

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SAMUEL G FOSTER**  
Claimant

**APPEAL NO: 10A-UI-16692-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OMG MIDWEST INC**  
Employer

**OC: 01/03/10**

**Claimant: Appellant (2)**

Section 96.4-3 - Able and Available  
871 IAC 24.22(2)j – Leave of Absence

**STATEMENT OF THE CASE:**

Samuel G. Foster (claimant) appealed a representative's December 1, 2010 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits in connection with OMG Midwest, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 21, 2011. The claimant participated in the hearing. The employer failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing and did not participate in the hearing. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant eligible for unemployment insurance benefits by being able and available for work? Was there period of voluntary unemployment through a leave of absence?

**FINDINGS OF FACT:**

After a prior period of employment with the employer, the claimant most recently started working for the employer in 2006. He works full time as a semi-truck driver in the state and local area. He continued working through November 3, 2010, but the employer would not provide further work for him until about December 3, 2010. After returning to work, he was subsequently laid off for a seasonal lack of work as of about December 9, 2010.

The employer considered the claimant on a leave of absence from about November 4 through about December 3; however, the leave was not with the claimant's consent. The reason for the leave was that the employer's doctor would not approve the claimant to return to work.

The claimant was required to have periodic physical examinations in order to maintain the commercial driver's license (CDL) needed for his job. The employer had advised him on about August 3 that his medical clearance was expiring and would need to be renewed by November 3. The claimant had the physical examination prior to October and cleared the DOT

physical requirements at that time, but the doctor did indicate that he wanted the claimant to perform a sleep apnea test. The claimant did have the test performed on October 21. On October 29 the employer's physician indicated he still would not issue the necessary medical clearance card until the claimant went through a 30-day continuous positive airway pressure (CPAP) monitoring process. The claimant had not previously been advised that he needed to anticipate allowing time for this process. He did begin the 30-day monitoring process, but as the process did not begin until a few days prior to the expiration of his current medical authorization, the new medical authorization was not issued until shortly before the claimant returned to work as of about December 3.

The CPAP monitoring requirement was not a requirement for the DOT medical authorization at the time of the claimant's examination, although it was scheduled to become part of the normal process in the future. However, since the employer's doctor would not issue the new medical authorization without the claimant completing the 30-day CPAP monitoring, he could not perform his regular job duties after November 3 until the new authorization was issued. The employer declined to provide other work for the claimant other than for about two days, but rather placed him on leave status until the new medical authorization was issued.

As a result of the employer not allowing the claimant to work, as of the week beginning October 31 the claimant reopened his prior claim for unemployment insurance benefits established January 3, 2010, and sought unemployment insurance benefits for the period of time between November 3 and when the employer returned him to work on or about December 3. After December 9 he continued to seek unemployment insurance benefits due to the seasonal layoff for lack of work.

#### **REASONING AND CONCLUSIONS OF LAW:**

For each week for which a claimant seeks unemployment insurance benefits, he must be able and available for work. Iowa Code § 96.4-3. In general, an employee who is only temporarily separated from his employment due to being on a leave of absence is not "able and available" for work during the period of the leave, as it is treated as a period of voluntary unemployment. 871 IAC 24.22(2)j. However, the leave of absence in this case was not "negotiated with the consent of both parties" as required for application of the cited rule.

The claimant's unemployment between October 30 and about the week ending December 4 was due to the employer, through its agent, its doctor, requiring the claimant to complete a 30-day period of being monitored on the CPAP, a requirement that was not then a part of the DOT requirement, and a requirement that was not communicated to the claimant in time for him to satisfy the requirement prior to the November 3 expiration of his prior medical authorization. The period of unemployment was therefore at the choice and discretion of the employer, not the claimant, and was not a "voluntary period of unemployment."

Although the employer might not have been able to allow the claimant to perform his regular job duties after his medical authorization expired, as the renewal was not issued by November 3 due to the actions of the employer's agent, its doctor, it was the employer's choice not to provide other work the claimant could have done without the authorization. The claimant remained able and available for such other work. In effect, the period of unemployment prior to the issuance of the new medical authorization was a layoff by the employer, not a true "leave of absence." Benefits are allowed, if the claimant is otherwise eligible.

Further, as of the benefit week ending December 11, 2010, the claimant was not even on an asserted "leave of absence," but was laid off outright by the employer; there is no basis for a denial of benefits.

**DECISION:**

The representative's December 1, 2010 decision (reference 01) is reversed. The claimant not on a bona fide "leave of absence," but was able and available for work effective the benefit week beginning October 31, 2010; the period of temporary separation was a period of involuntary unemployment attributable to the employer, in effect a layoff. For this reason, the claimant is qualified to receive unemployment insurance benefits for the period from October 31, 2010 through December 4, 2010. As of the week ending December 11, he had been returned to work and then was eligible to receive unemployment insurance benefits as being on a seasonal layoff for lack of work, not any continuation of an asserted "leave of absence."

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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