

**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**

**SHANE W HEITHER
1515 GRAND AVE
MUSCATINE IA 52761-5318**

**LUTHERAN HOMES SOCIETY
2421 LUTHERAN DR
MUSCATINE IA 52761-9392**

**Appeal Number: 06A-UI-05137-JTT
OC: 04/09/06 R: 04
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) – Able & Available for Work

STATEMENT OF THE CASE:

Lutheran Homes Society filed a timely appeal from the May 4, 2006, reference 04, decision that allowed benefits and that concluded the claimant had not refused to accept a suitable offer of employment. After due notice was issued, a hearing was held on May 31, 2006. Claimant Heither did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Administrator Eric Thomas represented the employer and presented additional testimony through Human Resources Representative Kris Wagner. The administrative law judge took official notice of the Agency's administrative file. The hearing in this matter was consolidated with the hearing in Appeal Number 06A-05136-JTT and the administrative law judge hereby takes official notice of the decision entered in that matter.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Shane Heither commenced his full-time employment with Lutheran Homes Society on August 26, 2004. Mr. Heither worked as the van driver until he injured his back at work on January 18, 2006. As the van driver, Mr. Heither had worked 8:00 a.m. to 3:00-5:00 p.m. and earned \$10.00 per hour.

After Mr. Heither was examined by a doctor, he returned to work at the end of January on light-duty status. The employer continued to pay Mr. Heither his previous \$10.00 per hour wage. While on light-duty status, Mr. Heither worked 8:00 a.m. to 4:00 p.m., Monday through Friday. Mr. Heither had injured his back the previous year and had returned to the employment on September 10, 2005 without restrictions. The second injury to his back on January 18, 2006 was of great concern to Mr. Heither and he was hesitant to place himself at further risk of injury by continuing in the van driver position. At the end of January, Administrator Eric Thomas asked Mr. Heither when he intended to return to the van driver position. Mr. Heither told Mr. Thomas that if his health condition stayed the same, he did not see himself returning to the van driver position. Mr. Thomas asked Mr. Heither whether he was open to receiving training for other positions and Mr. Heither indicated he was. Mr. Heither understood that the employer would need to at least get a substitute to drive the van while he continued on light-duty. Soon thereafter, the employer transferred a maintenance employee to the van driver position. The two men did not thereafter further discuss the van driver position.

Mr. Heither continued on light-duty status until he was released to work without restrictions on April 10, 2006. On the same day, Mr. Thomas summoned Mr. Heither to a meeting. Mr. Thomas offered Mr. Heither a "hydration aid" position. The hours would be 6:00 a.m. to 2:00 p.m. and the pay would be \$7.00 per hour. The earlier hours would interfere with Mr. Heither's ability to get his children to daycare. In addition, Mr. Heither was aware that some hydration aids were being paid \$10.00 per hour. Mr. Thomas told Mr. Heither that his choice was to take the position offered or separate from the employment. Mr. Heither declined to accept the hydration position and his employment ended. Mr. Heither had not previously given any indication of a desire to separate from the employment and had, in fact, been hoping the employer would be able to offer a position with hours and pay consistent with his employment up to that point.

Mr. Heither established a claim for benefits that was effective April 9, 2006 and has received benefits. Though the effective date of the claim was April 9, Mr. Heither did not, in fact, establish the claim until after he had declined the hydration aid position on April 10.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes Mr. Heither has been able and available for employment since establishing his claim 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".

The undisputed evidence is that Mr. Heither was released by a doctor to return to full-time employment without restrictions on April 10, 2006. Accordingly, the administrative law judge concludes that Mr. Heither has been able and available for work since establishing his claim for benefits.

DECISION:

The Agency representative's May 4, 2006, reference 04, decision is affirmed. The claimant has been able and available for work since establishing his claim for benefits. The claimant is eligible for benefits, provided he is otherwise eligible.

jtt/kkf