

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAMON BERRY
Claimant

APPEAL NO: 10A-UI-02374-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

BOB LENC LANDSCAPING INC
Employer

OC: 02-01-09
Claimant: Appellant (1)

Section 96.4-3 - Able and Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 8, 2010, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 24, 2010. The claimant participated in the hearing with Attorney Joseph Powell. Felicia Ramirez, Human Resources Manager and Jill Shirley, Snow Coordinator, participated in the hearing on behalf of the employer. Claimant's Exhibits A, B, and C were admitted into evidence.

ISSUE:

The issue is whether the claimant is able and available for work.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was hired as a full-time irrigation laborer for Bob Lenc Landscaping on September 17, 2007. The employer does most of its work in the summer but also regularly works during the winter removing snow or putting up holiday lights. If an employee is laid off and collecting unemployment benefits, he is required to sign up for snow removal. The claimant worked removing snow in 2007, 2008 and the early months of 2009. He testified in the hearing that he never did snow removal in the past and that snow removal was merely optional. The regular work season ended November 5, 2009, and the claimant was laid off. When he was called for snow removal beginning in December 2009, he was not available due to illness, childcare and vacation plans. He said that when he was hired, he gave his supervisor a note about his asthma which confirmed he had a hard time breathing in hot and cold weather. There was no doctor's note in the file and the employer told him he needed a doctor's excuse or had to work. The employer was willing to accommodate him and allow him to work in the truck until he could provide another doctor's note. The claimant reported to work December 7, 2009, but said he could not work December 9, 2009, because he could not get into work because of the snow. The employer sent a truck to pick him up that evening and the claimant worked six hours that night. He advised the employer he could only work evenings but no daytime hours due to childcare issues. The employer called the claimant for snow removal after that but could not reach him. A big snow storm was predicted and the employer called the claimant December 21,

2009, to get employees lined up to work. The claimant said he was going out of town for the holidays and could not work anyway because of childcare. Although the employer has a lot of work removing snow, it stopped calling the claimant for snow removal because he was unavailable, resistant and unreliable.

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 24.23(16) provides:

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

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

The preponderance of the evidence confirms the claimant was hired for landscaping and snow removal and had worked doing both. However, as of December 2009 he unduly limited his availability by refusing to work removing snow during the winter months. He contends he could work during the nights but was not available almost every time the employer called him in to work. He does not meet the availability requirements of the law, and therefore benefits must be denied.

DECISION:

The February 8, 2010, reference 02, decision is affirmed. The claimant does not meet the availability requirements as of December 12, 2009. Benefits are denied.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/cs