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

AMBER R DAWSON	:	
	:	**HEARING NUMBER:** 10B-UI-09829
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
MAINSTREAM LIVING INC	:	
Employer.		

SECTION: 96.5(3)A, 96.4(3)

D E C I S I O N

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** and **REMANDS** as set forth below.

FINDINGS OF FACT:

Amber Dawson (Claimant) has worked for Mainstream Living Inc. (Employer) since May 4, 2004. (Tran at p. 2). Prior to May of 2010 the Claimant had worked for the Employer on a 7 a.m. to 3 p.m. (at the latest) shift. (Tran at p. 3-5; p. 6). She applied for benefits on May 30, 2010. Since that time she has limited her hours of availability for work to between 7 a.m. to 5 p.m. (Tran at p. 6-7).

REASONING AND CONCLUSIONS OF LAW:

Standards For Able & Available: 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.…

871 IAC 24.22 expounds on this:

> 871—24.22 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.
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> 24.22(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.
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> …
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> b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides.

Among the reasons that can render an individual no longer able and available are self-imposed and voluntary work restrictions:

> a. Shift restriction. The individual does not have to be available for a particular shift. If an individual is available for work on the same basis on which the individual's **wage credits were earned** and if after considering the restrictions as to hours of work, etc., imposed by the individual there exists **a reasonable expectation of securing employment,** then the individual meets the requirement of being available for work.
> …
> m. An individual may not be eligible for benefits if the individual has imposed restrictions which leave the individual **no reasonable expectation of securing employment**. Restrictions may relate to type of work, hours, wages, location of work, etc., or may be physical restrictions.

871 IAC 24.22(2)(emphasis added). Similarly 871 IAC 24.23(16) provides that a claimant is unavailable for work if the claimant "is **unduly** limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available," and 871 IAC 24.23(8) states that a claimant is unavailable for work if "availability for work is **unduly** limited because of not having made **adequate** arrangements for child care."

The burden is on the claimant to establish that she is able and available for work within the meaning of the statute. 871 IAC 24.22; *Davoren v. Iowa Employment Sec. Comm'n*, 277 N.W.2d 602, 603 (Iowa 1979). To be found able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1).

Application of Standards: We emphasize that this is an able and available case, where benefits are denied on a week-to-week basis. It is not a refusal of suitable work case.

When a claimant is limited in the hours of work the availability issue is focused on the *effect* the limitation has on the claimant's ability to find work. This is true even when the limitation is caused by child care issues. The limitation must be "undue." Thus the question is whether the hours restrictions - including those caused by child care - "leave the individual no reasonable expectation of securing employment." 871 IAC 24.22(2)(m). We do not read rule 871 IAC 24.23(8) as contradicting this idea. Rule 24.23(8) finds a claimant not *able and available* if the claimant's "availability" is "unduly limited" because the claimant is has not made "adequate" child care arrangements. Rule 24.23(16) finds a claimant not *able and available* if the claimant's "availability" is "unduly limited" because the claimant is not willing to work "during" the hours in which suitable work is available. Also rule 24.23(17) refers to an undue limitation caused by a limit on the *number* of hours required by the claimant's "occupation." It is clear that these rules are saying that if a claimant has unduly limited her availability by not being able (or willing) to work the schedule required to get a job, then the claimant is not able and available so long as the restrictions last. The focus of the rule is clearly on whether the limitation is "undue," that is, how limiting it is to the ability to work.

Here the Claimant is willing to work the same total hours at the same time as she worked during the base period. She wants to work only during the day, preferably from 7 a.m. to 5 p.m.. In common experience, this is normal work time. The issue is whether given the restriction "there exists a reasonable expectation of securing employment." 871 IAC 24.22(2)(a). We find that there is such a reasonable expectation, and that the Claimant has not "unduly limited" her "availability for work." 871 IAC 24.23(8). The limitation by itself is not one which would leave the Claimant with no "reasonable expectation of securing employment." 871 IAC 24.22(2)(m). We find that the Claimant has not unduly limited her availability by limiting her hours. We emphasize that this is only a determination of availability and we have not engaged in an evaluation of whether the offer was "suitable" nor whether the reasons for refusal were "good cause." Those are not issues in this case.

Remand: The Notice of Hearing in this case did not include refusal of suitable work. It referred only to Iowa Code §§96.4 and 96.7. The issue of refusal of suitable work is a disqualification issue that is distinct from availability and eligibility. Thus notice of being unavailable or employed at the same hours is usually not notice of a pending adjudication of the question of refusal of suitable work. Now generally, "[i]f new issues appear, different from those which are noticed in the appeal, the board …in the interest of prompt administration of justice and without prejudicing the substantive rights of any party, may hear and decide any issue material to the appeal, even if not specifically indicated as a ground for appeal or not noticed for the administrative hearing." 486 IAC 3.1(6). Thus the fact that an issue is not raised does not necessarily preclude consideration of that issue at a later stage of the proceedings so long as due process is satisfied. *Id.; Swanson v. Employment Appeal Board*, 554 N.W.2d 294, 297 (Iowa App. 1996); *Kehde v. Iowa Dept. of Job Service*, 318 N.W.2d 202, 206 (Iowa 1982); *Flesher v. Iowa Dept. of Job Service*, 372 N.W.2d 230, 233 (Iowa 1985). Despite this, however, due process does require some notice to the parties of what issues are to be decided. For example, notice of a disqualification based on a discharge is not adequate notice that the issue of disqualification based on a quit will be adjudicated. *Silva v. Employment Appeal Bd*. 547 N.W.2d 232 (Iowa App. 1996); Iowa Code § 17A.12(2)(c) and (d). But quits and discharges are at least both concerned with the separation. The question of refusal of suitable work is even less clearly related to questions of availability, and so we feel this case falls under the rule of *Silva*. In fact Iowa Code §17A.12(2)(c) *requires* that the notice of hearing refer to the "particular sections of the statutes and rules involved." The section for a refusal of suitable work is Iowa Code §96.5, and this was not included on the notice of hearing, nor was notice waived by the parties. A remand for an additional hearing is therefore mandatory so that the parties can address the issue of disqualification based on a refusal of suitable work.

Although noticed for hearing the Administrative Law Judge did not rule on the question of whether the Claimant was still employed at the same hours and wages and whether the Employer can be relieved of charges. These issues should also be addressed on remand since the bases of the Administrative Law Judge's decision have either been reversed (Able and Available) or remanded (refusal of suitable work).

DECISION:

The administrative law judge's decision dated August 24, 2010 is **REVERSED** to the extent that it finds the Claimant not able and available based on her limitation on hours. The Employment Appeal Board concludes that the Claimant's hours limitation does not render her not able and available for work during the weeks in question. This matter is further **REMANDED** to an administrative law judge in the Workforce Development Center, Appeals Section. The administrative law judge shall conduct an additional hearing following due notice in order to address whether the Claimant is disqualified based on a refusal of suitable work, and to address whether the Claimant is still employed at the same hours and wages, and to address whether the Employer can be relieved of charges. After the hearing, the administrative law judge shall issue

a decision that provides the parties appeal rights. Our finding today that the Claimant is not ineligible based on her limitation on her hours does not prevent the Administrative Law Judge from finding, after the remand hearing, either that the Claimant is disqualified based on a refusal of suitable work or that she is not so disqualified. Nor does today's finding bear on the Administrative Law Judge's authority to rule on the issue of being employed at the same hours and wages, and the relief of charges under §96.4(3) and §96.7(2)(a). The Administrative Law Judge's finding of a disqualification based on refusal of suitable work is not vacated at this time, and remains in force unless and until the Department makes a differing determination pursuant to this remand.

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John A. Peno

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Elizabeth L. Seiser

RRA/fnv