

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

MARTY J GIBBS
Claimant

APPEAL NO. 09A-UI-03236-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AVALON TRANSPORT INC
Employer

OC: 01/04/09
Claimant: Respondent (4)

Iowa Code § 96.4(3) - Able and Available

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 20, 2009, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on March 25, 2009. Claimant did not respond to the hearing notice instructions and did not participate. Employer participated through George Leibfried, owner.

ISSUE:

The issue is whether claimant is able to and available for work effective January 4, 2009.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant is employed as a part-time truck driver two to three days per week as work is available after full-time drivers are assigned. No certain number of hours per week is guaranteed and claimant was able to and did refuse work assignments. In the last month he turned down work three or four times because he had "other commitments," including working at his own business of driving dump trucks. Claimant has other regular employment in the base period.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant's availability for work is moot.

Iowa Code § 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".

871 IAC 24.22(2)i(1) provides:

Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

i. On-call workers.

(1) Substitute workers (i.e., post office clerks, railroad extra board workers), who hold themselves available for one employer and who do not accept other work, are not available for work within the meaning of the law and are not eligible for benefits.

871 IAC 24.22(2)i(3) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market....

i. On-call workers.

(3) An individual whose wage credits earned in the base period of the claim consist exclusively of wage credits by performing on-call work, such as a banquet worker, railway worker, substitute school teacher or any other individual whose work is solely on-call work during the base period, is not considered an unemployed individual within the meaning of Iowa Code § 96.19(9)"a" and "b." An individual who is willing to accept only on-call work is not considered to be available for work.

Because claimant could and did refuse work and was hired to work only on-call or as needed after work was distributed to full-time drivers, the lack of additional work with this employer is moot given the other wages in the base period. Accordingly, benefits are allowed and the account of Avalon Transport (account number 283886) shall not be charged.

DECISION:

The February 20, 2009, reference 01, decision is modified in favor of the appellant. The claimant's seasonal on-call status renders this employment moot as he has other wages in the base period. Benefits are allowed and the account of Avalon Transport Inc. (account number 283886) shall not be charged.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs