons which claimant had packed were not filled tightly with excelsior but that discarded carton paper ordinarily used for partitions had been used by the claimant. The employer asked claimant why he did not put in more excelsior, to which claimant responded that he was quitting the job. Two days later, to wit, on April 26, 1942, claimant left this employment. Claimant contended that the employer continually found fault with his work and was constantly picking on him, that he could not take it any longer and that he told his employer he was leaving.

Appeal Board Opinion: In the instant case we cannot say that the employer's several admonitions to the claimant to "pack the carton tight" and to use more excelsior constituted extreme or unwarranted reprimands. We believe that the employer was justified in his criticism of claimant's work and had a right to instruct and direct him to pack in a manner best suited for out-of-town shipping purposes. We concur with the referee and hold that claimant voluntarily left his employment without good cause.

Decision: The initial determination made by the local office disqualifying the claimant from receiving any benefits until six weeks have elapsed after his refiling for benefits on the ground that he voluntarily left his employment without good cause is hereby sustained. The decision of the referee is affirmed. (8/24/42)

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

December 2, 1942

INTERPRETATION SERVICE – BENEFIT CLAIMS
VOLUNTARY LEAVING OF EMPLOYMENT
Working Conditions – Risk of Injury

Appeal Board Case No. 7671-42

VOLUNTARY LEAVING – WORKING CONDITIONS – RISK OF INJURY
(SECTION 506.2 OF LABOR LAW)

Voluntary leaving of employment rather than comply with employer's request to perform work which was dangerous and risky was found to be for good cause.

Referee's Decision: Initial determination disqualifying claimant for voluntary leaving of employment without good cause is sustained. (8/4/42)

Appeal By: Claimant

Findings of Fact: Claimant is a carpenter and handyman. For eight months prior to May 22, 1942 he was employed as a handyman in an apartment house. His duties consisted of making minor repairs to plumbing, shelves and closets. Incidental to such minor repairs, he occasionally did minor painting jobs, such as touching up a few spots. During the month of May 1942 claimant was requested to whitewash a penthouse wall, which in part was fifteen feet high. He was supplied with an extension ladder ten feet high on which to do the job. In order to accommodate the superintendent of the building, claimant did the job, although dangerous, to the best of his ability. While whitewashing the penthouse walls, claimant was required to climb on the roof and chimney in order to do the work. After claimant completed the job, the tenant was not satisfied and complained to the superintendent. The superintendent ordered claimant to do the job over again, which claimant refused because the work was not within the scope of his duties and was dangerous. The superintendent then advised claimant that he would have to do the job or he would get another man in his place, whereupon claimant quit the job.

Appeal Board Opinion: Claimant is not a painter and has had no experience in working on an extension ladder. The record abundantly shows that painting a fifteen-foot wall on a ten-foot extension ladder is exceedingly dangerous. Claimant was very fearful and highly nervous in doing the job. It is also questionable as to whether the assignment to whitewash the walls was part of claimant's duties under his contract of hire. At any rate, it is clear that the job was dangerous and risky and that claimant was justified in refusing to do this work.

Decision: Claimant's voluntary leaving of his employment was with good cause. The initial determination is overruled. The decision of the referee is reversed. (9/24/42)

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE
JANUARY 1943

INTERPRETATION SERVICE - BENEFIT CLAIMS
AVAILABILITY AND CAPABILITY
Evidence of

AVAILABILITY-DESIRE TO RETURN TO FORMER EMPLOYER

Unwillingness to accept employment other than with former employer was found to indicate unavailability. Specific referral was unnecessary as a condition for suspending for unavailability.

A.B. 7680-42

Referee's Decision: The initial determination suspending claimant's benefit rights for unavailability and removal from the labor market as of May 12, 1942 is overruled. (7/30/42)

Appealed By: Industrial Commissioner.

Findings of Fact: For about ten years prior to April 3, 1942 claimant was employed with one concern as a hand finisher on ladies' coats. The work was seasonal and during the slack periods claimant remained at home. On April 30, 1942, claimant's employment was terminated for that season by the arrival of the slack period. On May 3, 1942, claimant was advised by the United States Employment Service that there were several referrals available for her. Claimant refused to accept any referral because of her desire to return to her last employer. Upon receiving a report from the United States Employment Service, claimant was called to the local office and was interviewed on May 18, 1942. At that time claimant stated that she would not accept referral to any employer other than her last employer and signed a statement to that effect. Before signing such statement, the contents thereof were explained to claimant through the help of an interpreter. At the hearing before the referee claimant testified that she was ready and willing at all times to accept a temporary job. She further stated that although she actually did not return to her employment until July 21, 1942, at the time of her visit to the local office on May 18, 1942 she expected to return to her former employer within two or three weeks. Claimant's expectation was based upon alleged information received from a co-worker who allegedly spoke to the employer. The representative of the local office and of the United States Employment Service denied that claimant ever expressed a willingness to accept even temporary employment with any new employer.

Appeal Board Opinion: Claimant does not deny her statement to the United States Employment Service and the local office that she would not accept a job with any new employer. Her contention before the referee to the effect that she had advised the local office and the United States Employment Service that she was ready to take a temporary job is not borne out by the evidence. At the time of claimant's interviews, she was undoubtedly aware of the fact that she would not be normally re-employed with her last employer until about July. She was not justified, therefore, in refusing referrals to employment to new employers (A.B. 1425-39). Much stress has been laid by the referee on the fact that no specific referral was given to the claimant. Claimant, however, was not disqualified for refusal of an offer of employment. When claimant advised the United States Employment Service and the local office that she would not accept any referral to any new employer, they were justified in concluding that claimant was unavailable for employment. No specific referral was necessary as a condition for imposing the statutory disqualification for unavailability.

Decision: The initial determination suspending claimant's benefit rights for unavailability from May 12, 1942 to July 20, 1942 is sustained. The decision of the referee is reversed. (10/27/42)

A-750-378

Index No. 1440-5

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

January 2, 1943

INTERPRETATION SERVICE – BENEFIT CLAIMS

TOTAL OR PARTIAL EMPLOYMENT

Compensation without work

Appeal Board Case No. 7658-42

TOTAL OR PARTIAL EMPLOYMENT – COMMISSIONS RECEIVED SUBSEQUENT TO
TERMINATION OF EMPLOYMENT (SECTION 502.10 OF LABOR LAW)

Where claimant performed no services but received commissions on orders obtained prior to termination of employment, he was totally unemployed.

Referee's Decision: Initial determination that claimant was not totally unemployed is sustained. (7/23/42)

Appeal By: Claimant

Findings of Fact: Claimant was an outside woolen goods commission salesman. He ceased his last employment on November 30, 1940 and filed for unemployment insurance benefits on December 3, 1940. Claimant had worked under an agreement which provided as follows:

"As sole compensation for your services we are to pay you 2% of the net amount charged by us on orders solicited by you and accepted by us.

"Settlement shall be made monthly on the 15th of each month and shall be based upon the goods charged during the preceding (sic) month."

Subsequent to November 30, 1940, merchandise was charged and shipped by claimant's former employer pursuant to orders solicited and obtained by claimant prior to November 30, 1940, upon which claimant received commissions in excess of \$3.

Appeal Board Opinion: An analysis of Section 502.10 of the Unemployment Insurance Law discloses that the definition of "total unemployment" is comprised of three elements as follows: first, the total lack of any employment; second, the total lack of all compensation; and third, the capability of an availability for employment on the part of the claimant. It is conceded that the claimant had a total lack of employment and was capable of and available for employment. The basic element of "employment" is a contract of hire, either express or implied, written or oral. It is undisputed that claimant ceased his employment on November 30, 1940 and was not employed during all the time he reported to the local office. The \$3 maximum earnings provided for in Section 502.10 apply only to a claimant's current earnings in employment during the weeks in question. Since the claimant was not employed during such weeks, and performed no services subsequent to November 30, 1940, he was totally unemployed within the meaning of the Law.

Decision: Claimant was totally unemployed from November 30, 1940 up through July 24, 1941. The decision of the referee is reversed. (9/24/42)

A-750-383

Index No 725.8

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

January 16, 1943

INTERPRETATION SERVICE-BENEFIT CLAIMS
AVAILABILITY AND CAPABILITY

Evidence of

Appeal Board Case No.7747-42

CAPABILITY - INCAPABLE OF REGULAR WORK

Physical incapability to perform usual work and preference for a job at a salary which there was no reasonable probability of obtaining constituted unavailability.

Referee's Decision: Initial determination suspending claimant's benefit rights for incapability and unavailability is overruled. {8/12/42}

Appeal by: Industrial Commissioner.

Finding of Fact: Claimant is a building construction laborer and was last employed on May 22, 1942. On May 23, 1942 he was operated on for appendicitis and was confined to the hospital for twelve days. He was advised by his physician not to do heavy lifting. He was capable of and willing to do light work. On June 29, 1942 he was referred to a job as a watchman paying \$18 a week. Claimant refused to consider this referral because the salary was -too low and expressed a preference for a job paying no less than \$30 to \$35 a week. In his last employment claimant earned \$42.50 a week.

Appeal Board Opinion: Claimant was under directions from his physician to refrain from heavy work during the period of recovery from his operation. Such precautions were essential to assure restoration to good health and prevent the opening of the incision. We do not believe that claimant could have disregarded his physician's instructions. Claimant is a building construction laborer and has no other work experience. This is a field of hard labor. There is no such thing as an "easy job" for a building laborer. In order .To secure light work claimant would be required to go into another employment field. We doubt that he could find employment in another field at a rate of pay that would be satisfactory to him. While we have previously held that physical handicaps do not, under all circumstances, render claimant unavailable for employment, in the instant case, however, claimant's unwillingness to consider a job as a watchman at \$18 a week and his statement that he would like a job at \$30 to \$35 a week erected barriers that rendered him unavailable for employment during the period in question. There is no reasonable opportunity of securing employment for him under these circumstances.

Decision: The initial determination is sustained. The decision of the referee is reversed. (11/30/1942)

NEW YORK STATE DEPARTMENT OF LABOR
 UNEMPLOYMENT INSURANCE DIVISION
 ADJUDICATION SERVICES OFFICE

January 23, 1943

INTERPRETATION SERVICE – BENEFIT CLAIMS
 VOLUNTARY LEAVING OF EMPLOYMENT

Grievances – Discrimination

Appeal Board Case No. 7965-42

VOLUNTARY LEAVING OF EMPLOYMENT – DISCRIMINATION – PROMOTIONS
 CONTRARY TO PREVAILING CUSTOM (SECTION 506.2 OF LABOR LAW)

Promotion in disregard of seniority rights established by prevailing custom indicated discrimination and was good cause for voluntary leaving.

Referee's Decision: Initial determination disqualifying claimant for voluntary leaving of employment without good cause is sustained. (10/22/42)

Appeal By: Claimant

Findings of Fact: Claimant, a barber, worked for two years with one employer. Throughout this period of employment he was stationed at the seventh chair in the barber shop. The chairs with the lowest numbers were considered the more lucrative stations. There were eight chairs in the establishment attended to by separate barbers. Whenever a vacancy occurred in the more lucrative stations, it was customary to promote the barber with the longest service to this chair. The fifth chair was left vacant on two occasions during claimant's employment. The employer promoted two other barbers with less seniority rights to this chair. On August 8, 1942 the employer transferred a barber who had been working for him only two months from the eighth chair to the fifth chair. Claimant thereupon voluntarily left this employment because he felt the employer discriminated against him by not promoting him to the more lucrative station. At the date of separation claimant received a basic wage of \$18 a week plus commissions of fifty percent of the gross receipts in excess of \$33.

Appeal Board Opinion: The uncontradicted evidence establishes that claimant left his employment because the employer promoted other barbers to a more lucrative post in disregard of claimant's longer period of service. This, it appears, was contrary to the custom prevailing in the establishment and in the industry generally. The circumstances under which claimant left his employment indicate that he was discriminated against without apparent reason and constitute good cause within the meaning of the Law.

Decision: The local office determination is overruled on the ground that claimant voluntarily left his employment with good cause. The decision of the referee is reversed. (12/21/42)

ADJUDICATION SERVICES OFFICE

January 30, 1943

INTERPRETATION SERVICE – BENEFIT CLAIMS

REFUSAL OF SUITABLE EMPLOYMENT

Evidence of

Appeal Board Case No. 7598-42

REFUSAL TO ACCEPT OFFER OF EMPLOYMENT – REQUEST FOR SHORT
POSTPONEMENT FOR REPORTING TO PROSPECTIVE EMPLOYER (SECTION 506.1 OF
LABOR LAW)

An offer of employment was deemed withdrawn because the referral card was taken back from a claimant who had requested, upon reasonable grounds, to be allowed to report to the prospective employer on the following morning.

Referee's Decision: Initial determination disqualifying claimant for refusal to accept an offer of employment is sustained. (7/22/42)

Appeal By: Claimant

Findings of Fact: On March 18, claimant was offered a job as a sewing machine operator in a factory making defense garments. Claimant stated to the interviewer that she did not have her working glasses with her and requested that she be given the referral card in order that she could call on the employer early the following morning. The interviewer thereupon took back the referral card from claimant and made the following notation upon it: "Refused to take referral – 'too late today' 12:30 p.m." On March 24, 1942 an initial determination was issued disqualifying claimant for refusal to accept employment. On May 12, 1942 claimant returned to employment.

Appeal Board Opinion: Claimant contended that she did not refuse the referral but rather requested that she be permitted to report to the employer on the following morning because she had forgotten her glasses and could not work without them. This does not appear to have been an unreasonable request on her part, nor is there anything in the record to show that the job offer was open for only that day. The circumstances would appear to point to a withdrawal of the job offer by the local office.

Decision: Initial determination disqualifying claimant for refusal to accept an offer of employment is overruled. The decision of the referee is reversed. (9/29/42)

A-750-394

Index No. 735A.1
785.3

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

February 9, 1943

INTERPRETATION SERVICE- BENEFIT CLAIMS

DETERMINATION OF BENEFITS

AVAILABILITY AND CAPABILITY

Evidence of

Appeal Board Case No. 7954-42

AVAILABILITY- NON EXISTENCE OF PLACEMENT OPPORTUNITIES

Removal to community with no placement possibilities and no transportation to communities where employment might be found, resulted in unavailability.

Referee's Decision: Initial determination suspending claimant's benefit rights for unavailability is sustained. (10/21/42)

Appeal By: Claimant.

Findings of Fact: Claimant is married. She worked as a sewing machine operator on ladies' straw hats in New York City during the season, which usually commences about Christmas or New Year's and ends the following April. After the busy season in this industry ended, she resided with her husband at his farm located at Elk Creek, New York, which is in Otsego County. Throughout the year claimant's husband managed the farm, from which he derived his livelihood. This farm is located about nine miles from Worcester. No means of transportation either by bus or train are available from Elk Creek to Worcester. Claimant's husband owns an automobile but because of gas rationing and the poor condition of the tires on his car, he is unable to furnish transportation for claimant. On July 14, 1942 the local office referred claimant to a job as a machine operator in a glove factory located at Worcester, New York. Claimant refused to accept the referral because there were no means of transportation available to her to reach the prospective employer's establishment and, further, she never did that type of work.

Appeal Board Opinion: Since there are no means of transportation available to claimant by which she may reach the prospective employer's establishment in Worcester, it must be held that she had good cause to refuse the offer of employment. The determination of the local office disqualifying claimant for refusing the offer of employment is overruled. However, all the circumstances herein compel the conclusion that claimant was unavailable for employment. There are no placement opportunities in Elk Creek, where she resides. No means of transportation are available from the farm to any place of possible employment. Having removed herself to a community in which there is no likelihood that placement of any sort may be obtained it may be held that claimant has thereby rendered herself unavailable for placement within the meaning of the law.

Decision: Determination suspending claimant's benefit rights for unavailability is sustained. The determination disqualifying claimant for refusing to accept an offer of employment is overruled. The decision of the referee as modified is affirmed. (12/14/42)

A-750-396

Index No. 1235-1

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

February 9, 1943

INTERPRETATION SERVICE – BENEFIT CLAIMS
REFUSAL OF SUITABLE EMPLOYMENT
Permanency

Appeal Board Case No. 7951-42

REFUSAL TO ACCEPT OFFER OF EMPLOYMENT – TEMPORARY POSITION
(SECTION 506.1 OF LABOR LAW)

Refusal of employment because temporary was not justified.

Referee's Decision: Initial determination disqualifying claimant for refusal to accept an offer of employment without good cause is sustained. (10/21/42)

Appeal By: Claimant

Findings of Fact: Claimant was offered a temporary position of two or three months' duration at \$120 per month for a thirty-seven hour work week. By virtue of her previous work history claimant was reasonably fitted for the position offered to her. Claimant refused the referral on the grounds that it was a temporary job and that the salary offered was less than her previous salary. The evidence indicated that \$120 per month was a little better than the prevailing wages for the type of job offered claimant.

Appeal Board Opinion: Both reasons given by claimant for refusing the referral are insufficient to constitute good cause. The fact that the position offered was temporary does not in and of itself constitute sufficient reason for refusing the referral. An offer of employment of temporary or part-time nature does not necessarily render it unsuitable. Claimant's second reason for refusing the referral is that the salary offered was less than her previous salary. This excuse does not aid the claimant. The testimony is not whether the offered position paid less than claimant's last position but is rather whether the offered position meets the prevailing rate of pay for the particular type of work for the locality in question. The facts in this case satisfy the latter test.

Decision: The initial determination is sustained. The decision of the referee is affirmed.
(12/14/42)
