

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

THOMAS J NETOLICKY
834 AUGUSTA CIR
NORTH LIBERTY IA 52317-9419

HOME REPAIR TEAM INC
2698 RESERVOIR DR NE #3
NORTH LIBERTY IA 52317

Appeal Number: NUNC PRO TUNC
OC: 06/05/05 **R:** 02
Claimant: Appellant (1-R)

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 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Thomas J. Netolicky, filed a timely appeal from an unemployment insurance decision dated February 23, 2006, reference 02, denying unemployment insurance benefits to him because he was not able to perform the work. After due notice was issued, a telephone hearing was held on March 23, 2006, with the claimant participating. Julie Hajek, Co-Owner, participated in the hearing for the employer, Home Repair Team, Inc. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit 1 and 2, the administrative law judge finds: The claimant was employed by the employer from August 1, 2005, until he was separated by a letter dated February 2, 2006. The claimant filed for unemployment insurance benefits effective June 5, 2005 and reopened his claim effective January 22, 2006 and on February 5, 2006. Since being employed by the employer the claimant has received no unemployment insurance benefits. Prior to his employment the claimant did receive unemployment insurance benefits but these are not relevant here.

On or about January 18, 2006, the claimant was hospitalized for two days for a seizure of undetermined origin and released from the hospital on January 20, 2006. Immediately after his release the claimant was restricted from driving for six months. He was also restricted to avoid climbing high places or up on tall ladders. These restrictions are shown at Employer's Exhibit One. On or about March 9, 2006, the claimant's physician removed the restriction concerning climbing high places or high ladders but the restriction from driving for six months remains in place. While employed with the employer driving was an integral part of his job. The claimant also got to and from the workplace by driving his personal vehicle. The claimant cannot now drive. The claimant lives in North Liberty, Iowa, where public transportation is limited. The claimant can walk or bicycle three miles to Coralville, Iowa, where he can get some public transportation. There may be taxicabs available to the claimant. The claimant can also ride to a place of employment with his wife if he can schedule employment so as to not conflict with his wife's employment. There are some employment locations where the claimant cannot reach even with public transportation. The claimant has been approved for and received one month of disability payments as shown at Employer's Exhibit Two. The disability payments have been delayed now pending an investigation. The claimant has been approved by Iowa Workforce Development to seek employment by using résumés. The claimant has made at least two employment contacts either in-person or by résumés each week. The claimant is applying for positions in manufacturing, brewing, beverage services and janitorial businesses.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not able, available, and earnestly and actively seeking work. The administrative law judge concludes that the claimant is ineligible to receive unemployment insurance benefits because he is not able to work and available for work.

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.

871 IAC 24.23(1) (4) (10) provide:

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

(1) An individual who is ill and presently not able to perform work due to illness.

(4) If the means of transportation by an individual was lost from the individual's residence to the area of the individual's usual employment, the individual will be deemed not to have met the availability requirements of the law. However, an individual shall not be disqualified for restricting employability to the area of usual employment. (See subrule 24.24(7)).

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he is either temporarily unemployed or partially unemployed as defined by Iowa Code section 96.19(38)(b) and (c) so as to excuse him from the requirements that he be available for work and earnestly and actively seeking work. The administrative law judge further concludes that the claimant has not met his burden of proof to demonstrate by a preponderance of the evidence that, at relevant times, he is, and was, able to work and available for work. The evidence establishes that the claimant

was hospitalized from January 18 to January 20, 2006, because of a seizure with undetermined origin. After being released from the hospital, the claimant's physician placed restrictions on him of no driving for six months and avoiding climbing high places including climbing up on tall ladders as shown at Employer's Exhibit One. For one month, at least from January 25, 2006 to February 26, 2006, the claimant received short term disability as shown at Employer's Exhibit Two. The short term disability has been temporarily suspended pending an investigation. The claimant is clearly not able to work for the employer from whom he separated. The administrative law judge is constrained to conclude that because of the claimant's physical condition and the restrictions, that the claimant is not able to work. The administrative law judge is also constrained to conclude that the claimant is not available for work. The claimant cannot drive for six months. The claimant was driving to and from the employer's location. When an individual loses his or her means of transportation to the area of the individual's usual employment the individual will be deemed not to have met the availability requirements of the law. Clearly here, the claimant lost his means of transportation to the area of his usual employment. The claimant testified that he could use public transportation but he lives in North Liberty, Iowa, and the claimant conceded that public transportation there is "limited." The claimant testified that he would have to walk three miles or bicycle three miles to Coralville, Iowa, in order to obtain public transportation. The claimant testified that he might be able to ride to work with his wife but his wife is employed so the claimant's work schedule must not conflict with that of his wife. The administrative law judge concludes that the potential of public transportation is so unlikely as to make the claimant unavailable for work. The administrative law judge specifically notes that the evidence establishes that the claimant could not get to his usual area of employment for the employer herein even with public transportation. The claimant testified that he was earnestly and actively seeking work by making at least two in-person job contacts or contacts by résumé each week. The claimant is approved by Iowa Workforce Development to seek work using résumés. There is no evidence to the contrary. The administrative law judge concludes that the claimant is earnestly and actively seeking work but is not convinced that the claimant can find a job that meets the restrictions noted above. Accordingly, the administrative law judge concludes that the claimant is not able to work and is not available for work and, as a consequence, he is ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, he demonstrates that he is able, available, and earnestly and actively seeking work and is otherwise entitled to unemployment insurance benefits.

At the hearing evidence was offered by both parties that the claimant permanently separated from his employment on or about February 2, 2006. However, whether the claimant would be disqualified to receive unemployment insurance benefits as a result of a permanent separation from his employment, that is whether the claimant is disqualified to receive unemployment insurance benefits either because he was discharged for disqualifying misconduct according to Iowa Code section 96.5(2)(a) or whether he is disqualified to receive unemployment insurance benefits because he left work voluntarily without good cause attributable to the employer under Iowa Code section 96.5(1), was not set out in the notice of appeal and the administrative law judge does not now have jurisdiction to decide those issues. The employer, as was its right, resisted or objected to permitting the administrative law judge to take evidence and decide those issues. Therefore, this matter must be remanded to Claims for an investigation and determination as to whether the claimant is disqualified to receive unemployment insurance benefits as a result of a permanent separation from his employment either because he was discharged for disqualifying misconduct or because he left his employment voluntarily without good cause attributable to the employer.

DECISION:

The representative's decision of February 23, 2006, reference 02, is affirmed. The claimant, Thomas J. Netolicky, is not entitled to receive unemployment insurance benefits, until, or unless, he demonstrates that he is able, available, and earnestly and actively seeking work and is otherwise entitled to receive such benefits because he is not now able to work and available for work. This matter must be remanded to Claims for an investigation and determination as to whether the claimant is disqualified to receive unemployment insurance benefits as a result of a permanent separation from his employment either because he was discharged for disqualifying misconduct or because he left his employment voluntarily without good cause attributable to the employer.

REMAND:

This matter is remanded to Claims for an investigation and determination as to whether the claimant is disqualified to receive unemployment insurance benefits as a result of a permanent separation from his employer herein, either because he was discharged for disqualifying misconduct pursuant to Iowa Code section 96.5(2)(a) or because he left his employment voluntarily without good cause attributable to the employer pursuant to Iowa Code section 96.5(1).

cs/tjc/tjc