

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

TIM B BRESLEY
2806 KINSEY
DES MOINES IA 50317

DES MOINES COLD STORAGE
COMPANY INC
PO BOX 781
DES MOINES IA 50303-0781

Appeal Number: 04A-UI-08852-RT
OC: 07-25-04 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.4-3 – Required Findings (Able and Available for Work)
Section 96.5-3 – Failure to Accept Work
Section 96.7-2-a(2) – Employer Contributions and Reimbursements (Same Employment –
Benefits Not Charged
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Des Moines Cold Storage Company, Inc., filed a timely appeal from an unemployment insurance decision dated August 16, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Tim B. Bresley. After due notice was issued, a telephone hearing was held on September 7, 2004, with the claimant participating. Sandy Trimmell, Controller, participated in the hearing for the employer. The administrative law

judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was and has been employed by the employer for seven and a half years as a day laborer hired daily with varying hours. The claimant has not really been separated from his employment. He has never been permanently discharged nor has he ever permanently quit. The claimant is to show up for work and if work is available, he works and if not, he goes home. The claimant has continued to show up for work faithfully. The claimant has never refused an offer of work and the claimant has never placed any restrictions on his ability or availability for work. The claimant has earned the following amounts from the employer: \$935.00 for the first quarter of 2003; \$1,641.00 for the second quarter of 2003; \$2,200.50 for the third quarter of 2003; \$2,110.50 for the fourth quarter of 2003; \$1,816.50 for the first quarter of 2004; and \$1,295.00 for the second quarter of 2004. However, work has slowed for the employer and since filing for unemployment insurance benefits effective July 25, 2004, the claimant has reported earnings from the employer as follows: \$28.00 for benefit week ending July 31, 2004; \$56.00 for benefit week ending August 7, 2004; \$63.00 for benefit week ending August 14, 2004; \$39.00 for benefit week ending August 21, 2004; and \$49.00 for benefit week ending August 28, 2004. The average for those five weeks is \$47.00 per week. Assuming a 12-week quarter, at \$47.00 per week, the total amount earned would be \$564.00, significantly less than any of the other quarters noted above. Pursuant to his claim for unemployment insurance benefits filed effective July 25, 2004, the claimant has received unemployment insurance benefits in the amount of \$355.00 for six weeks from benefit week ending July 31, 2004 to benefit week ending September 11, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is disqualified to receive unemployment insurance benefits because he refused to accept suitable work. He is not.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because he is and was at all material times not able, available, and earnestly and actively seeking work. He is not.
3. Whether the claimant was not receiving the same employment that he received during his base period and, therefore, the account of the employer should be charged for any benefits to which the claimant is entitled. The employer should be charged for unemployment insurance benefits to which the claimant is entitled.
5. Whether the claimant is overpaid unemployment insurance benefits. He is not.

871 IAC 24.26(19) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(19) The claimant was employed on a temporary basis for assignment to spot jobs or casual labor work and fulfilled the contract of hire when each of the jobs was completed. An election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment. The issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer. The provisions of Iowa Code section 96.5(3) and rule 24.24(96) are controlling in the determination of suitability of work. However, this subrule shall not apply to substitute school employees who are subject to the provisions of Iowa Code section 96.4(5) which denies benefits that are based on service in an educational institution when the individual declines or refuses to accept a new contract or reasonable assurance of continued employment status. Under this circumstance, the substitute school employee shall be considered to have voluntarily quit employment.

Iowa Code Section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge concludes that the claimant has not really separated from his employment. There is no evidence that the claimant has ever been permanently discharged or that he has ever permanently voluntarily quit. Even assuming that the claimant had failed to show up for a new assignment for spot jobs or casual labor work, such failure would not be construed as a voluntary leaving of employment. The administrative law judge notes that there is no evidence that the claimant has ever failed to show up for spot jobs or casual labor work. If he had, the issue of a refusal of an offer of suitable work should be adjudicated. Accordingly, the administrative law judge concludes that the claimant has never really been separated from his employment and, as a consequence, he is not disqualified to receive unemployment insurance benefits.

The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that he is able, available, and earnestly and actively seeking work. The evidence establishes that the claimant has placed no restrictions on his ability or availability for work. Further, the evidence establishes that the claimant is a day laborer hired daily but the evidence establishes that the claimant has never failed to show up for work he has and worked when work was available. Accordingly, the administrative law judge concludes that the claimant is able and available for work. In addition, the claimant is earnestly and actively seeking work by showing up everyday for work. In addition, the administrative law judge would conclude that the claimant is also temporarily and partially unemployed under Iowa Code Section 96.19(38)(b)(c). The claimant is working at his

regular job and working less than he usually works and is earning less than his weekly benefit amount plus \$15.00 and the claimant's temporary unemployment is due to a slow down in the work available. Both witnesses agree that the employer's work has slowed down over the past few weeks and this has caused reduced hours for the claimant. Accordingly, the administrative law judge concludes that the claimant is actually excused from the provisions that he be able, available, and earnestly and actively seeking work and even if not, the administrative law judge concludes that the claimant is able, available, and earnestly and actively seeking work and, as a consequence, he is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code Section 96.5-3 provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The administrative law judge concludes that the employer has the burden to prove that the claimant has refused to accept suitable work. Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 910 (Iowa 1987). The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant has refused to accept suitable work. The employer's witness, Sandy Trimmell, Controller, credibly testified that the claimant has never refused any offer of work by the employer and always works when work is available. Ms. Trimmell testified that there is a slow down in work and so there is sometimes no work for the claimant to do and this is confirmed by the figures set out in the Findings of Fact. Accordingly, the administrative law judge concludes that the claimant has not refused to accept suitable work and, as a consequence, he is not disqualified to receive unemployment insurance benefits.

Iowa Code Section 96.7-2-a(2) provides:

2. Contribution rates based on benefit experience.

a. (2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during

the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge concludes that the claimant is not receiving the same employment from the employer that he received during his base period. This is clearly shown by the records in the Findings of Facts. The claimant's earnings have dropped substantially from what they had been during the claimant's base period. This is confirmed by the testimony of the witnesses. Accordingly, the administrative law judge concludes that the claimant is not receiving the same employment from the employer that he received during his base period and, as a consequence, any unemployment insurance benefits to which the claimant is entitled shall be charged to the account of the employer herein.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$355.00 since filing for such benefits effective July 25, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of August 16, 2004, reference 01, is affirmed. The claimant, Tim B. Bresley, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he is able, available, and earnestly and actively seeking work and even if he was not, he would be excused from such provisions. The claimant is not disqualified to receive unemployment insurance benefits because he has not refused to accept suitable work. Any unemployment insurance benefits to which the claimant is entitled shall be charged to the account of the employer herein. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his cutback in work or hours by the employer herein.

pjs/b