

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEVEN MCDONALD
Claimant

APPEAL NO. 11A-UI-03148-WT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BRICKLAYERS & ALLIED CRAFTSMEN
LOCAL 3**
Employer

**OC: 03/11/11
Claimant: Appellant (2)**

Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Claimant filed an appeal from a fact-finding decision dated March 11, 2011, reference 02 (which amended reference 01), which held claimant was still employed in an on-call job and not able and available for work. After due notice, a telephone conference hearing was scheduled for and held on April 4, 2011. Claimant participated personally. Employer participated by Jeff Smith.

ISSUE:

The issue is whether claimant is able and available for work and specifically whether the “on-call” rule excludes claimant from receiving benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds the following. Mr. McDonald was employed by Weitz Construction as a union bricklayer until approximately January 2010. As a union bricklayer, Mr. McDonald earned union scale wages and benefits. He has been laid off since that time. In addition to being a union bricklayer, Mr. McDonald was simultaneously employed as an executive board officer of Bricklayers & Allied Craftsmen Local 3. Specifically, he is the chapter chairman for the Cedar Rapids area, a position he has held for approximately nine years. In that position, he earned a flat fee of \$150 per meeting attended. He usually attends one meeting each month, although this varies to some degree based upon the needs of leadership. The job includes various union functions, including negotiating contracts on behalf of all employees covered by the Bricklayers & Allied Craftsmen, in addition to conducting normal union business operations for the benefit of its members.

According to Iowa Workforce Development records, Mr. McDonald has significant base period wages from Weitz Construction in multiple quarters. He is actively and earnestly seeking work as a bricklayer.

REASONING AND CONCLUSIONS OF LAW:

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.

The issue clearly is not whether claimant was able to work, it is whether he was available to work as of December 12, 2010. The administrative rules outline specific exclusions under the able and available statutory provisions. Although not explicit, the fact-finding decision relied upon 871 IAC 24.24.22(2)(i) to deny claimant benefits. "An individual whose wage credits earned in the base period of the claim consist exclusively of wage credits by performing on-call work, such as banquet worker, railway worker, substitute school teacher or any other individual whose work is solely on-call work during the base period, is not considered an unemployed individual within the meaning [of Iowa law]. An individual who is willing to accept only on-call work is not considered to be available for work." 871 IAC 24.22(2)(i).

Unfortunately, "on-call" employment is not well-defined within the statute or rules. Examples of on-call employment are listed within 871 IAC 24.22(2)(i), such as banquet workers and substitute teachers. The apparent purpose of the "on-call" provisions of the statute and rule is to place reasonable limitations on the receipt of benefits for workers who prefer and choose to work "on-call" employment, only working when work is available in a limited field. For some workers, an on-call lifestyle is preferred over regular, full-time employment. In essence, the rule as applied does not reward the choice to engage exclusively in on-call work with unemployment benefits to supplement this lifestyle choice.

Under the facts presented, it is found that the work of Mr. McDonald is not at all similar to the work of banquet workers or substitute teachers and, as such, does not qualify as "on-call" employment within the meaning of the rule. Mr. McDonald's work for the Bricklayers & Allied Craftsmen included attending one regularly scheduled meeting per month. This is not an example of a worker who prefers to work in an on-call position so he can enjoy working limited hours for lifestyle reasons. He serves as an elected union official and attends regularly scheduled union meetings to perform business on behalf of all of the workers represented by the Bricklayers & Allied Craftsmen. Significantly, the work is usually performed in conjunction with his full-time employment as a bricklayer. Mr. McDonald has been unable to find work as a bricklayer.

Aside from not being "on-call" employment, the type of work performed by Mr. McDonald is actually a form of service to his fellow workers and the workforce in general. It is not at all the type of work the rule seeks to contain. To be clear, however, this decision does not hold that a part-time union official could never be classified as "on-call"; but, under the facts presented herein, Mr. McDonald is not an on-call worker.

Even assuming that Mr. McDonald somehow could be considered an "on-call" worker under Rule 24.22(2)(i), the plain text of the language would exclude its application in any event. On its face, the exclusion only applies to workers "whose wage credits earned in the base period of the claim consist *exclusively* of wage credits by performing on-call work ..." Id. (*Emphasis added*). The word *exclusively* is found to be significant and controlling in interpreting this rule.

Mr. McDonald's primary occupation is that of a union bricklayer. This is reflected in his base period wages. Mr. McDonald further testified that he is able and available to accept work as a bricklayer and that he is actively and earnestly seeking such work. He is found to be credible.

In arriving at the conclusions set forth above, the undersigned administrative law judge is mindful of the guidance provided in Iowa Code section 96.2 (2009). This case is ultimately decided as a matter of statutory construction and the statute itself indicates how it is to be construed. The statute is to be interpreted liberally to achieve its beneficial purpose of providing economic relief to the unemployed, their families, and the communities in which they live. Strained or forced constructions which deny benefits to unemployed workers should be avoided at all costs. In cases where reasonable minds could differ as to how to interpret the statute, any doubt should be interpreted in favor of the unemployed worker.

For the foregoing reasons, Mr. McDonald is found to be able and available for work as of January 16, 2011.

DECISION:

The fact-finding decision dated March 11, 2011, reference 02, is reversed. Claimant is eligible to receive unemployment insurance benefits effective January 16, 2011, provided claimant meets all other eligibility requirements.

Joseph L. Walsh
Administrative Law Judge

Decision Dated and Mailed

jlw/kjw