

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

TIMOTHY L SMITH

Claimant,

and

LABOR READY MIDWEST INC

Employer.

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HEARING NUMBER: 08B-UI-02098

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1-j

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting in part, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **AFFIRMS IN PART AND REVERSES** as set forth below.

FINDINGS OF FACT:

The administrative law judge's Findings of Fact are adopted by the Board as its own with the following additional findings:

The Claimant was laid off from Twin City Concrete from January 11, 2008 through March 16, 2008. (Tran at p. 4, line 1; p. 5, line 28-34). During this period the Claimant was unemployed. (Tran at p. 4, line 1; p. 5, line 28-34).

REASONING AND CONCLUSIONS OF LAW:

Separation from Labor Ready: On the question of whether the Claimant was disqualified based on the nature of his separation from Labor Ready the administrative law judge's Reasoning and Conclusions of Law are adopted by the Board as its own.

Able & Available: Once the Claimant was separated from Labor Ready under circumstances that did not disqualify him he was not required to remain available for work at Labor Ready, or any other employer, even though he was not collecting benefits. The Claimant is only required to be able and available for the weeks for which he claims for benefits. Following his separation from Labor Ready it is true that the Claimant was not able and available, because he was not "unemployed", for the time between his quit at Labor Ready and his layoff from Twin City Concrete. This period is from December 5, 2007 through January 10, 2008. While the Claimant was not "unemployed" during this period it is also true that he did not claim for benefits during this period. The Claimant filed his claim for benefits following his January 11, 2008 layoff. Once laid off the record shows that the Claimant was unemployed. He was unemployed from January 11, 2008 through March 16, 2008. He cannot be found ineligible for this period on the basis of being employed for the simple reason that he wasn't employed. We therefore reverse the finding of the Administrative Law Judge on the Claimant's being able and available for work.

DECISION:

The administrative law judge's decision dated March 25, 2008 is **REVERSED IN PART AND AFFIRMED IN PART**. The Employment Appeal Board **affirms** the Administrative Law Judge's conclusion that the Claimant was not separated from Labor Ready on December 5, 2007 for any disqualifying reason. The Employment Appeal Board **reverses** the Administrative Law Judge conclusion that the Claimant is not considered unemployed because he is working to such a degree that makes him unavailable for work. Based on the evidence the Board finds instead that the Claimant was able and available from January 11, 2008 through March 16, 2008. Accordingly, the Claimant is allowed benefits attributable to this period provided the Claimant is otherwise eligible. The overpayment entered against claimant in the amount of \$2,862.00 is vacated and set aside.

John A. Peno

Elizabeth L. Seiser

CONCURRING OPINION OF ELIZABETH L. SEISER: I write separately to address possible issues concerning the disqualification for the separation from Labor Ready. First, the testimony is highly suggestive of a spot labor arrangement between the Claimant and Labor Ready. (Tran at p. 3). In such cases an employee is not required to return and offer services regardless of compliance with Iowa Code §96.5(1)(j). 871 IAC 24.26(19). I note that the spot labor regulation was specifically noticed for hearing in this matter. Given the record it is entirely possible that the Claimant would, in addition to the reasons we have adopted today, be qualified for benefits because he fell under the spot labor rule. While this result seems likely I do not reach this conclusion today because it is unnecessary given our ruling on failure to comply with Iowa Code §96.5(1)(j). Similarly, the situation described by the record likely falls under the rule of McCarthy v. Iowa Employment Sec. Commission, 76 N.W.2d 201, 247 Iowa 760 (Iowa, 1956). Under McCarthy and rule 871 IAC 24.27(96) the quit of the part-time Labor Ready job is irrelevant if the Claimant had adequate wage credits from his full time work at his regular employer. As with spot labor I leave this issue for another day, if necessary, because of our ruling on noncompliance with Iowa Code §96.5(1)(j).

Elizabeth L. Seiser

RRA/ss

OPINION OF MONIQUE KUESTER CONCURRING IN PART AND DISSENTING IN PART : While I agree that the decision of the Administrative Law Judge should be affirmed on the issue of separation from Labor Ready, I respectfully dissent from the majority decision of the Employment Appeal Board on the question of able and available. Because the record on availability is scanty a remand for more testimony of the Claimant's employment with Twin City Concrete is necessary. The Claimant has the burden of proof on availability but was unrepresented at hearing. As the Iowa Court of Appeals noted in Baker v. Employment Appeal Board, 551 N.W. 2d 646 (Iowa App. 1996), the administrative law judge has a heightened duty to develop the record from available evidence and testimony given the administrative law judge's presumed expertise. The brief record on the Claimant's job history is insufficient for this member to conclude the Claimant was or was not unemployed for the period in question. I would remand to clarify this.

Monique Kuester

RRA/ss