

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ERIC A SCHMIDT

Claimant

APPEAL NO. 14A-UI-00546-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FARR TRANSPORT INC

Employer

OC: 11/10/13

Claimant: Respondent (4-R)

Section 96.4-3 – Able and Available for Work
871 IAC 24.24(14)(a), (b) – Failure to Accept Suitable Work

STATEMENT OF THE CASE:

Farr Transport, Inc. filed a timely appeal from a representative's decision dated January 7, 2014, reference 01, which held claimant eligible to receive unemployment insurance benefits beginning November 10, 2013 finding that the claimant was able and available for work. After due notice was provided on potential job separation issues, the overpayment issue and the issue of responsibility for overpayment of unemployment insurance benefits, a hearing was scheduled for February 6, 2014. Mr. Schmidt participated personally. The employer participated by Mr. Brad Newhard, Traffic Manager. Both parties waived notice on the issue of whether the claimant was able and available for work.

ISSUE:

The issue is whether the claimant was able and available for work because he did not accept recall for employment.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Eric Schmidt began employment with Farr Transport, Inc. as a full-time over-the-road tractor/trailer driver on April 16, 2013. Mr. Schmidt was paid by the mile plus paid for extra stops and detention pay. Claimant's immediate supervisor was Mr. Brad Newhard.

Mr. Schmidt was temporarily laid off work on November 4, 2013 because the over-the-road tractor unit that was assigned to him needed extensive repairs. The claimant was informed of the reason for the layoff and told that the company would be recalling him back to work when the truck was repaired.

On December 3, 2013, the claimant's traffic manager e:mailed the claimant informing Mr. Schmidt that the truck had been repaired and that Mr. Schmidt was being recalled back to work. Before the claimant returned to his job duties, however, the employer wanted to personally meet with Mr. Schmidt to clarify the employer's job expectations for Mr. Schmidt.

During the meeting, the employer presented the claimant a list of seven bullet-point items that the employer wished to clarify with Mr. Schmidt. The employer clarified that the company's "no riders" rule was to be enforced by the company and that Mr. Schmidt should obtain written permission if he wanted family members to ride with him on the company truck and that the company could not allow Mr. Schmidt's girlfriend to ride with him on the truck on a regular basis, however, on a very limited basis with specific written authorization of the company. The employer also re-emphasized the requirement that Mr. Schmidt and the company truck assigned to him should be available to haul loads five or more days per week. Mr. Newhard emphasized the necessity for fuel economy and limited truck idling time for long periods, except times when Mr. Schmidt was on duty and was off duty on a trucking run and in the sleeping berth. Employer emphasized that Mr. Schmidt should leave the company truck in the company's parking lot over weekends when it was not being used but had no issue with Mr. Schmidt parking the truck at home or near his home for short periods of time. Mr. Schmidt was encouraged to dress appropriately in the future and avoid wearing pajama pants while representing the company. Mr. Newhard emphasized the employer's expectation that Mr. Schmidt arrive at shipper locations on time to pick up loads and emphasized the rule that purchases of parts or service by drivers must be pre-approved.

During the discussion of these issues, Mr. Schmidt explained to his employer some of the previous factors that had caused the issues to be reviewed and explained his actions in the past. Although Mr. Schmidt did not fully agree with the reason for some of the company rules, the claimant nevertheless was willing to abide by them, but wanted to review the matter with his girlfriend prior to agreeing to return to work and resuming his truck driving duties with the company. Mr. Schmidt stated that he would call the employer the next day and let them know his decision on the recall. As the meeting was concluding on December 3, 2013, Mr. Schmidt made reference to a previous personal loan that he had received from the company and the agreement to repay the personal loan by payroll deductions that Mr. Schmidt had agreed to. Mr. Schmidt wanted the company to suspend or reduce deductions from his pay for the purpose of repaying the personal loan because he did not have excess funds due to being laid off. Mr. Newhard agreed to have the claimant's request reviewed by other management, stating that he would "get back" to the claimant.

Although Mr. Schmidt had agreed to contact the employer with the decision on his recall to work the next day, he did not do so. After the claimant had not responded to the offer of returning to his regular job for a number of days, the employer reasonably concluded that Mr. Schmidt had not accepted the recall and the company hired another driver.

Mr. Schmidt testified that although he did not agree with all of the issues discussed by Mr. Newhard in the meeting of December 3, 2013, he understood those were management decisions and he did not object to them. Mr. Schmidt testified he did not return to work with Farr Transport, Inc. because he had concluded that the employer had not modified an agreement in effect between the parties for repayment of the personal loan, when he heard nothing further from the company on this issue.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes that the claimant was able and available for work or whether the claimant's refusal of the recall to work affected his availability.

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".

An otherwise eligible claimant is eligible to receive benefits with respect to any week only if the evidence indicates that the individual is able to work, is available for work and if required, is earnestly and actively seeking work. Iowa Code section 96.4(3) and 871 IAC 24.22. The claimant bears the burden of establishing the claimant meets the above requirements. 871 IAC 24.22. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to lack of work from the individual's regular job or trade in which he worked full time and would again work full time, if the individual's employment, although temporarily suspended, has not been terminated. Iowa Code section 96.19(38)(c).

871 IAC 24.22(2) provides as follows:

To satisfy the availability requirement, an individual must be willing, able and ready to accept suitable work for which an individual does not have good cause to refuse.

The administrative law judge concludes that Mr. Schmidt was able and available for work within the meaning of the Employment Security Law from November 10, 2013, the date of his claim for unemployment insurance benefits until December 3, 2013. During this time the claimant was laid off and waiting for recall to work from his employer.

871 IAC 24.23(41) provides:

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

(41) The claimant became temporarily unemployed, but was not available for work with the employer that temporarily laid the claimant off. The evidence must establish that the claimant had a choice to work, and that the willingness to work would have led to actual employment in suitable work during the weeks the employer temporarily suspended operations.

This rule is intended to implement Public Law 96-499, Iowa Code sections 96.4(3), 96.5(1), 96.6(1), 96.19(38)"c" and 96.29.

871 IAC 24.24(1)a provides:

(1) Bona fide offer of work.

a. In deciding whether or not a claimant failed to accept suitable work, or failed to apply for suitable work, it must first be established that a bona fide offer of work was made to the individual by personal contact or that a referral was offered to the claimant by personal contact to an actual job opening and a definite refusal was made by the individual. For purposes of a recall to work, a registered letter shall be deemed to be sufficient as a personal contact.

871 IAC 24.24(4) provides:

(4) Work refused when the claimant fails to meet the benefit eligibility conditions of Iowa Code section 96.4(3). Before a disqualification for failure to accept work may be imposed, an individual must first satisfy the benefit eligibility conditions of being able to work and available for work and not unemployed for failing to bump a fellow employee with less seniority. If the facts indicate that the claimant was or is not available for work, and this resulted in the failure to accept work or apply for work, such claimant shall not be disqualified for refusal since the claimant is not available for work. In such a case it is the availability of the claimant that is to be tested. Lack of transportation, illness or health conditions, illness in family, and child care problems are generally considered to be good cause for refusing work or refusing to apply for work. However, the claimant's availability would be the issue to be determined in these types of cases.

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.

871 IAC 24.24(14)(a)(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.

On December 3, 2013, Mr. Schmidt was personally recalled to his regular job as an over-the-road truck driver for Farr Transport, Inc. at the same rate of pay and duties as he had previously accepted. During a meeting regarding the recall, the employer re-emphasized its expectation that Mr. Schmidt would comply with company rules governing the operation of the company truck. Although Mr. Schmidt did not fully agree with the company rules being enforced by the company he did not refuse the recall to work for those reasons.

The administrative law judge concludes that the work that Mr. Schmidt was being recalled to was suitable work and that the claimant was properly notified of a recall back to that suitable work. The claimant's refusal to accept the recall to suitable work was not based upon a disagreement with the company rules that were being emphasized, but because the employer had not expressed a willingness to forgive or place an abeyance on the claimant's agreement to have a portion of his pay deducted each pay period to repay a portion of a personal loan that he had previously requested and received from his employer.

Based upon the claimant's refusal to accept a bona fide offer of a recall to suitable work on December 3, 2013, the administrative law judge concludes that Mr. Schmidt has not met the availability requirements of the Iowa Employment Security Law by his refusal to accept a recall to suitable work.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received after December 3, 2013 constitute an overpayment. Mr. Schmidt received benefits in the amount of \$848.00 for benefit weeks beginning December 7 and December 14, 2013. The issue of whether the claimant is liable to repay that amount or whether the amount is chargeable to the employer's account based upon the employer's participation in the fact-finding that may have been related to the availability issue is remanded to the Claims Division for determination.

DECISION:

The representative's decision dated January 7, 2014, reference 01, is affirmed as modified. The claimant is eligible to receive unemployment insurance benefits beginning November 10, 2013 until December 6, 2013 because he was available for work. The claimant is disqualified for the receipt of unemployment insurance benefits effective December 7, 2013 and thereafter until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. The issue of whether the claimant is liable to repay the \$848.00 overpayment in unemployment insurance benefits received for the weeks of December 7, 2013 and December 14, 2013 or whether the employer should be charged is remanded to the Claims Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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