

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MODESTO LIZARDO
Claimant

APPEAL NO. 07A-UI-07254-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FRIESEN USA INC
Employer

**OC: 06/03/07 R: 01
Claimant: Respondent (4)**

Section 96.4-3 – Able and Available for Work
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Friesen USA, Inc. (employer) appealed an unemployment insurance decision dated July 19, 2007, reference 02, which held that Modesto LizarDO (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 4, 2007. The claimant participated in the hearing. Oliver Koch interpreted on behalf of the claimant. The employer participated through Al Gonzalez, Human Resources & Safety Director. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired as a full-time assembler on January 22, 2007 and continues in that same capacity with no significant change in his hours or wages. He filed his claim effective June 3, 2007 but continued working, except for the two-week period ending July 7, 2007. The employer's equipment was down during the week ending June 30, 2007 and the plant was closed during the week ending July 7, 2007. Other than this, the claimant continues to work full-time.

The claimant filed a claim for unemployment insurance benefits effective June 3, 2007 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue to be determined is whether the claimant is still employed with the employer for the same hours and wages as contemplated in the original contract of hire.

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(23) provides:

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

(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

The claimant has the burden of proof in establishing his ability and availability for work. Davoren v. Iowa Employment Security Commission, 277 N.W.2d 602 (Iowa 1979). He was hired full-time and continues in that same capacity. The claimant is working to such a degree that he is removed from the labor market and not available for work. However, the employer did not have work for the two-week period ending July 7, 2007 and the claimant is available for benefits for that time frame. Otherwise, he does not meet the availability requirements of the law. Benefits are denied from June 3 through June 23, 2007.

DECISION:

The unemployment insurance decision dated July 19, 2007, reference 02, is modified in favor of the appellant. The claimant is not eligible to receive unemployment insurance benefits from June 3 through June 23, 2007, because he was not available for work. The claimant is overpaid benefits in the amount of \$107.00.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw