

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GARY L KREMER
Claimant

APPEAL NO: 12A-UI-03865-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BROWNS CREW CAR OF WYOMING
Employer

OC: 02/12/12
Claimant: Appellant (1)

Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Gary L. Kremer (claimant) appealed a representative's March 30, 2012 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits in connection with his employment with Browns Crew Care of Wyoming, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 30, 2012. The claimant participated in the hearing. Kristen Branson appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The claimant started working for the employer on September 3, 2008. He works part-time on an on-call basis as a driver in the employer's railroad crew hauling business. He does not have any present work schedule or guaranteed hours. He holds himself out available for calls to work from 12:01 a.m. Monday through 5:00 p.m. on Wednesday each week. During that period, he could at anytime receive a call to pick up a railroad crew with between a half-hour and an hour and a half notice, which he is free to either accept or decline, although he rarely declines any calls. He is paid only for the amount of time he is actually driving, and is then paid on an hourly basis plus a mileage reimbursement.

The claimant seeks partial unemployment insurance benefits effective February 12, 2012, because work is typically slower in the first quarter of the year and he has not had as many calls as during busier quarters. The claimant's base period is the fourth quarter 2010 through the third quarter 2011. The claimant's only employment during that period has been the employer on the same on-call basis.

REASONING AND CONCLUSIONS OF LAW:

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, be available for work, and be earnestly and actively seeking work. Iowa Code § 96.4-3.

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 section 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.

The claimant's base period wages are exclusively from on-call employment with the employer, and he remains in that relationship with the employer. His not considered partially unemployed within the meaning of the law, and therefore is not able and available for work or eligible to receive unemployment insurance benefits.

DECISION:

The representative's March 30, 2012 decision (reference 01) is affirmed. The claimant is not able to work and available for work effective February 12, 2012. The claimant is not qualified to receive unemployment insurance benefits.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw