

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSEPH L JOHNSON
Claimant

APPEAL NO. 08A-UI-01367-H2T

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

RODNEY CHRISTNER CONSTRUCTION
Employer

**OC: 01-28-07 R: 03
Claimant: Respondent (2R)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 31, 2008, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on February 25, 2008. The claimant did participate. The employer did participate through Rodney Christner, Owner.

ISSUE:

Did the claimant fail to return to work after a layoff?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: The claimant worked full time for the employer beginning in early 2005 as a construction worker in the summer and snow remover in the winter months.

In the past the claimant and each of his coworkers was assigned a specific list of business or customers that were their responsibility to shovel or plow out whenever it snowed. In the past whenever it snowed the claimant reported for work and plowed or shoveled out his assignment. When there was no construction or concrete work or snow removal work, the claimant was on lay off status.

On December 6, 10 and 15 the claimant worked performing various snow removal duties. The claimant was to work performing snow removal duties again on December 21 and 22. The claimant called the employer and told him that he had car problems and could not get his car started or moving. The claimant did not work on December 21 and 22 due to car problems. On December 21 or 22 the claimant was told that when it snows he needed to come in to work to participate in snow removal activities as he had in the past.

The claimant was again to work on December 28 removing snow. The claimant neither called in to report why he would not be at work nor did he show up to perform his snow removal tasks as he had in the past.

The claimant participated in the fact-finding interview held on January 25, 2008. After the interview ended the claimant called the employer, Mr. Christner, and indicated he wanted to return to work. Mr. Christner told him to report to work the following day to participate in snow removal activities. The claimant did not report for work and has since been separated from his employment.

At hearing the claimant was able to recite correctly from memory, both of Mr. Christner's cell phone numbers, his office phone number and his home phone number. The claimant clearly knew how to contact the employer. The claimant failed to contact the employer after December 22 until he called the employer after the fact-finding interview on January 25 and asked to return to work. The employer told the claimant to return to work the following day but the claimant did not return to work again. The claimant did not report back to work when it snowed after December 22. The claimant was on lay off status until it snowed when he was expected to come back to work and perform snow removal duties as he had in the past.

Because of the heavy snows in late 2007 and early 2008, snow removal work was available for the claimant on December 27, 28, 29, 30, 31 and January 1, 10, 11, 17, 22 and 24.

Claimant has received unemployment benefits since filing a claim for benefits.

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 effective December 21, 2007.

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".

When it snowed there was work available for the claimant. The claimant knew that he should report for snow removal work as he had done so in the past. The claimant's chose not to work when work was available making himself not able to and available for work. Accordingly, benefits are denied.

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

REMAND: The separation issue delineated in the findings of fact is remanded for an initial review and determination.

DECISION:

The January 31, 2008, reference 02, decision is reversed. The claimant is not able to work and available for work effective December 21, 2007. Benefits are denied. Claimant is overpaid benefits in the amount of \$880.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css