

IOWA DEPARTMENT OF INSPECTIONS & APPEALS
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

DECISION OF THE ADMINISTRATIVE LAW JUDGE

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INVESTIGATION AND RECOVERY
IOWA WORKFORCE DEVELOPMENT
1000 EAST GRAND AVENUE
DES MOINES IA 50319-0209

DAN ANDERSON, IWD

Appeal Number: 08-IWDUI-020
OC: 01/14/07
Claimant: Appellant (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 the department. 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)

February 22, 2008

(Decision Dated & Mailed)

Section 96.4-3 - Able and Available
871 IAC 24.22 – Benefit Eligibility Conditions
871 IAC 24.23 – Availability Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from a Iowa Workforce Development Department decision dated January 18, 2008, reference 04, which held the claimant ineligible for benefits the week ending December 29, 2007, because he was unable to work the major portion of the week.

The hearing was held pursuant to due notice on February 21, 2008, by telephone conference call. The claimant participated. The employer and Iowa Workforce Development did not participate.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having considered all of the evidence in the record, finds that: The claimant was hired by the employer (B-C Construction), as a full-time laborer in September 2006. The claimant had previously worked for J & J Construction, but he became an employee of B-C Construction when it acquired the business of his previous employer.

The claimant worked a seasonal pattern of employment where he worked full-time hours during the spring, summer and early fall, and a reduction in hours that would lead to a lay-off during the winter months. The claimant filed a claim for benefits effective January 14, 2007 due to a lay-off, and his claim was not protested by his employer.

The claimant returned to employment in March 2007, and he worked full-time hours thirty-four to fifty, until the work slowed-down in November. The claimant's supervisor, Brian Corrigan, advised that he could call-in or report to work on Mondays, and find-out what was available. The claimant re-opened his unemployment claim due to the reduction in work-hours.

During November, the claimant worked part-time hours, averaging six to ten when he usually worked on Mondays and Tuesdays. As he had done in the past, the claimant was given permission to be off work during the deer season (December 1-5) in early December. The claimant did report for work, and did work for one day, on the Monday following the deer season. At the end of the week, the employer had a Christmas party and Supervisor Corrigan told him the work was way, way, slow, and that he would call the claimant, if needed. The claimant received no calls for work during the period from December 16 to December 22nd.

Supervisor Corrigan contacted the claimant on his cell phone on December 26, and asked if he had a certain drill in his possession. The claimant replied that he did have it in the company pickup truck that he was allowed to use, even when not working. The claimant made arrangements for his supervisor to get the drill.

Sometime later, in January 2008, after the employer protested the claimant's unemployment claim, Supervisor Corrigan visited the claimant, and took-back the company pick-up truck. The employer offered the claimant no further work.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is able 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(96) 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.

(2) *Available for work.*

871 IAC 24.23(96) Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
24.23(29) Failure to work the major portion of the scheduled workweek for the claimant's employer.

The administrative law judge concludes that the claimant was able and available for work on the same part-time, on-call basis that he had been working to the employer in November 2007, when he re-filed his unemployment claim due to a seasonal lay-off, such that no disqualification should be imposed. The disqualification section cited above requires the claimant to have been working a "scheduled" workweek, which he was not due to being put on an on-call, work basis, due to a seasonal lay-off. The claimant was not scheduled and/or called-in to work and refused for the week ending December 29, 2007, such that no availability disqualification may be imposed.

DECISION:

The decision of the representative dated January 18, 2008, reference 04, is REVERSED. There is No availability disqualification for the week ending December 29, 2007, and benefits are allowed, provided the claimant is other wise eligible.

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