

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

BRENDA L SLY

Claimant

and

FLAGGER PROS USA LLC

Employer

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HEARING NUMBER: 15B-UI-04472

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-3

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES IN PART AND AFFIRMS IN PART** as set forth below.

FINDINGS OF FACT:

The Administrative Law Judge's findings of fact are adopted by the Board as its own.

REASONING AND CONCLUSIONS OF LAW:

This case involves two issues. First is refusal of suitable work. If the Claimant had refused suitable work without good cause we would disqualify her until she earns ten times her benefit amount. Instead, we affirm the Administrative Law Judge on this issue and find for the Claimant. The second issue is availability to work. The Administrative Law Judge did not address this issue, although it was noticed for hearing. We find on this record that the Claimant was not available for work for the week starting on March 15, 2015 and ending March 21, 2015. She is, as a result, denied benefits for that one week only, and

need not earn requalifying wages. Moreover, since this is a case where both the Administrative Law Judge and the claims section allowed benefits, the Claimant will not be required to repay the overpayment. Instead, the only effect of today's decision will be to relieve the Employer of charges for the one week in question (\$213).

Refusal of Suitable Work: Under rule 871 IAC 24.24(4) “[b]efore a disqualification for failure to accept work may be imposed, an individual must first satisfy the benefit eligibility conditions of being able to work and available for work If the facts indicate that the claimant was or is not available for work, and this resulted in the failure to accept work or apply for work, such claimant shall not be disqualified for refusal since the claimant is not available for work.” That rule goes on to specify that “Two reasons which generally would be good cause for not accepting an offer of work would be if the claimant were gainfully employed elsewhere or the claimant did not reside in the area where the job was offered.” 871 IAC 24.24(4). As cited by the Administrative Law Judge this would be good cause for refusal of the offer regardless of whether we were to find a bona fide offer by personal contact and a definite refusal. We thus do not address those issues and affirm the Administrative Law Judge on **refusal of suitable work** only, on the ground that the Claimant had good cause for refusing the offers of March 13, and following.

Able and Available: Iowa Code section 96.4(3) (2015) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds:

The individual is able to work, is available for work, and is earnestly and actively seeking work....

871 IAC 24.22 expounds on this:

24.22(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.

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c. Intermittent employment. An individual cannot restrict employability to only temporary or intermittent work until recalled by a regular employer.

The burden is on the claimant to establish that she is able and available for work within the meaning of the statute. 871 IAC 24.22; *Davoren v. Iowa Employment Sec. Comm'n*, 277 N.W.2d 602, 603 (Iowa 1979). The Claimant did not show up at the hearing and so we are left with what evidence is in the record. That

evidence shows that the Claimant refused work with the Employer because she had a job starting ten days later. This is good cause for a job refusal for the purposes of a refusal of suitable work disqualification. But by the same token it means that the Claimant is not available for work during the week she was awaiting her new job to start. Just like someone who is on layoff becomes *unavailable* if she would not accept work while waiting to be recalled to an *old* job, just so someone also becomes unavailable if she would refuse jobs (including recalls) while waiting to start a *new* job. It is true this is good cause for work refusal purposes, but it does not excuse the availability and earnestly and actively seeking work requirements. *C.f.* 871 IAC 24.24(4)(Excusing work refusal based on “[I]ack of transportation, illness or health conditions, illness in family, and child care problems are generally considered to be good cause for refusing work or refusing to apply for work” but specifying that still “the claimant’s availability would be the issue to be determined in these types of cases.”) In short, she got a job offer, accepted, and stopped looking for work, and looking for work is a prerequisite to collecting unemployment benefits. We note that four weeks following the application for benefits was up before March 15, and no issue of temporary unemployment applies here. The Claimant is thus denied benefits for the one week ending on March 21, 2015.

No Repayment Of Overpayment: Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

871 IAC 23.43(3) Rule of two affirmances.

- a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
- b. However, if the decision is subsequently reversed by higher authority:
 - (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
 - (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
 - (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer’s account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant **will not be required to repay benefits** already received.

DECISION:

The administrative law judge’s decision dated August 20, 2010 is **REVERSED IN PART AND AFFIRMED IN PART**. The Employment Appeal Board concludes that the Claimant did not refuse suitable work without good cause and affirms the Administrative Law Judge on this issue. The Employment Appeal Board reverses the Administrative Law Judge decision to the extent that it allows benefits for the week starting on March 15, 2015 and ending on March 21, 2015. Instead, the Board finds that the Claimant was not available to work that week and thus is denied benefits for that week. Thereafter, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged for the \$213 payment made to the Claimant for the week ending March 21, 2015.

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman

RRA/fnv