

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VAJGERT, MICHAEL, R
Claimant

APPEAL NO. 12A-UI-10570-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES MOINES COLD STORAGE CO INC
Employer

OC: 07/29/12
Claimant: Respondent (1)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.4(3) – Still Employed Same Hours and Wages
Iowa Code Section 96.7(2) – Employer Liability

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 24, 2012, reference 01, decision that allowed benefits effective July 29, 2012, based on an agency conclusion that the claimant was able and available for work but was partially unemployed from Des Moines Cold Storage Company, Inc. After due notice was issued, a hearing was held on September 28, 2012. Claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Chad Witte represented the employer. The administrative law judge took official notice of the agency's administrative record (DBRO) of wages reported by the claimant and benefits disbursed to the claimant.

ISSUES:

Whether the claimant was able to work and available for work during the four-week period of July 29, 2012 through August 25, 2012, during which the claimant had an active claim for unemployment insurance benefits.

Whether the claimant was partially unemployed from his employment during the four-week period of July 29, 2012 through August 25, 2012, during which the claimant had an active claim for unemployment insurance benefits.

Whether the employer's account may be assessed for benefits paid to the claimant for the four-week period of July 29, 2012 through August 25, 2012.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Des Moines Cold Storage Company, Inc. contracts with the JBS hog production plant in Marshalltown to provide cold storage. Michael Vajgert has been employed by Des Moines Cold Storage for approximately 14 years as a full-time forklift driver and box thrower. During times where the cold storage workload diminishes, the employer assigns workers to perform building maintenance to keep the workers busy. During July 2012, JBS business decisions resulted in a

decrease in the cold storage work that Des Moines Cold Storage had available for its employees. Des Moines Cold Storage assigned workers, including Mr. Vajgert, to perform building maintenance. Included in the building maintenance projects was painting the outside of the employer's building during the hottest part of the Iowa summer. Mr. Vajgert declined to assist with painting the building in the heat and instead volunteered to go home instead.

Mr. Vajgert established a claim for unemployment insurance benefits that was effective July 29, 2012. Workforce Development calculated Mr. Vajgert's weekly unemployment insurance benefit amount at \$299.00. Mr. Vajgert continued his claim for four weeks, though the week that ended August 25, 2012. At that point, the cold storage work picked up again, Mr. Vajgert returned to his normal duties, and discontinued his claim for benefits.

Mr. Vajgert's reported wages and the unemployment insurance benefits disbursed to him were as follows:

<u>Benefit week end date</u>	<u>Wages reported</u>	<u>Benefits Disbursed.</u>
8/4/12	353.00	0.00
8/11/12	306.00	67.00
8/18/12	263.00	110.00
8/25/12	188.00	185.00

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. 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(2) 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.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment

insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

An individual shall be deemed partially unemployed in any week in which, while employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars. Iowa Code Section 96.19(38)(b).

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.

2. Contribution rates based on benefit experience.

a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.

(2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

(a) However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

[Emphasis added.]

The weight of the evidence in the record establishes that during the period of July 29, 2012 through August 25, 2012, the employer did not have full-time cold storage work available to Mr. Vajgert. Instead, the employer wanted to assignment Mr. Vajgert to perform other duties. One of the projects the employer wanted Mr. Vajgert to assist with was painting the outside of the employer's building during the hottest part of the Iowa summer. This proposed alternative work was a drastic change from Mr. Vajgert's normal work duties. Mr. Vajgert was not obligated to perform the painting work in order to demonstrate that he was available for his regular duties. Mr. Vajgert needed only to demonstrate that he was available for his regular duties to meet the work availability requirements of Iowa Code section 96.4(3). The weight of the evidence indicates Mr. Vajgert was indeed available for his usual duties during the four-week period when his claim was active. The evidence establishes that Mr. Vajgert was partially unemployed during the weeks that ended August 11, 18 and 25, 2012. Mr. Vajgert was eligible for the benefits he received for those three weeks, provided he was otherwise eligible. The employer's account may be charged for those benefits. Mr. Vajgert was not partially unemployed during the week that ended August 4, 2012 because his reported wages were greater than his weekly unemployment insurance benefit amount plus \$15.00.

DECISION:

The Agency representative's August 24, 2012, reference 01, is affirmed. The claimant met the work availability requirement during the four-week period of July 29, 2012 through August 25, 2012 when his claim was active. The claimant was partially unemployed during the weeks that ended August 11, 18 and 25, 2012 and was eligible for the benefits for those three weeks, provided he was otherwise eligible. The employer's account may be charged for those benefits. The claimant was not partially unemployed during the week that ended August 4, 2012 and was not eligible for benefits for that week.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs