

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIMOTHY HIERS SR
Claimant

APPEAL NO. 07A-UI-00061-BT

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

VARIETY GLASS FABRICATION
Employer

**OC: 11/12/06 R: 01
Claimant: Respondent (4)**

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

STATEMENT OF THE CASE:

Variety Glass Fabrication, Inc. (employer) appealed an unemployment insurance decision dated December 22, 2006, reference 04, which held that Timothy Hiers Sr. (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 January 11, 2007. The claimant participated in the hearing. The employer participated through Lori Nahnsen, Co-owner. 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 to work?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired as a full-time delivery driver on May 23, 2005 and worked through November 3, 2006. As of November 5, 2006, he was unable to work due to a work-related injury pursuant to medical advice from a treating physician. He was released with a ten-pound lifting restriction on December 19, 2006, but his attorney did not provide the employer with that release until December 28, 2006. The employer contacted the claimant on January 5, 2007 stating that work was available and directed the claimant to report to work on January 8, 2007. The claimant replied that he first had to go to the doctor on January 8, 2007, and on that date he was again taken completely off work for one week.

The claimant filed a claim for unemployment insurance benefits effective November 12, 2006 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue to be determined is whether the claimant is able and available for work. In order for an individual to be eligible to receive unemployment insurance benefits, the evidence in the record must establish that he is able to work, available for work, and earnestly and actively seeking work. See Iowa Code §96.4(3) and 871 IAC 24.22.

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 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

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 taken off work by his treating physician on November 5, 2006 and although he was released to return with restrictions on December 19, 2006, the release was not provided to the employer until December 28, 2006. He was able and available to work for the one-week period ending January 6, 2007 but was again taken off work on January 8, 2007. The claimant is eligible for benefits for the one-week period ending January 6, 2007, provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The unemployment insurance decision dated December 22, 2006, reference 04, is modified in favor of the appellant. The claimant was able and available to work for the one-week period ending January 6, 2007, but is disqualified after that. The claimant is overpaid benefits in the amount of \$642.00.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw/kjw