

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFREY M KUBIK
Claimant

APPEAL NO. 12A-UI-14255-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC
Employer

OC: 07/29/12
Claimant: Respondent (2)

Iowa Code Section 96.5(3)(b) – Refusal of Suitable Work from Former Employer
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 27, 2012, reference 03, decision that allowed benefits based on an agency conclusion that an offer of work made to the claimant on October 24, 2012 was not suitable in light of the wage offered. After due notice was issued, a hearing was held on January 8, 2013. Claimant Jeffrey Kubik participated. Jim Cole, Staffing Consultant, represented the employer. The administrative law judge took official notice of the claimant's average week wage during his highest earning base quarter. The administrative law judge also took official notice of the agency's administrative record of the claimant's weekly claim reporting via the Internet (KCCO).

ISSUES:

Whether Mr. Kubik refused an offer of suitable work without good cause since he established the additional claim for benefits that was effective October 28, 2012.

Whether Mr. Kubik has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency. Jeffrey Kubik completed a full-time, third-shift, temp-to-hire assignment at Con-Trol on October 25, 2012. In that assignment, Mr. Kubik had worked as a forklift operator. The assignment paid \$9.00 per hour. The hours of employment in that assignment were 9:30 p.m. to 6:00 a.m. unless there was overtime work.

On November 13, 2012, Express Services, Inc., contacted Mr. Kubik by telephone and spoke directly to Mr. Kubik about a new full-time temporary work assignment that had become available in the Waterloo-Cedar Falls metropolitan area. The employer told Mr. Kubik that the assignment would offer first shift work hours, 7:00 a.m. to 3:30 p.m., Monday through Friday, unless there was overtime work. Mr. Kubik had previously advised the employer that he was available for work during all shifts. The employer told Mr. Kubik the work assignment would involve operating a forklift and some palletizing. The employer told Mr. Kubik that the work

would pay \$11.00 per hour. The employer told Mr. Kubik that the assignment was expected to last two to three months. The employer offered Mr. Kubik the assignment. Mr. Kubik refused the assignment. Mr. Kubik cited only the temporary nature of the assignment as the basis for his refusal. Mr. Kubik told the employer that he was not interested in a temporary or contract position, but instead wanted only permanent work.

Mr. Kubik's base period for purposes of the claim he started on July 29, 2012 consisted of the second, third and fourth quarter of 2011 and the first quarter of 2012. Mr. Kubik's highest earning base period quarter was the second quarter of 2011, when Mr. Kubik's average weekly wage was \$672.19. That average weekly wage translates to \$16.80 per hour based on a 40-hour work week. The position offered on October 24 would have offered a weekly wage of \$440.00 based on a 40-hour work week.

Mr. Kubik established an "additional claim" for benefits that was effective October 28, 2012 in response to his assignment at Con-Trol coming to an end. For each of the weeks between October 28, 2012 and December 15, 2012, Mr. Kubik received \$379.00 in weekly unemployment insurance benefits. The week that included November 13, 2012 was the benefit week that ended November 17, 2012. That week was the third week of Mr. Kubik's additional claim for benefits. Mr. Kubik received unemployment insurance benefits for that week.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.24(8) provides:

(8) Refusal disqualification jurisdiction. Both the offer of work or the order to apply for work and the claimant's accompanying refusal must occur within the individual's benefit year, as defined in subrule 24.1(21), before the Iowa code subsection 96.5(3) disqualification can be imposed. It is not necessary that the offer, the order, or the refusal occur in a week in which the claimant filed a weekly claim for benefits before the disqualification can be imposed.

Iowa Code section 96.5-3-b provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

b. Notwithstanding any other provision of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

- (1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;
- (2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
- (3) If as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

Iowa Administrative Code rule 871 IAC 24.24(14)(a) and (b) provides:

Failure to accept work and failure to apply for suitable work. Failure to accept work and failure to apply for suitable work shall be removed when the individual shall have worked in (except in back pay awards) and been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

(14) Employment offer from former employer.

a. The claimant shall be disqualified for a refusal of work with a former employer if the work offered is reasonably suitable and comparable and is within the purview of the usual occupation of the claimant. The provisions of Iowa Code section 96.5(3)"b" are controlling in the determination of suitability of work.

b. The employment offer shall not be considered suitable if the claimant had previously quit the former employer and the conditions which caused the claimant to quit are still in existence.

The weight of the evidence indicates that the employer made a bonafide offer of employment. Mr. Kubik refused the offer of employment. The offer of employment and the refusal occurred during the third week of Mr. Kubik's claim for unemployment insurance benefits. Express Services falls within the definition of a former employer for determining whether the new assignment Express Services offered to Mr. Kubik was suitable work. For that reason, the wage percentage analysis the Workforce Development representative used to conclude the offered work assignment was unsuitable was the wrong analysis. The correct analysis comes from Iowa Administrative Code rule 871 IAC 24.24(14)(a) and (b) coupled with Iowa Code section 96.5(3)(b). Under that analysis, the work offered by the employer was suitable work. There is no indication that the assignment was available due to a labor dispute, strike or lockout. The wages, hours, and conditions of the work offered were not less favorable than those prevailing for similar work in the community. The new assignment actually offered Mr. Kubik a \$2.00 raise and better working hours than the first assignment he had with the employer. There is nothing to suggest that acceptance of the new assignment would require Mr. Kubik to join or refrain from joining a labor organization.

Mr. Kubik's desire for permanent work did not constitute good cause to refuse the temporary assignment offered to him on November 13, 2012. That assignment, including the daytime work hours, would not prevent Mr. Kubik from searching for permanent employment while he remained in the assignment. Because Mr. Kubik refused suitable work, effective November 13, 2012, he is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Kubik would then have to meet all other eligibility requirements.

Iowa Code section 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.

Because Mr. Kubik was disqualified for benefits effective November 13, 2012, the \$1,895.00 in benefits he received for the week ending November 17, 2012 through the week ending December 15, 2012 were an overpayment of benefits. Mr. Kubik must repay that amount.

DECISION:

The Agency representative's November 27, 2012, reference 03, is reversed. The claimant refused an offer of suitable employment from a former employer on November 13, 2012. Effective November 13, 2012, the claimant is disqualified for unemployment insurance benefits

until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant would then have to meet all other eligibility requirements. The claimant is overpaid \$1,895.00 for the weeks ending November 17, 2012 through December 15, 2012.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs