

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIEL L HENDERSON
Claimant

APPEAL NO: 11A-UI-05962-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CEMEX INC
Employer

OC: 03/27/11

Claimant: Respondent (5)

Section 96.5-3-a – Work Refusal
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Cemex, Inc. (employer) appealed a representative's April 25, 2011 decision (reference 02) that concluded Daniel L. Henderson (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 1, 2011. The claimant received the hearing notice and responded by calling the Appeals Section on May 24, 2011. He indicated that he would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, he did not participate in the hearing. Steve Zaks of Barnett Associates appeared on the employer's behalf and presented testimony from one witness, Brian McCarthy. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the claimant disqualified due to refusing an offer of suitable work or recall to work?

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 March 7, 2005. He worked full time as a laborer at the employer's Davenport, Iowa facility. His last day of work was on or about November 16, 2010. He was laid off with other employees at that time due to the seasonal nature of the work.

The employer attempted to recall the claimant to return to work approximately the end of February 2011. The production manager, Mr. McCarthy, tried three numbers he had for the claimant, but all numbers were either disconnected, there was no answer, or there was a voice mail greeting given by someone other than the claimant. None of the three numbers matched either of the two numbers which appear in the Agency records for the claimant. The employer

did not choose to send a notice of recall to the claimant to the last known address it had for the claimant, which is the same address for the claimant which appears in the Agency records.

REASONING AND CONCLUSIONS OF LAW:

The primary issue in this case is whether the claimant refused a suitable offer of work or recall to work. Iowa Code § 96.5-3 provides that a claimant will be disqualified for benefits if he has failed without good cause to accept suitable work when offered. However, applying this statute, 871 IAC 24.24(1)a provides that in order for there to be a disqualification for a refusal of work, there must have been a bona fide offer of work to the claimant by personal contact and a definite refusal was made by the claimant.

871 IAC 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.

In this case, there was no bona fide offer of work actually communicated to the claimant, and no definite refusal of work after the November 16, 2010 separation from employment. Benefits are allowed, if the claimant is otherwise eligible.

The remaining question is whether the claimant is and was able and available for work after the separation. With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. To be found able to work, an individual must only be able to work in some employment, not necessarily in his prior employment. Sierra v. Employment Appeal Board, 508 N.W.2d 719, 721 (Iowa 1993); Geiken v. Lutheran Home for the Aged, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). The employer's only basis for asserting that the claimant was not available for work was that he could not be reached at any of the three numbers it had on file for the claimant. This is not adequate to establish that the claimant was not able and available for any work with any employer. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's April 25, 2011 decision (reference 02) is affirmed as modified. After the non-disqualifying November 16, 2010 separation from employment due to a layoff, the claimant did not refuse a suitable offer of recall to work. He has not been shown to be unavailable for

any work. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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