

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

BRUCE L JOHNSON
Claimant

ATLANTIC PEST CONTROL LLC
Employer

APPEAL NO. 20A-UI-12857-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/29/20
Claimant: Appellant (2/R)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.5(3)(a) – Refusal of Suitable Work

STATEMENT OF THE CASE:

Bruce Johnson filed a timely appeal from the July 6, 2020, reference 01, decision that disqualified him for benefits, based on the deputy's conclusion that Mr. Johnson refused recall to suitable work on April 1, 2020. After due notice was issued, a hearing was held on November 20, 2020. Mr. Johnson participated personally and was represented by attorney Stuart Higgins. Mr. Higgins presented testimony through Mr. Johnson and Jen Wilson. Kerri Towne represented the employer and presented additional testimony through Bill Menefee. Exhibits A through D was received into evidence. The administrative law judge took official notice of the following Agency administrative records: DBRO and KCCO.

ISSUES:

Whether the claimant was able to work and available for work during the period of March 29, 2020 through May 16, 2020.

Whether the claimant refused an offer of suitable work without good cause on about April 1, 2020.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Bill Menefee owns and operates Atlantic Pest Control, L.L.C. (APC). The company provides residential and commercial insect and rodent extermination services. Bruce Johnson was employed by APC as a full-time pest control service technician from 2010 until August 2020. Mr. Johnson was assigned a sales and service route and was responsible for servicing existing accounts and soliciting new business. Mr. Johnson's employment was commission-based. Mr. Johnson was guaranteed \$450.00 per week and received a 35 percent commission on the weekly revenue that exceeded \$1,500.00. In March 2020, the COVID-19 pandemic began to have a severe financial impact on the APC business, as clients declined to let APC staff into their homes and commercial facilities. Mr. Menefee had his administrative assistant, Jen Wilson, research available unemployment insurance relief, including whether Mr. Menefee could qualify for unemployment insurance benefits under the CARES Act.

On March 31, 2020, Mr. Menefee convened a staff meeting to discuss the company's financial straits. At Mr. Menefee's request, Ms. Wilson ran the meeting. During the meeting, Mr. Menefee solicited input from the service technicians regarding the extent to which customers on their routes were declining service. The majority of customers, including the majority of customers on Mr. Johnson's route, were declining service. Mr. Menefee told Mr. Johnson, two other technicians, and Ms. Wilson that they would be laid off and should apply for unemployment insurance benefits. After the meeting, Mr. Menefee vacillated between rescinding the layoff notice and reiterating the layoff notice. The final outcome was that Mr. Johnson, the other two service techs, and Ms. Wilson were temporarily laid off. Mr. Johnson's last day of work before the layoff took effect was April 1, 2020. Mr. Menefee had Mr. Johnson and the other two service techs return their company vehicles to the workplace and clean them out in case the vehicles were repossessed. Two other technicians whose routes centered more on exterior pest control at grain facilities remained on staff to service their own accounts and to service customers on other routes as needed. During the layoff period, Mr. Johnson remained physically and mentally able to work, despite diabetes treated with oral medication. Mr. Johnson remained available to Mr. Menefee and continued to field calls from route customers. Mr. Menefee touched base with Mr. Johnson to discuss when to recall Mr. Johnson to the employment, based on whether customers were signaling they were open to service calls. On April 27, 2020, Mr. Menefee and Mr. Johnson agreed to a May 14, 2020 return-to-work date and Mr. Johnson returned to the full-time employment at that time.

Mr. Johnson established a claim for unemployment insurance benefits that Iowa Workforce Development deemed effective March 29, 2020. IWD set the weekly benefit amount at \$481.00. Mr. Johnson made weekly claims for each of the seven weeks between March 29, 2020 and May 16, 2020. For the week that ended April 4, 2020, Mr. Johnson reported the \$360.00 in wages he made during the week when the layoff went into effective. During the week that ended May 16, 2020, Mr. Johnson reported the \$350.00 in wages he earned during the week he was recalled to the employment.

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".

Iowa Admin. Code r. 871-24.22(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.

Iowa Admin. Code r. 871-24.23(41) provides:

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

(41) The claimant became temporarily unemployed, but was not available for work with the employer that temporarily laid the claimant off. The evidence must establish that the claimant had a choice to work, and that the willingness to work would have led to actual employment in suitable work during the weeks the employer temporarily suspended operations.

Iowa Code section 96.19(38) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) 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.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

If a claimant 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. Iowa Code section 96.7(2)(a)(2)(a).

The weight of the evidence in the record establishes that Mr. Johnson was temporarily laid off effective April 2, 2020. During the week that ended April 4, 2020, Mr. Johnson was able to work, available for work, but partially unemployed, based on the wages that did not exceed his weekly benefit amount by more than \$15.00. During the five weeks between April 5, 2020 and May 9, 2020, Mr. Johnson was able to work, available for work, but temporarily unemployed. The weight of the evidence fails to support the employer's assertion that the employer had work available for Mr. Johnson during those weeks. During the week that ended May 16, 2020, Mr. Johnson was able to work, available for work, but partially unemployed, based on the wages that did not exceed his weekly benefit amount by more than \$15.00. Mr. Johnson is eligible for benefits for each of the weeks between March 29, 2020 through May 16, 2020, provided he meets all other eligibility requirements. The employer's account may be assessed for benefits for those weeks, pending remand to the Iowa Workforce Development Tax Bureau for a determination of whether the employer charge may be waived in light of the COVID-19 basis for the temporary layoff.

A claimant who fails to accept recall to suitable work without good cause is disqualified for unemployment insurance benefits. Iowa Code section 96.5(3).

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.

The weight of the evidence establishes there was no bona fide recall to the employment until April 27, 2020, when the parties agreed to a May 14, 2020 return-to-work date. At no time did Mr. Johnson refuse recall to the employment.

DECISION:

The July 6, 2020, reference 01, decision is reversed. The claimant was able to work and available for work during the period of March 29, 2020 through May 16, 2020. The claimant was partially unemployed during the benefit weeks that ended April 4, 2020 and May 16, 2020. The claimant was temporarily unemployed during the five weeks between April 5, 2020 and May 9 2020. The claimant is eligible for benefits for the period of March 29, 2020 through May 16, 2020, provided he meets all other eligibility requirements. The employer's account may be assessed for benefits for those weeks, pending remand to the Iowa Workforce Development Tax Bureau for a determination of whether the employer charge may be waived in light of the COVID-19 basis for the temporary layoff.



James E. Timberland
Administrative Law Judge

December 3, 2020
Decision Dated and Mailed

jet/scn