

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

JOHN W BLOOM

Claimant,

and

HAROLD DICKEY TRANSPORT INC

Employer.

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HEARING NUMBER: 08B-UI-08714

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.4-3

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant was off work due to non-work related illness until he was released to work by August 12, 2008. (Tran at p. 2; p. 4; Ex. 1). On the afternoon of August 13, 2008 the Claimant called into work to offer services. (Tran at p. 4; p. 5-6). The Employer offered the Claimant work on August 16-17 but the Claimant turned it down because he did not want to work the weekend. (Tran at p. 5). For the week ending August 16, 2008 the Claimant was not able and available for August 10-13, and August 16.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.4(3) (2003) provides:

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

The individual is able to work, is available for work, and is earnestly and actively seeking work....

871 IAC 24.22 expounds on this:

871-24.22 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.

24.22(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

871 IAC 24.22(2) provides:

871-24.22(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.

...

h. Available for part of week. Each case must be decided on its own merits. Generally, if the individual is available for the major portion of the workweek, the individual is considered to be available for work.

871 IAC 24.22(2)“m”. The burden is on the claimant to establish that he is able and available for work within the meaning of the statute. 871 IAC 24.22; Davoren v. Iowa Employment Sec. Comm'n, 277 N.W.2d 602, 603 (Iowa 1979).

The Claimant was not available for the major portion of the workweek ending August 16, 2008. In fact, the Claimant was unavailable for five of the seven days. For this reason alone we would find the Claimant not able and available for the week ending August 16. In addition, the Claimant delayed in notifying the Employer of his release, and the Claimant did not let the Employer know that he would be returning that week. (Tran at p. 6). Under these circumstances, given the unavailability on the other days, we find that the Claimant has failed to prove that he was in fact "genuinely attached to the labor market" for the week in question. We reverse the decision of the Administrative Law Judge in so much as it modifies the decision of the claims representative. In other words, we affirm the claims representative finding that the Claimant is not able and available.

DECISION:

The administrative law judge's decision dated October 15, 2008 is **AFFIRMED IN PART AND REVERSED IN PART**. The Employment Appeal Board concludes that the claimant was not able and available as of August 10, 2008 including for the week ending August 16, 2008. Accordingly, he is denied benefits until such time as he may become able and available for work, assuming he meets all other eligibility criteria. See, Iowa Code section 96.4.

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

Elizabeth L. Seiser

Monique F. Kuester

RRA/fnv

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

John A. Peno

RRA/fnv