

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MIKEL S O'HAYER
617 INLAND RD
TIPTON IA 52772

CEDAR VALLEY GOLF CORP
2228 HICKORY GROVE RD
DAVENPORT IA 52804

AMENDED

Appeal Number: 06A-UI-02001-LT
OC: 01-15-06 R: 04
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Iowa Code § 96.4(3) - Able and Available
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

Employer filed a timely appeal from the February 13, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 8, 2006. Claimant did participate. Employer did participate through Mark Burns. The administrative law judge took judicial notice of the administrative record. Employer's Exhibit 1 was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant has been employed as a full-time groundskeeper and maintenance worker during the golf season since 2001. His last day of work was May 26, 2005 when he was injured at work. He

then worked in the tavern on light duty during June and July 2005. Employer removed him from that duty because he could not run the register, stock shelves or the cooler or bring up ice from the basement because of his restrictions, and it was impractical for employer to have two people working in that position. As of November 28, 2005 the workers' compensation carrier ceased paying him temporary total disability (TTD) workers' compensation benefits because he was not complying with medical instructions and failed repeatedly to keep medical (he rescheduled twice with Dr. Brady because of lack of transportation) and physical therapy appointments on September 22, 23, October 3, 6 and 12, 2005. Although he rescheduled the appointments, it delayed his course of treatment. His physical restrictions ("Sitting job mainly, able to [change] positions frequently. No riding on lawn equipment.") remain the same.

He has been looking for work as a food service worker (Pizza Hut), factory worker, gas station attendant, and farm equipment sales clerk. He has not looked outside of Tipton since he does not have transportation outside of town.

The claimant has received unemployment benefits since filing a claim effective January 15, 2006.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work

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".

871 IAC 24.22(1)a provides:

Benefits 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.

(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.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A

statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

871 IAC 24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

Inasmuch as the injury was work-related, the treating physician has released the claimant to return to work with restriction, and the claimant has declined the accommodated work and has not presented other medical evidence that the work offered was not appropriate for the restrictions, he has not established his ability to work. Furthermore, the jobs for which he has applied so far do not appear to meet his medical restrictions and the options are further limited by his lack of transportation. Benefits are denied.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision dated February 13, 2006, reference 01 is reversed. The claimant is not able to work and available for work effective November 27, 2005. Benefits are withheld until such time as the claimant obtains a medical release to return to work and makes himself reasonably available for work. The claimant is overpaid benefits in the amount of \$1,048.00.

dml\kkftjc