

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MERRITT E DANN**

Claimant

**APPEAL NO. 10A-EUCU-00054-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ADVANCED ENVIRONMENTAL  
TESTING AND ABATEMENT**

Employer

**Original Claim: 11/01/09  
Claimant: Respondent (1)**

Section 96.4(3) – Able & Available

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the January 19, 2010, reference 02, decision that allowed benefits effective November 1, 2009 based on an Agency conclusion that he was able to work and available for work. After due notice was issued, a hearing was held on June 16, 2010. Claimant Merritt Dann participated and presented additional testimony through Hope Dann. Attorney Brandon Gray represented the employer and presented testimony through Michael Poe and Dave Bloss. Exhibits One through Four were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits paid to the claimant and wages reported by the claimant. The record was left open for the limited purpose of allowing Mr. Dann to provide a log of his job search. Mr. Dann provided a partial log on June 18, 2010, which log was received into the evidence as Exhibit A.

**ISSUE:**

Whether Mr. Dann has been able to work and available for work since he established the original claim for benefits that was effective November 2, 2008.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Merritt Dann was employed by Advanced Environmental Testing and Abatement, Inc., until November 7, 2008, when Michael Poe, owner, discharged him from the employment. Mr. Dann established a claim for unemployment insurance benefits that was effective November 2, 2008. The employer did not protest the claim for unemployment insurance benefits. For the period of November 9, 2008 through May 16, 2009, Mr. Dann received weekly unemployment insurance benefits of \$389.00. The total amount of regular benefits disbursed for that period was \$10,114.00. For the period of May 17, 2009 through May 10, 2010, Mr. Dann received weekly extended unemployment compensation (EUC) benefits of \$389.00. The total amount of EUC benefits disbursed to Mr. Dann was \$18,283.00. Mr. Dann's eligibility for the federal stimulus benefits was contingent upon him being eligible for the weekly regular benefits or EUC benefits.

At the time Mr. Dann separated from Advanced Environmental Testing and Abatement, Inc., he was subject to a one-year non-compete agreement that restricted him from working in the asbestos abatement industry in the Iowa and a designated portion of Illinois.

Immediately following his discharge from the employment, Mr. Dann established his own company, ESCI. While Mr. Dann asserts the company is an Iowa corporation, there is no listing for the company on the Iowa Secretary of State's corporation database. Mr. Dann and his wife, Hope Dann, are the company's sole shareholders/owners. The company has no bylaws. Mr. and Mrs. Dann are also the company's only employees.

Through ESCI, Mr. Dann began in February 2009 to provide environmental abatement and other construction project leads to Abatement Specialties, L.L.C., a company operated by Dave Bloss. Mr. Dann worked as an independent contractor, not as an employee of Abatement Specialties. Mr. Bloss wished to utilize Mr. Dann's industry expertise to locate new environmental abatement projects. Mr. Bloss desired to have Mr. Dann perform this work because he himself lacked sufficient time to perform the work. Mr. Dann would search Internet-based construction industry project clearinghouses to find projects that he thought Abatement Specialties might be interested in bidding. Abatement Specialties was ESCI's only client. There was no written contract and no restriction on Mr. Dann providing similar services to other clients. Mr. Dann did this work 15 to 20 hours per week, during the day and evening. Mrs. Dann had other full-time employment and had minimal involvement in the company or work. All of the above work was performed from Mr. Dann's home utilizing his home computer. Mr. Dann would also attend construction pre-proposal meetings as Abatement Specialties' representative. Mr. Dann attended two such meetings, one on June 22, 2009 and another on November 16, 2009. Abatement Specialties paid ESCI a \$500.00 per week flat fee for the service. In 2009, Abatement Specialties paid Mr. Dann \$500.00 in February, \$2,000.00 in March and April, \$2,500 in May, \$2,000.00 in June, \$2,500.00 in July, \$2,000.00 in August and September, \$2,500.00 in October, \$2,000 in November, and \$2,500.00 in December. For 2009, Abatement Specialties paid Mr. Dann's company fees totaling \$22,500.00. Mr. Dann's final salary at Advanced Environmental Testing and Abatement had been \$85,000.00 per year.

While Mr. Dann performed the independent contracting work for Abatement Specialties, he continued his search for full-time employment. Mr. Dann's job search was hindered by the non-compete agreement he had with Advanced Environmental Testing Abatement.

In October-November, 2009, Mr. Dann and Mr. Bloss discussed having Mr. Dann join Abatement Specialties as a full-time employee. Mr. Dann assisted a third party in working on Abatement Specialties' website. The website referenced Mr. Dann as the company's Sales and Marketing Manager. Mr. Dann did not join Abatement Specialties as an employee and the reference to him on the Abatement Specialties website was subsequently removed.

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

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.

Iowa Administrative Code rule 871 IAC 24.23 provides, in relevant, part as follows:

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

24.23(7) Where an individual devotes time and effort to becoming self-employed.

24.23(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

The weight of evidence in the record establishes that Mr. Dann engaged in limited self-employment from the time he established the original claim for unemployment insurance benefits that was effective November 2, 2008. The weight of the evidence indicates that Mr. Dann pursued the self-employment as a stop-gap measure while he waited out the one-year non-compete agreement with the former employer, Advanced Environmental Testing and Abatement. The weight of the evidence indicates that Mr. Dann devoted 15 to 20 hours per week on the self-employment venture. While most of this time fell during the normal working day, some of it occurred during the evening hours. The weight of the evidence indicates that Mr. Dann continued to actively and earnestly pursue new full-time employment to replace his former \$85,000.00 annual salary. Mr. Dann's self-employment venture did not impede his search for new full-time employment. Instead, Mr. Dann used the self-employment venture as a means to network with prospective employers. The administrative law judge concludes that Mr. Dann has satisfied the able and available requirements of Iowa Code section 96.4(3) since he established the original claim for benefits that was effective November 2, 2008 and has been eligible for benefits since that time, provided he is otherwise eligible. Mr. Dann's income from the self-employment venture did not constitute wages for unemployment insurance purposes and are not deductible from his unemployment insurance benefits.

**DECISION:**

The Agency representative's January 19, 2010, reference 02, decision is affirmed. Since the original claim that was effective November 2, 2008, the claimant has been able and available for work and eligible for benefits, provided he is otherwise eligible.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/kjw