

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CRUZ MARTINEZ

Claimant

APPEAL NO. 09A-UI-07683-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

JASPER CONSTRUCTION SERVICES

Employer

OC: 12/14/08

Claimant: Respondent (4)

Section 96.5-3-a – Job Refusal
871 IAC 24(15)a, b – Health/Physical Fitness
Section 96.4-3 – Able and Available
871 IAC 24.23(35) – Unable to Work/Doctor's Care
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated May 20, 2009, reference 01 that it made no offer of suitable work to the claimant on April 13, 2009, and benefits are allowed. A hearing was held on June 11, 2009. The claimant participated with Ike Rocha, as his interpreter. Don Van Dusseldorp, Vice President, participated for the employer.

ISSUES:

The issue is whether the claimant refused an offer of suitable work.

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

The issue is whether the claimant is overpaid benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having considered the evidence in the record, finds that: The claimant worked a full-time laborer job for the employer from April 2005 to December 4, 2008 when he was laid-off. The employer did not protest the claimant's unemployment claim due to the lay-off.

Jasper Construction Foreman Garcia called the claimant on April 20, 2009, and re-called him to his former job to begin in the following week. The claimant told him he would not be going back to work at Jasper Construction, as he was going to work for someone else.

The claimant had hernia surgery in April 2009, and he remained under the care of his doctor who had not released him to return to work without restriction. The claimant ceased claiming unemployment benefits after the week ending April 18, 2009. The doctor told the claimant not to

work for two or three weeks. The claimant has begun work for another employer, and his current job is within his doctor's restrictions.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-3-a provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

(1) One hundred percent, if the work is offered during the first five weeks of unemployment.

(2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.

(3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.

(4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

The administrative law judge concludes that the claimant had a good cause for refusing his employer's recall to work on April 20, 2009 due to being under doctor's care for a hernia repair who had not released him to work without restriction. Department regulations recognize that claimant's condition is a good cause for a job refusal (871 IAC 24.24.15).

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(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

The administrative law judge further concludes that the claimant is not able and available for work effective April 19, 2009 due to being under doctor's care for hernia repair, and not being released to return to work without restriction.

Although the claimant was not clear as to the timing of his surgery as it relates to his job refusal, his recovery from the surgery, and when he began other employment, he ceased claiming for unemployment benefits after the week ending April 18, 2009 that is before he refused the recall to work. The employer is not prejudiced by the claimant's job refusal and his inability to work, because these events post-date his no longer claiming for unemployment.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue

of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

There is no overpayment in this matter, because the availability disqualification is imposed after the claimant ceased claiming benefits and began work for a new employer. Should the claimant become unemployed from his new employer, he should provide the department with a doctor's statement that he has recovered from his hernia repair, and is released without restriction in order to show he is able and available for work.

DECISION:

The decision of the representative dated May 20, 2009, reference 01 is modified. The claimant had a good cause for refusing a recall to suitable work. An availability disqualification is imposed effective April 19, 2009, as the claimant has not been released by his doctor to perform work without restriction.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs