

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**JOSH P REILLY**  
Claimant

**C2C INC**  
Employer

**APPEAL 15R-UI-08634-DGT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 01/25/15**  
**Claimant: Respondent (2)**

Iowa Code § 96.4(3) – Ability to and Availability for Work  
Iowa Code Section 96.5(3) – Refusal of Suitable Work  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

Employer filed an appeal from a decision of a representative dated February 18, 2015, (reference 03) that held claimant able to and available for work. After due notice, a hearing was scheduled for and held on August 26, 2015. Claimant participated personally. Employer participated by Callin Cummings, Vice President. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant and of wages reported by or for the claimant (DBRO, WAGE-A and WAGE-B).

**ISSUES:**

The issue in this matter is whether claimant is able and available for work?  
Whether the claimant refused suitable work without good cause?  
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can any charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Brad Cummings and his son, Callin Cummings, conduct business through three different corporate entities: C2C Express, Inc. (employer account number 521172), C3C, Inc. (employer account number 526410) and C2C, Inc. (employer account number 526845). C2C, Inc., the employer account at issue in the present case, is a grain hauling enterprise. The other two corporate entities have contracts with FedEx to haul freight for FedEx. Because Josh Reilly performed commercial truck driving work for all three corporate entities, it is somewhat difficult to ascertain the particulars of the three employments. Because the February 18, 2015, reference 03, decision regarding whether there was a refusal of suitable work on or about February 5, 2015, referenced only C2C, Inc., it is important to focus on that employer entity when addressing the employer's appeal from the reference 03 decision.

The employer has reported quarterly wages for Mr. Reilly under all three entities as follows:

<u>Account Name (Number)</u>	<u>Year/Quarter</u>	<u>Wages Reported by Employer</u>
C2C Express, Inc. (521172)	2013/3	376.90
C3C, Inc. (526410)	2013/3	70.00
<b>C2C, Inc. (526845)</b>	<b>2013/3</b>	<b>1,490.96</b>
C2C Express, Inc. (521172)	2013/4	1,500.00
C3C, Inc. (526410)	2013/4	2,833.00
<b>C2C, Inc. (526845)</b>	<b>2013/4</b>	<b>225.38</b>
C2C Express, Inc. (521172)	2014/1	1,655.00
C3C, Inc. (526410)	2014/1	2,457.40
C3C, Inc. (526410)	2014/2	1,527.40
C3C, Inc. (526410)	2014/3	164.00
<b>C2C, Inc. (526845)</b>	<b>2014/3</b>	<b>536.63</b>
C2C Express, Inc. (521172)	2014/4	1,270.00
C2C Express, Inc. (521172)	2015/1	350.00

Mr. Reilly began his employment relationship with the Cummings during the third quarter of 2013 and started by hauling grain for C2C, Inc. In about September 2013, Mr. Reilly began hauling FedEx freight for the Cummings' two other corporate enterprises. Mr. Reilly performed part-time grain hauling work for C2C, Inc., during the day and performed part-time, on-call overnight work for the other two corporate entities. The daytime grain hauling work for C2C, Inc., paid a flat rate. The night-time FedEx work paid 38 cents per mile. The Cummings try to ensure that their drivers make at least the equivalent of \$20.00 per hour. Mr. Reilly did not care for the overnight FedEx work, but continued to perform both the C2C, Inc., daytime grain hauling work and the overnight FedEx work for an extended period. The employer's quarterly wage reports to Workforce Development indicate that Mr. Reilly last performed the C2C, Inc., grain hauling work during the third quarter of 2014.

Employer tried to contact claimant in January of 2015 and claimant would not accept the offers of work at that time. Continuing work was available to him. His refusal to accept work made him unavailable for work for the entire period of his claim. Employer needed drivers, and would have allowed claimant to return to work up through the date of this hearing.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3562.00, since filing a claim with an effective date of January 25, 2015, for the 23 weeks ending June 27, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal.

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

For the reasons that follow, the administrative law judge concludes that the claimant refused an acceptable offer of work and was not able to work and available for work effective January 25, 2015.

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".

Iowa Admin. Code r. 871-24.22(1)a 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.

(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.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.23(16) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

Iowa Admin. Code r. 871-24.23(35) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

Iowa Admin. Code r. 871-24.24(1)a provides:

(1) 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.

To be able to work, "[a]n 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." *Sierra v. Emp't Appeal Bd.*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723.

Claimant's refusal to accept work when offered made him unavailable for work during the entire period of his claim. Employer had work available to him, but claimant refused their offers and indicated that he was too busy with personal or other matters to attend work. Employer needed drivers and had work available for claimant during the entire period of his claim.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2,

means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will

not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

**DECISION:**

The decision of the representative dated February 18, 2015, (reference 03) is reversed. Claimant is not eligible to receive unemployment insurance benefits, effective January 25, 2015. The claimant has been overpaid unemployment insurance benefits in the amount of \$3562.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Duane L. Golden  
Administrative Law Judge

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Decision Dated and Mailed

dlg/pjs