

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT J ATZENI
Claimant

APPEAL NO. 16A-UI-05372-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

FLAGGER PROS USA LLC
Employer

OC: 03/27/16
Claimant: Appellant (2)

Section 96.4-3 – Able & Available for Work

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated May 10, 2016, reference 01, which denied unemployment insurance benefits as of March 27, 2016 finding that the claimant was unduly limiting his availability for work by not being willing to work during times when work was available in his occupation. After due notice was provided, a telephone hearing was held on May 25, 2016. Claimant participated. The employer participated by Ms. Kaleena Middendorf, Human Resource Assistant.

ISSUE:

The issue is whether the claimant is able and available for work within the meaning of the Iowa Employment Security Law.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Robert Atzeni began employment with Flagger Pros USA LLC on April 29, 2015. The claimant was employed as a full-time flagger performing seasonal work and is considered an “on call” employee after the seasonal work ends. Mr. Atzeni was last employed by Flagger Pros USA LLC on April 29, 2016. Mr. Atzeni was paid by the hour.

After the seasonal flagging work had come to an end in February 2016, the claimant was assigned to additional flagger work intermittently as it became available. The claimant was, at times, assigned to flagging assignments at various locations, but inclement weather and other factors often resulted in the claimant working only one or two days out of a work week. Mr. Atzeni wanted more working hours, however, the hours available were subject to the weather conditions and other factors related to projects that the claimant was assigned to work on.

Flagger Pros USA LLC attempted to contact Mr. Atzeni for a work assignment for the week of March 27 through April 2, 2016 but the company was unable to reach Mr. Atzeni by telephone. The employer believed they were calling the claimant's cell phone at a location where the claimant could receive a call and left a message offering work to the claimant. Mr. Atzeni did not receive the message and did not know that a work assignment was available. During this time Mr. Atzeni had been accepting limited work assignments that had been offered to him by Flagger Pros USA LLC as well as supplementing his income by taking spot jobs for another employer.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes that Robert Atzeni has been able and available for work since establishing a claim for benefits that was effective March 27, 2016. He was.

Iowa Code § 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".

Iowa Admin. Code r. 871-24.23(3) provides:

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

(3) If an individual places restrictions on employability as to the wages and type of work that is acceptable and when considering the length of unemployment, such individual has no reasonable expectancy of securing work, such individual will be deemed not to have met the availability requirements of Iowa Code § 96.4(3).

Iowa Code § 96.3-4 provides:

4. Determination of benefits. With respect to benefit years beginning on or after July 1, 1983, an eligible individual's weekly benefit amount for a week of total unemployment shall be an amount equal to the following fractions of the individual's total wages in insured work paid during that quarter of the individual's base period in which such total wages were highest; the director shall determine annually a maximum weekly benefit amount equal to the following percentages, to vary with the number of dependents, of

the statewide average weekly wage paid to employees in insured work which shall be effective the first day of the first full week in July:

If the number of dependents is:	The weekly benefit amount shall equal the following fraction of high quarter wages:	Subject to the following maximum percentage of the statewide average weekly wage.
0	1/23	53%
1	1/22	55%
2	1/21	57%
3	1/20	60%
4 or more	1/19	65%

The maximum weekly benefit amount, if not a multiple of one dollar shall be rounded to the lower multiple of one dollar. However, until such time as sixty-five percent of the statewide average weekly wage exceeds one hundred ninety dollars, the maximum weekly benefit amounts shall be determined using the statewide average weekly wage computed on the basis of wages reported for calendar year 1981. As used in this section "dependent" means dependent as defined in section 422.12, subsection 1, paragraph "c", as if the individual claimant was a taxpayer, except that an individual claimant's nonworking spouse shall be deemed to be a dependent under this section. "Nonworking spouse" means a spouse who does not earn more than one hundred twenty dollars in gross wages in one week.

Iowa Admin. Code r. 871-24.24(1)a provides:

(1) Bona fide offer of work.

a. In deciding whether or not a claimant failed to accept suitable work, or failed to apply for suitable work, it must first be established that a bona fide offer of work was made to the individual by personal contact or that a referral was offered to the claimant by personal contact to an actual job opening and a definite refusal was made by the individual. For purposes of a recall to work, a registered letter shall be deemed to be sufficient as a personal contact.

An otherwise eligible claimant is eligible to receive benefits with respect to any week only if the evidence indicates that the individual is able to work, is available for work and is earnestly and actively seeking work. Iowa Code section 96.4(3) and 871 IAC 24.22. Claimant bears the burden of establishing that the claimant meets the above requirements. 871 IAC 24.22.

871 IAC 24.22(2) provides that to satisfy the availability requirement, an individual must be willing, able and ready to accept suitable employment which the individual does not have good cause to refuse. The individual must be attached to the labor market.

In the case at hand the claimant was attempting to accept various flagging assignments at remote locations, however, inclement weather often prevented Mr. Atzeni from working full weeks. During the times that he was seasonally laid off by Flagger Pros USA LLC the claimant at times also accepted spot jobs with other employees or traveled to work locations for Flagger Pros USA LLC that turned out to be of one or two days' duration instead of a full week's work as had previously been indicated by the employer.

Although the employer attempted to offer the claimant a work assignment for the week of March 27, 2016 through April 2, 2016, the offer was not made by personal contact. The employer left a message at a cell phone number that they believed belonged to the claimant and assumed that Mr. Atzeni would receive the message. He did not. Based upon the evidence in the record and application of the appropriate law, the administrative law judge concludes that Robert Atzeni has been able and available for employment since establishing his claim for benefits and, therefore, meets the eligibility requirements of the law.

DECISION:

The representative's decision dated May 10, 2016, reference 01, is reversed. Claimant has been able and available for work since establishing his claim for benefits. Accordingly, claimant is eligible to receive unemployment insurance benefits, provided that he meets all other eligibility requirements of Iowa. Law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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