

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RALPH ORTEGA
Claimant

APPEAL NO. 08A-UI-02189-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NEHRING CONSTRUCTION INC
Employer

OC: 01/06/08 R: 02
Claimant: Appellant (4/R)

Section 96.4-3 - Able and Available for Work

STATEMENT OF THE CASE:

Ralph Ortega (claimant) appealed an unemployment insurance decision dated February 28, 2008, reference 01, which held that he was not eligible for unemployment insurance benefits because he was not available to work. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 19, 2008. The claimant participated in the hearing. The employer participated through owner Brent Nehring. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant is able and available to work?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was temporarily laid off during the first or second week of December 2007. He did work for the employer at some point in January 2008 but reported no wages for this time frame. There were reportedly some other days he was asked to come to work but refused because it was only a day or two of work. However, the employer is unaware of the specific dates this happened. The claimant does not have a driver's license or a vehicle but claims that he is able to find rides to work. He was in California from February 16, 2008 through February 23, 2008 and not available for work. However, he filed a weekly claim and reported he was available. The claimant is no longer working for this employer but these issues were not included in the notice of hearing.

REASONING AND CONCLUSIONS OF LAW:

The issue to be determined is whether the claimant is able and available for work. In order for an individual to be eligible to receive unemployment insurance benefits, the evidence in the record must establish that he is able to work, available for work, and earnestly and actively seeking work. See Iowa Code § 96.4(3) and 871 IAC 24.22.

Iowa Code § 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 24.23(25) provides:

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

(25) If the claimant is out of town for personal reasons for the major portion of the workweek and is not in the labor market.

The claimant has the burden of proof in establishing his ability and availability for work. Davoren v. Iowa Employment Security Commission, 277 N.W.2d 602 (Iowa 1979). Although the claimant's availability is certainly questionable, the evidence only confirms that he was not available for work during the one-week period ending February 23, 2008, because he was in California. He is not eligible for unemployment insurance benefits for the week ending February 23, 2008.

Several issues arose during the hearing, which were not included in the notice of hearing. There is the first issue of whether the claimant reported income earned from his employer during January 2008. The case will be remanded to Quality Control for an investigation and determination as to whether the claimant had earned but unreported wages. 871 IAC 26.14(5). The other issues that arose are regarding the claimant's final separation from the employer and the case will also be remanded for an investigation and determination of those issues. Id.

DECISION:

The unemployment insurance decision dated February 28, 2008, reference 01, is modified in favor of the appellant. The claimant was not available for work for the one-week period ending February 23, 2008 and benefits are denied for this time frame. This case is remanded for further determination.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw