

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

MERRITT E DANN	:	
	:	
Claimant,	:	HEARING NUMBER: 10B-EUCU-00054
	:	
and	:	
	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
ADVANCED ENVIRONMENTAL	:	
	:	
Employer.	:	

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: 96.4(3)

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, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Employment Appeal Board adopts and incorporates as its own the administrative law judge's Findings of Fact with the following modifications:

The employer (Advanced Environmental Testing and Abatement, Inc.) was in the business of environmental consulting and remediation (removal of asbestos, lead, mold) with some light construction. (Tr. 7) The claimant worked as a manager for the Davenport office. (Tr. 7)

The non-compete clause expired for Mr. Dann "...one year from termination, not working in the asbestos field in the state of Iowa and north of whatever highway...takes the Illinois – or the Iowa southern border and...straight across." (Tr. 46) That expiration date would be November, 7, 2009.

The claimant looked for other types of work, but was told he was overqualified. Due to the specialized nature of his work, his work search did not include Clinton, as there were no opportunities there. (Tr. 11) Iowa-Illinois Thermal would not hire him until the expiration of his non-compete covenant (Tr. 14), which was the case when he applied for work at Active in Cedar Rapids in January of 2009 (Tr. 15)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.4(3) (2009) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds:

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 requirement 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 the benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(96) provides:

Benefit 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.

The claimant failed to satisfy his burden of proving by a preponderance of the evidence that he was able and available within the meaning of the statute based, in part, on the establishment of his consulting business and his self-employment status. In spite of the lack of registration with the Secretary of State, the claimant and his wife clearly engaged in actions that would prohibit Mr. Dann from being able and available for work. Although the claimant asserted that he had an opportunity to work full-time with Abatement Specialists (Tr. 9, 34), his reasoning for why he couldn't hinged on the fact that he started his own company, and no one wanted to hire him until his legal matters with the employer were settled. (Tr. 14, 17, 18, 34) Yet, the record reveals that Mr. Dann admittedly worked 15-20 hours weekly for Abatement Specialists both daytime and evening hours. (Tr. 21, 62, 68) When asked to show how many hours he worked in February 2009, the claimant was vague, "...I don't know; I didn't log my hours on that." (Tr. 19, 56) The fact that the claimant was also listed as Abatement Specialists' Sales and Marketing Manager certainly lends credence to the claimant's deeper involvement with that company than he so testified. (Employer's Exhibit 4)

In addition, the claimant failed to provide any supporting documentation at the hearing to establish that he had been “earnestly and actively seeking work”. (Tr. 26-27) Even though the administrative law judge indicated that he would leave the record open for the claimant submit job search documentation, the documentation provided lacks evidence regarding job searches that were allegedly done from November of 2008 through August of 2009, which included the time frame he started consulting for Abatement Specialists. Based on this record as a whole, we conclude that the claimant failed to satisfy his burden of proof.

DECISION:

The administrative law judge’s decision dated July 26, 2010 is **REVERSED**. The claimant was not able and available for work during the time frame at issue. Accordingly, he is denied benefits.

Monique F. Kuester

Elizabeth L. Seiser

AMG/fnv

CONCURRING OPINION OF ELIZABETH L. SEISER:

I agree with my fellow board members that the administrative law judge's decision should be affirmed; however, I would also comment that self-employment income is not considered wages and is *not* deductible from unemployment benefits.

871 IAC 24.13(4) provides:

Nondeductible payments from benefits. The following payments are not considered as wages and are not deductible from benefits:

- a. Self-employment income. However, the individual must meet the benefit eligibility requirements of Iowa Code section 96.4(3).

Elizabeth L. Seiser

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

John A. Peno

AMG/fnv

Although this decision disqualifies the claimant for receiving benefits, those benefits already received shall *not* result in an overpayment. Nor will the employer's account be charged.

Iowa Code section 96.6(2) (2009) provides, in pertinent part:

...If an administrative law judge affirms a decision of the representative, or the Appeal Board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5....

John A. Peno

Elizabeth L. Seiser

Monique F. Kuester

AMG/fnv