

No. A07-348

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State of Minnesota  
**In Court of Appeals**

WORK CONNECTION INC THE,

*Relator,*

vs.

SON Q BUI,

*Respondent,*

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

*Respondent.*

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**RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## **I. LEGAL ISSUE**

A person is disqualified from receiving unemployment benefits if he refuses or avoids an offer of suitable employment without good cause. Did Son Bui refuse an offer of suitable employment with good cause, where he had been taking the bus to work for the last two years in his previous assignment with The Work Connection, he did not own a vehicle, and the job The Work Connection offered him was not on the bus line?

The Unemployment Law Judge held that Bui refused an offer of suitable employment from The Work Connection on September 18, 2006, but that he had good cause for refusing and so was not denied benefits based upon that refusal.

## **II. STATEMENT OF THE CASE**

This case involves whether Relator Son Bui is ineligible to receive unemployment benefits for an eight week period due to his refusal of a job offer. Bui established a benefit account with the Minnesota Department of Employment and Economic Development (the "Department"). The Department issued a determination of eligibility finding that Bui did not refuse an offer of suitable employment from The Work Connection, Inc. and that he was not ineligible for benefits. (D1)<sup>1</sup> The Work Connection appealed.

After a de novo hearing, the Unemployment Law Judge ("ULJ") affirmed

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<sup>1</sup> Transcript references will be indicated as "T" and Department exhibits will be indicated as "D," Employer exhibit will be indicated as "E" with the number following.

the initial determination and held that Bui refused an offer of suitable employment with good cause on September 18, 2006 and was, therefore, not ineligible based upon his refusal of that offer. The ULJ also held that The Work Connection did not offer Bui any employment on September 20, 2006; October 2, 2006; and October 3, 2006. (Appendix to Department's Brief, A4-A7) The Work Connection filed a request for reconsideration to the ULJ, who affirmed the initial decision. (Appendix to Department's Brief, A1-A4)

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by The Work Connection under Minn. Stat. § 268.105, subd. 7(a) (2006) and Minn. R. Civ. App. P. 115.

### **III. STATEMENT OF FACTS**

Bui worked for The Work Connection, Inc. on an assignment at Technical Resin Packaging from February 2, 2004 until August 29, 2006. (T. 24-25) During that time, he worked as an assembler packager earning \$8.25 per hour. (T. 24-25, 36) At the time, Bui lived in Brooklyn Park, about four miles from Technical Resin Packaging and he either rode his bike to work or took the bus when weather was bad, because he does not own a vehicle. (T. 37)

When Bui's assignment ended at Technical Resin Packaging, he contacted The Work Connection on August 31, 2006 and asked for more work. (T. 26) On September 18, 2006, area manager for The Work Connection, Laura Root telephoned Bui and offered him a full-time, dayshift, entry warehouse position that paid \$10 per hour. (T. 26-27) Root told Bui that the position was located in Coon

Rapids and was not on the bus line. (T. 26-27) Bui told Root he would call her back with an answer. (T. 26-27) He then telephoned his relatives to see if they could give him a ride to Coon Rapids each day, and found out that they could not guarantee him a daily ride to work. (T. 27) Bui called Root back and declined the job, because it was not on the bus line and he had no reliable ride to get there. (T. 28, 38-40)

The Work Connection tried to contact Bui again by telephone on September 20, 2006; October 2, 2006; and October 3, 2006 about additional job offers. (T. 29-32, D3) Each time The Work Connection called, Bui was not home and his sister, who speaks very little English, answered the phone. (T. 29-32, 41-42) Bui's sister did not give him the message that The Work Connection had called about available jobs, so he did not return the calls. (T. 34)

Bui established an unemployment benefit account with the Department effective September 3, 2006. (D1) On September 18, 2006, The Work Connection submitted a Report to Raise an Issue to the Department stating that Bui had refused a job offer. (D7) The Department's customer service center investigated the issue of whether Bui refused an offer of suitable employment without good cause and a Department adjudicator found that Bui did not refuse an offer of suitable employment. (D1)

When The Work Connection appealed that determination, it argued that Bui "was offered and declined work on September 18, 2006." (D2) The Work Connection submitted a memorandum a day prior to the hearing on the matter

arguing that Bui refused an offer of suitable employment without good cause and that he was not “available for suitable employment.” (E1) But The Work Connection did not raise the availability issue in the hearing before the ULJ, and the ULJ did not make a decision on the issue of whether Bui was available for suitable employment. (Appendix A4-A7) The only issue argued to the ULJ and decided in the ULJ’s decision was whether Bui refused an offer of suitable employment without good cause. (Appendix A4-A7)

#### **IV. ARGUMENT**

##### **A. SUMMARY OF ARGUMENT**

The issue on appeal in this matter is whether Bui refused an offer of suitable employment from The Work Connection with good cause on September 18, 2006. Contrary to The Work Connection’s argument, this is the *only* issue on appeal. The Work Connection’s attorney did not directly address the issue of the September 18, 2006 offer in his brief, but conceded that the ULJ correctly held there were no job offers made on September 20, October 2 and October 3, 2006. (Relator’s Brief, p. 2) The Work Connection argued, however, that Bui was not available for suitable employment and should be held ineligible on that basis. (Relator’s Brief, p. 2). The ULJ did not issue a decision about Bui’s availability for work, and though The Work Connection may still raise this issue with the Department, it is not properly before this Court. Therefore, because substantial evidence supports the ULJ’s decision that Bui had good cause for refusing The

Work Connection's September 18, 2006 offer of employment, that decision should not be disturbed.

#### **B. STANDARD OF REVIEW**

The standard of review, under Minn. Stat. § 268.105, subd. 7(d) (2006), is as follows:

(d) The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

#### **C. ARGUMENT FOR NON-DISQUALIFICATION**

An applicant for unemployment benefits is ineligible to receive benefits for a period of eight weeks if he, without good cause, fails to apply for suitable employment of which he has been advised, fails to accept suitable employment that is offered, or avoids an offer of suitable employment. Minn. Stat. §268.085, subd. 13c (2006) "Good cause" is defined statutorily as "a reason that would cause a reasonable individual who wants suitable employment to fail to apply for, accept, or avoid suitable employment." *Id.* "Suitable employment" is defined as "employment in the applicant's labor market area that is reasonably related to the applicant's qualifications." Minn. Stat. § 268.035, subd. 23a (2004).

It is not disputed in the record that The Work Connection made Bui an offer of employment on September 18, 2006. (T. 26-27) It is also undisputed that this employment was suitable for Bui, where it was a higher pay rate, equivalent hours and equivalent duties to his recent work history. (T. 26-27) The issue before this Court, then, is whether Bui had good cause for refusing the September 18, 2006 job offer. Substantial evidence on record shows that Bui had good cause for refusing this offer. (T. 28, 38-40) Bui tried to find a reliable ride to the job in Coon Rapids that was offered September 18, 2006, but he was unable to do so and did not accept the position, because it was not on the bus line and he did not own a vehicle. (T. 38-40) Where Bui lived on the bus line and he had taken the bus to work for the last two years, he certainly had good cause to refuse a job that was not on the bus line.

Entrenched in an argument about a separate issue regarding Bui's availability (discussed *infra*), The Work Connection argues that Bui and not The Work Connection should bear the burden of finding transportation to work. While this argument may hold true in some circumstances, under this particular factual situation it does not. First, unlike the applicant in *Hill v. Contract Beverages*, 240 N.W.2d 314 (Minn. 1976), this was not an issue involving a job that Bui already held. It involved an offer for new employment. And while the terms and conditions of the employment itself were suitable for Bui, the location was not, because it was not located on the bus line. The issue for the Court to decide, then, is whether this is a reason that would cause a reasonable individual who wants

suitable employment to fail to accept the position. Clearly, it is. Why would a reasonable individual, knowing he would be expected to get to work every day, accept a position that he had no way of getting to?

Now, this takes us to the main thrust of The Work Connection's argument, that Bui should be held ineligible for benefits, because he did not have transportation throughout the labor market area and was, therefore, not "available for suitable employment." But The Work Connection misses the point of this matter, which is whether Bui had good cause for refusing the September 18, 2006 offer of employment, not whether he was available for suitable employment. Notably, though mentioned in a written submission faxed to the ULJ just one day before the hearing, The Work Connection did not raise this issue or discuss it at any point during the hearing before the ULJ. Nor was this issue noticed to the parties or decided by the ULJ. The *only* issue that was addressed by the ULJ was whether Bui refused an offer of suitable employment without good cause, and that is the only issue to be decided.

Minnesota Statutes §268.101 describes the process that the Department goes through to identify and adjudicate eligibility issues. Under Subdivision 1 of that section, an employer may raise an issue with the Department so that the Department may gather information and issue a determination under Subdivision 3. If a party then appeals that determination, the Department must send notice to any involved applicant and any involved employer not less than ten days prior to the hearing date of the time of the hearing and the issues to be addressed. *See*

Minn. Stat. §268.105, subd. 1(a). The only issue that was noticed for the hearing in this matter was whether Bui refused an offer of suitable employment without good cause. Yet The Work Connection is now arguing a new, distinct issue of whether Bui was available for suitable employment.

When a ULJ is faced with a new issue before or during a hearing, he may do one of four things:

1. Continue the hearing so he may give the parties proper notice of the issue as required by Minn. Stat. §268.105, subd. 1(a);
2. Ask the parties to waive notice of the issue and address it in the hearing and the decision;
3. Remand the issue to the customer service center for adjudication; or
4. Not hear the issue, because it was not properly noticed.

The ULJ in this matter chose not to hear the availability issue, and so it was not discussed in the hearing or in the decision. The issue of whether Bui was available, therefore, is not properly before this Court.

The Work Connection did argue on Request for Reconsideration that Bui should be ineligible for benefits, because he was not available for suitable employment. (Return-4, Return-5) However, the ULJ explained in his memorandum on the Order affirming the decision that “this matter came up before the above signed judge on the issue as to whether Bui refused an offer of suitable employment without good cause.” (Return-6) Though the ULJ commented in that memorandum on The Work Connection’s availability argument, those comments

were at most dicta and in no way a decision. Again, the availability issue can be raised with the Department, but is not a proper issue before this Court. In fact, this Court should be advised that the undersigned attorney has forwarded the issue of whether Bui was available for suitable employment to the Department's customer service center for adjudication, and the parties may appeal any resulting determination.

As for the argument that Bui did not have good cause for refusing the September 18, 2006 offer because of transportation problems, the cases The Work Connection cites to are distinguishable from the facts of this matter. The main case that The Work Connection cites for this argument, *Hill v. Contract Beverages*, is entirely distinguishable from the matter at hand, because it involved an applicant who quit employment. 240 N.W.2d at 357. In *Hill*, the employee quit his employment, because he did not own a vehicle, he could not get to work by bus, and his regular ride to work was transferred to a different shift. *Id.* The Court then had to analyze whether Hill quit "without good cause *attributable to the employer.*" *Id.* at 358 (emphasis added). And in this context, the Court held that transportation to and from work was not the employer's responsibility and that Hill, therefore, did not quit with good cause attributable to his employer.

In contrast, Bui did not have to refuse the offer of employment for a reason attributable to The Work Connection; he instead had to refuse for "a reason that would cause a reasonable individual who wants suitable employment to fail to apply for, accept, or avoid suitable employment." Minn. Stat. §268.085, subd. 13c.

Substantial evidence supports that Bui did just this; he refused an offer that a reasonable person seeking suitable employment would also have refused under the same circumstances.

The unpublished cases The Work Connection cited to are also distinguishable. Notably, the applicant in *Ess v. Olsten Staffing Services* could have taken the bus to the job that was offered, but decided that the bus fare would be too expensive. (CX-99-939, Minn. App. Dec. 18, 1999) This is entirely different than Bui's circumstances. Bui was willing to take the bus to the job that was offered, but could not do so, because the job was not located on the bus line. Furthermore, Bui had taken the bus to his job with The Work Connection for the last two years. His situation had not changed, unlike that of the applicant in *Johnson v. Allied Interstate*, who could no longer get a ride to work as she had in the past. C4-98-1381 (Minn. App. Dec. 8, 1998)

In sum, while this Court may have held under different fact patterns that an individual did not have good cause to refuse an offer of suitable employment due to transportation concerns, under the distinct facts of this matter, Bui had good cause. Bui did not have a vehicle throughout his two years of employment at The Work Connection in his previous assignment. He had to rely on the bus then, and his situation did not change; he still had to rely on the bus. The Work Connection knew this, yet now argues Bui did not have good cause to refuse the offer, because it should not have to bear the burden of supplying transportation. Again, this is not a situation where Bui quit his employment with The Work Connection due to a

transportation problem and must show that he quit for a good reason attributable to his employer. It is a situation where he must have acted reasonably in refusing the offer despite wanting suitable employment.

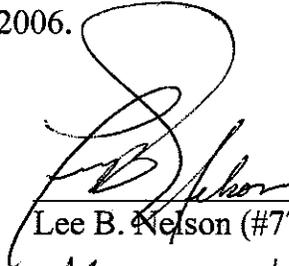
The Work Connection also tries to argue that the availability requirement of Minn. Stat. §268.085, subd. 1(4) required Bui to accept the September 18, 2006 job offer, because he must “have transportation throughout the labor market area to be considered ‘available for suitable employment.’” Minn. Stat. §268.085, subd. 15. Again, this Court is not deciding whether Bui was available for suitable employment, it is deciding whether Bui had good cause for refusing an offer of suitable employment. The Work Connection’s argument, then, is off point in this context, because it cannot be said that a reasonable person who is seeking suitable employment, but who does not own a vehicle, would accept a position that is not reachable by bus. Furthermore, if The Work Connection prevailed in its argument of how the “availability” requirement should be interpreted, then any individual who does not own a vehicle would not be entitled to unemployment benefits. This result is absurd and should not be applied in this context.

Therefore, because substantial evidence shows that Bui had good cause for refusing the September 18, 2006 job offer, the Court should not disturb the ULJ’s holding that he is not denied based upon that refusal. Furthermore, it should again be noted that the availability issue is in the process of adjudication at the lower level and is not properly before this Court.

**V. CONCLUSION**

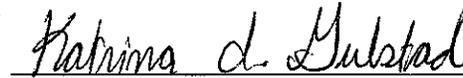
Substantial evidence supports the Unemployment Law Judge's decision that Bui refused an offer of suitable employment with good cause and that he was not denied benefits based upon that refusal. The Department respectfully requests that the Court affirm the decision.

Dated this 6<sup>th</sup> day of June, 2006.



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