

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT E DURR
Claimant

APPEAL NO. 08A-UI-00850-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STAFFCO OUTSOURCE MANAGEMENT
Employer

**OC: 12/16/07 R: 04
Claimant: Respondent (4/R)**

Section 96.4-3 – Able and Available
871 IAC 24.22(2)j – Leave of Absence
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Staffco Outsource Management (employer) appealed a representative's January 17, 2008 decision (reference 01) that concluded Robert E. Durr (claimant) was qualified to receive unemployment insurance benefits in connection with his employment with the employer. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 11, 2008. The claimant participated in the hearing. Kelly Graves appeared on the employer's behalf and presented testimony from one witness, Teresa Jacobs. 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:

Was the claimant eligible for unemployment insurance benefits by being able and available for work?

Was there period of voluntary unemployment through a leave of absence?

FINDINGS OF FACT:

The employer provides contract employees for a tire manufacturing plant in Mt. Pleasant, Iowa. The claimant started working for the employer on April 26, 2005. Since about April 2007, he worked full time as storekeeper/inventory control on the second shift.

On October 15, 2007, the claimant began a leave of absence due to a surgery on his right shoulder he had on that date. The shoulder injury was not asserted to be caused or aggravated by the employer's work. On December 4, the claimant's doctor gave him a release to return to work as of December 17 under "light duty." Through discussions between the claimant and Ms. Jacobs, the employer's human resources manager, it was also agreed that for the first week the claimant should only work four hours a day, as he had for the first week after a prior surgery on the claimant's left shoulder. On or about December 18, the employer requested further clarification as to what restrictions the doctor meant by "light duty." The doctor provided an explanation indicating that this meant no overhead work, a five-pound limit with is right shoulder, and no repetitive work with his right shoulder. The claimant's normal storekeeper duties would normally involve at least some overhead work and some repetitive work with the right shoulder. The claimant had previously done

assembly work, which also would have required work beyond the restrictions. Therefore, on December 19 the employer informed the claimant it had no work available for him within his current conditions until he received a further release.

On January 4, 2008, the claimant's doctor gave him a full release to return to his prior work without restrictions effective January 14, 2008. The claimant did return to work with the employer on January 14, but a separation occurred on January 15, at least related in part to a question as to what position the claimant was to work. There has not been a preliminary investigation or representative's decision as yet relating to the January 15, 2008 separation.

The claimant established a claim for unemployment insurance benefits effective December 16, 2007. The claimant has received unemployment insurance benefits between December 16 and January 13, 2008 in the amount of \$795.00.

REASONING AND CONCLUSIONS OF LAW:

The underlying issue in this case is whether the claimant was eligible for unemployment insurance benefits for his period of unemployment insurance benefits from December 17, 2007 through January 13, 2008.

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 24.23(10) provides:

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

The claimant's period of unemployment following his October 15 surgery was a period of voluntary unemployment due to being on a leave of absence during which he would not be eligible to receive unemployment insurance benefits. When a period of voluntary unemployment is due to a non-work related medical issue, in order for the disqualification to be lifted, the claimant must upon recovery return to the employer and offer to perform his regular duties. Iowa Code § 96.5-1-d. A "recovery" under Iowa Code § 96.5-1-d means a complete recovery without restriction. Hedges v. Iowa Department of Job Service, 368 N.W.2d 862 (Iowa App. 1985). The claimant was not released to return to full work duties as of December 17, 2007; he could not perform his regular duties as storekeeper without restriction until his full release on January 14, 2008. For a non-work-related injury, the employer is not compelled to provide work within the light-duty restrictions. 871 IAC 24.26(6)b. Therefore, his voluntary period of unemployment due to his medical condition continued until the effective date of his full release on January 14, 2008. Unemployment insurance benefits are not intended to substitute for health or disability benefits. White v. Employment Appeal Board, 487 N.W.2d 342 (Iowa 1992). The claimant, therefore, was not eligible for unemployment

insurance benefits for the entire duration of the period of unemployment prior to January 14, 2008. Benefits are allowed as of his full release without restrictions effective January 14, 2008, if 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 period of unemployment insurance benefits from December 17, 2007 through January 13, 2008 was disqualifying, benefits paid for that period are benefits for which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

During the hearing it became apparent that a separation from employment had occurred on or about January 15, 2008. There has not been an initial inquiry or representative's decision on that issue, and it was not included in the notice of hearing for this case. Therefore, the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's January 17, 2008 decision (reference 01) is modified in favor of the employer. The claimant was not able and available for work by being released to his regular duties without restriction for the period of December 17, 2007 through January 13, 2008. That period was therefore a temporary voluntary separation during which the claimant was not qualified to receive unemployment insurance benefits. This restriction is lifted as of the claimant's full release effective January 14, 2008, and he is eligible for benefits as of that date if he is otherwise qualified. The claimant is overpaid benefits in the amount of \$795.00. The matter is remanded to the Claims Section for investigation and determination of the January 15, 2008 separation issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw