

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRADY E GRAHAM**  
Claimant

**APPEAL NO. 11A-UI-16329-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IOWA BRIDGE & CULVERT LC**  
Employer

**OC: 12/26/10**  
**Claimant: Respondent (4)**

Section 96.4(4) – Refusal of Suitable Work  
Section 96.4(3) – Able & Available  
Section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the December 13, 2011, reference 01, decision that allowed benefits based on an Agency conclusion that the claimant had not received an offer to return to work on November 14, 2011. After due notice was issued, a hearing was held on January 24, 2012. Claimant Brady Graham participated. Burge Hammond represented the employer and presented additional testimony through Mary Nebel and Whitney Garman. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant.

**ISSUES:**

Whether Mr. Graham refused recall to employment on or about November 14, 2011.

Whether Mr. Graham has been available for work since he established the additional claim for benefits that was effective November 13, 2011.

Whether Mr. Graham has been overpaid benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Brady Graham was employed by Iowa Bridge and Culvert, L.C., as a full-time laborer from 2006 and last performed work for the employer on Monday, November 7, 2011. Mr. Graham's immediate supervisor was Whitney Garman, superintendent. Mr. Garman and Mr. Graham are cousins. Mr. Graham's usual work hours were Monday through Friday, 7:00 a.m. to 5:30 p.m. or whenever the day's work was done. Mr. Graham worked as part of a crew that erected concrete structures. The work was subject to weather-based interruptions. Mr. Graham worked his whole shift on Monday, November 7, 2011. On that day, Mr. Garman told Jonathan Leucht, a carpenter, to tell the rest of the group that he rode to the jobsite with that they would be on temporary layoff for the rest of that week. Mr. Leucht gave the news to Mr. Graham. Under

such circumstances, it was customary for the crew to apply for unemployment insurance benefits for the period of the short-term layoff.

At the end of such short-term, weather-related layoffs, it was also customary for the employer to provide one member of a group that rode to work together with the details regarding when work would restart and to have that crew member notify the rest of the group that rode together. This was in contrast to the procedure the employer used to recall workers from the winter layoff. At the end of the winter layoff, Mr. Garman or his brother, Bill Garman, would contact each crew member directly to let them know work was restarting.

Mr. Graham had worked for the employer for a number of years and was well aware of how the employer usually communicated layoffs and how the employer usually recalled workers.

On Saturday, November 12, Superintendent Whitney Garman told John Leucht that the crew would be returning to work the next Monday and directed him to notify the rest of the crew members he rode with. Mr. Leucht sent Mr. Graham a text message telling him that the crew *might be* returning to work the next Monday, but that it was not for certain. When Mr. Graham did not show, the employer initially concluded that he must be sick. The employer did not make any further contact with Mr. Graham to figure out why he had not returned. When Mr. Graham did not show by the end of November, the employer concluded Mr. Graham had decided not to return and sent him a letter about how to continue his health benefits under COBRA.

Rather than filing a claim for unemployment insurance benefits for the week that ended November 12, 2011, Mr. Graham filed a claim the next week and the claim was deemed effective November 13, 2011. Mr. Graham received \$2,256.00 benefits for the six-week period of November 13 through December 24, 2011, when his claim year ended. Mr. Graham established a new original claim that was effective December 25, 2011, but so far has not received benefits in connection with that new claim.

Both parties participated in a December 12, 2011, fact-finding interview, but apparently not at the same time, so there was no discussion *between the parties* at that time about a recall to work or refusal of recall. But, Mr. Graham was aware that the employer had challenged his claim for unemployment insurance benefits.

Rather than seeking other work during the winter seasonal layoff, Mr. Graham spends his time volunteering at a high school wrestling program. Since Mr. Graham last performed work for the employer on November 7, 2011, he has not looked for work, even after he got notice from the employer at end of November that the employer considered him to have separated from the employment. Instead, Mr. Graham has done his usual volunteer work. Mr. Graham has not looked for work, in part, because he knew he could go to work for his brother when he decided to.

#### **REASONING AND CONCLUSIONS OF LAW:**

An involuntary separation from employment by means of a layoff would not disqualify a claimant for benefits. See Iowa Code section 96.5(2)(a) and 96.5(1); see also 871 IAC 24.1(113)(a). An worker is deemed *temporarily unemployed* if, for a period not to exceed four consecutive weeks, the worker is unemployed *due to a plant shutdown, vacation, inventory, lack of work or emergency* from the worker's regular job or trade in which he worked full-time and will again work full-time, if the worker's employment, although temporarily suspended, has not been terminated. See Iowa Code Section 96.19(38)(c). Mr. Graham was indeed temporarily laid off

for the week that ended November 12, 2011. This week predated the filing of his additional claim for benefits.

The question is whether the employer recalled Mr. Graham to the employment and, if so, whether Mr. Graham refused recall to suitable work.

A claimant who fails to accept an offer of suitable employment without good cause is disqualified for benefits until the claimant earns ten times his weekly benefit amount from insured work. See Iowa Code section 96.5(3)(a).

Iowa Administrative Code rule 871 IAC 24.24(1)a provides:

Bona fide offer of work.

a. In deciding whether or not a claimant failed to accept suitable work, or failed to apply for suitable work, it must first be established that *a bona fide offer of work was made to the individual by personal contact* or that a referral was offered to the claimant by personal contact to an actual job opening and a definite refusal was made by the individual. *For purposes of a recall to work, a registered letter shall be deemed to be sufficient as a personal contact.*

[Emphasis added.]

When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer asserts that it recalled Mr. Graham to the employment, effective November 14, 2011, by communicating the recall to another crew member, Mr. Leucht, on November 12 and by directing Mr. Leucht to notify Mr. Graham of the recall. The employer had the ability to present testimony through Mr. Leucht regarding what steps he took to notify Mr. Graham of the recall, but the employer did not present such testimony. Mr. Graham was the only witness to provide firsthand testimony regarding the message he received concerning *possible* recall. Mr. Graham's testimony was that he received a text message from Mr. Leucht on Saturday, November 12, advising that work *might* start again the next Monday, but that it was not yet certain. The evidence fails to establish a recall to the employment by *personal contact* from the employer. Because there was no bona fide recall, there could be no refusal of recall. Mr. Graham had a point when he testified that he and Mr. Garman were cousins and that all Mr. Garman had to do was call him. Mr. Garman did not do that. Mr. Graham's failure to return to work in November did not disqualify him for benefits. The employer's account may be charged for benefits.

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".

871 IAC 24.22(2) 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. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

The weight of the evidence indicates that Mr. Graham knew on or about November 30, 2011, by means of the COBRA letter, that the employer deemed him separated from the employment. Despite that, Mr. Graham made no contact with the employer and no effort to look for new employment. Instead, Mr. Graham dedicated his time to a leisure activity, continued to collect unemployment insurance benefits, and deferred starting the work he knew he had available to him through his brother. While Mr. Graham may have reasonably concluded that he was *temporarily* laid off through the end of November 2011, shortly thereafter it would have been apparent to him that he was permanently separated from the employment. Mr. Graham's failure to search for work or otherwise make himself available for work after receipt of the COBRA letter made him ineligible for unemployment insurance benefits effective the week that started December 4, 2011. Mr. Graham was eligible for the benefits he received during the three-week period of November 13 through December 3, 2011, provided he was otherwise eligible. Mr. Graham was not eligible for the benefits he received during the three-week period of December 4 through 24, 2011.

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.

Mr. Graham was overpaid \$1,128.00 for the three-week period of December 4 through 24, 2011.

**DECISION:**

The Agency representative's December 13, 2011, reference 01, is modified as follows. The claimant was laid off effective November 7, 2011. The layoff did not disqualify the claimant for benefits. The employer's account may be charged for benefits. There was no recall to employment on or about November 14, 2011. The claimant was temporarily laid off through the end of November 2011 and then was permanently separated from the employment. The claimant was available for work, and eligible for benefits, for the three-week period of November 13 through December 3, 2011. The claimant was not available for work and, therefore, not eligible for benefits, effective December 4, 2011. The claimant was overpaid \$1,128.00 in benefits for the period of December 4 through December 24, 2011.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw