



*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

JUNE TERM, 2022

Brian Mace* v. Department of Labor	}	APPEALED FROM:
(Punger Enterprises LLC)	}	
	}	Employment Security Board
	}	CASE NO. 01-21-180-01

In the above-entitled cause, the Clerk will enter:

Claimant appeals an order of the Employment Security Board concluding that claimant was obligated to repay unemployment benefits because he failed, without good cause, to accept an offer of suitable, available work, and misrepresented or failed to disclose a material fact related to his receipt of benefits. We reverse and remand.

The Board's repayment order and claimant's arguments on appeal stem from amendments to the unemployment benefits statute made in response to the COVID-19 pandemic. Under existing statutory provisions, unemployed individuals are eligible for benefits when they do not leave work voluntarily. While receiving benefits, unemployed individuals may be disqualified from benefits if they refuse suitable work without good cause. 21 V.S.A. § 1344(a)(2)(C). In March 2020, the Legislature enacted emergency legislation adding COVID-related provisions to Vermont's unemployment scheme. See 2019, No. 91 (Adj. Sess.), § 31 (eff. Mar. 30, 2020). The revised statute provided, among other things, that individuals were not disqualified from benefits if they left their job to care for a child whose school was closed or whose "child care provider is unavailable due to a public health emergency related to COVID-19." 21 V.S.A. § 1344(a)(2)(A)(vi) (eff. Mar. 30, 2020, to Mar. 31, 2021). Individuals who fail to make efforts to secure suitable work without good cause or who misrepresent a material fact related to receipt of benefits must repay amounts that were received while ineligible. *Id.* § 1347(a), (c). Similarly, the Federal Pandemic Unemployment Compensation (FPUC) statute requires individuals to repay amounts where the individual makes a false statement or misrepresentation or was not entitled to benefits. 15 U.S.C. § 9023(f)(1), (2). The question in this appeal is whether claimant was obligated to repay benefits because he received an offer of suitable work and lacked good cause for refusing it or made a material misrepresentation related to the receipt of benefits and was ineligible for benefits at the time.

The Board made the following findings. Claimant worked as a laborer for Punger Enterprises, a construction company, until mid-March 2020 when employer laid him off due to the COVID-19 pandemic. On April 15, 2020, employer asked claimant to return to his position on April 20, 2020. Claimant declined, explaining that he wanted to return but lacked childcare for his ten-year-old son, whose school was closed due to the pandemic. Claimant shared custody

with his ex-wife and, prior to the pandemic, claimant's father cared for his son during non-school hours. In April 2020, claimant's father declined to care for claimant's son due to the risk of contracting COVID. In early May 2020, employer again asked claimant to return to work, and claimant agreed to return on May 18. Claimant agreed on the basis that his fiancée could provide childcare for his son after that date. Claimant did not, however, return to work on that date because he and his fiancée broke up on May 17 and he was again left without childcare. In late May 2020, claimant told employer he could return on June 1 because claimant's father felt comfortable caring for claimant's son. Employer told claimant he did not have any work for him.

Claimant filed for unemployment compensation and completed a weekly claim certification online. In his certifications for April, May, and June 2020, claimant did not report refusing an offer of work and stated that he was able to work and available for work. Claimant received \$469 in regular unemployment benefits and \$600 in FPUC for the weeks ending April 25 through June 20, 2020.

A claims adjudicator found that claimant failed without good cause to accept an offer of available, suitable work and was therefore disqualified for benefits from April 25 onward. She found that claimant was overpaid benefits and ordered him to repay \$9621. Claimant appealed and an Administrative Law Judge (ALJ) modified the order, finding that claimant was eligible for benefits under Act 91 in April and early May 2020 because his child's regular childcare provider was unavailable due to COVID. However, the ALJ found that claimant was ineligible for benefits beginning the week of May 17 because his new childcare provider (claimant's fiancée) was unavailable for reasons unrelated to the pandemic. The ALJ ordered claimant to repay \$5345 in state and FPUC benefits for the weeks ending May 23 to June 20, 2020. Claimant appealed to the Board. The Board affirmed. Claimant filed this appeal.

"Our review of decisions by the Employment Security Board is highly deferential." Beasley v. Dep't of Lab., 2018 VT 104, ¶ 9, 208 Vt. 433 (quotation omitted). The Board's findings will be affirmed if supported by the evidence and its conclusions if supported by the findings. Id. This Court "will also generally defer to [the Board's] interpretations of the statutes it is charged with administering, while mindful that they must be construed liberally in favor of claimants to compensate employees laid off involuntarily through no fault of their own." Blue v. Dep't of Lab., 2011 VT 84, ¶ 6, 190 Vt. 228 (quotation omitted).

Claimant advances several bases for reversing the Board's decision. Claimant asserts that the Board improperly shifted the burden to him, that the Board's interpretation of the statute is inconsistent with its remedial purpose, that claimant was not required to return to work because employer was not adhering to COVID-19 protocols, and that claimant was eligible for benefits because his girlfriend was not a "child care provider" as defined in the statute.

We begin with the final argument. As relevant to this case, repayment of benefits is required when (1) an individual refuses suitable work without good cause or makes material misrepresentations or omissions, and (2) the individual was ineligible for benefits at the time. 21 V.S.A. § 1347(a), (c). The question is whether claimant was eligible for benefits after May 18. Under the emergency statutory amendments related to the pandemic, individuals were not eligible for benefits if they left their job to care for a child whose school was closed or whose "child care provider is unavailable due to a public health emergency related to COVID-19." Id. § 1344(a)(2)(A)(vi) (eff. Mar. 30, 2020, to Mar. 31, 2021). The ALJ properly concluded that claimant was eligible for benefits at the end of April and beginning of May under this section because his son's school was closed due to the pandemic and his regular afterschool provider, his

father, was unavailable due to health concerns related to the pandemic. The ALJ found, however, that after May 18, claimant's lack of a childcare provider was a result of claimant's domestic situation and unrelated to the pandemic.

Claimant contends that his fiancée was not a regular childcare provider in that she had not provided care and therefore the ALJ's decision was incorrect as a matter of law. We do not reach the question of whether an individual could ever legally meet the definition of a childcare provider when care was expected but not provided because we conclude that as a factual matter claimant's fiancée did not meet the requirements of § 1344(a)(2)(A)(vi) in late May. The facts simply do not support the ALJ's finding that claimant's fiancée became his son's childcare provider as of May 18. It is undisputed that throughout May claimant's regular childcare providers—his son's school and his father—were both unavailable due to the pandemic. Despite the unavailability of his regular childcare providers, claimant arranged for his fiancée to temporarily provide care while the regular providers were unavailable so he could return to work. There is no evidence showing, however, that she actually provided childcare to claimant's son, and claimant remained in the same position he was before May 18: claimant's son's school remained closed, and he continued to lack childcare due to the pandemic. Therefore, he continued to be eligible for benefits after May 18. Given this conclusion, we do not reach claimant's burden-shifting argument.

Because it could arise on remand, we address claimant's argument that he was eligible for benefits because his employer did not comply with health and safety requirements related to the COVID-19 pandemic. He asserts that the Department failed to show that employer had lawfully reopened business in compliance with the Governor's executive orders at the time employer offered claimant work. Claimant has provided no legal authority for the proposition that the Department was required to affirmatively prove that employer was complying with workplace safety protocols. Moreover, the record supports the finding that claimant's decision not to return to work was related to childcare and not to safety concerns.

Finally, claimant argues that because he was not ineligible for benefits during the weeks of May 17-30, he was not automatically disqualified from receiving benefits for the three weeks after that. The Board concedes that if claimant was not disqualified from benefits, then he is eligible for payment. We remand for the Board to reconsider what benefits are due to claimant given our decision that claimant was not disqualified under 21 V.S.A. § 1344(a)(2).

Reversed and remanded.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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William D. Cohen, Associate Justice