

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALTON O PETERSON
Claimant

APPEAL NO. 12A-UI-00763-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DAVID L NEUBAUER
Employer

**OC: 12/12/10
Claimant: Appellant (2)**

871 IAC 23.19 – Employer-Employee
871 IAC 24.1(113) – Layoff
Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Alton Peterson filed a timely appeal from the January 11, 2012, reference 01, decision that denied benefits based on an Agency conclusion that he had voluntarily quit on November 27, 2011 to become self-employed. After due notice was issued, a hearing was held on March 19, 2012. Mr. Peterson participated. Attorney Todd Kowalke represented the employer and presented testimony through David Neubauer. Exhibits A through I and Department Exhibits D-1 through D-3 were received into evidence.

ISSUES:

Whether Mr. Peterson was an employee of Mr. Neubauer's business or was an independent contractor.

Whether Mr. Peterson separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

Whether Mr. Peterson has been able to work and available for work since he established his claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: David Neubauer operates a 2000-acre farm. Alton Peterson worked for Mr. Neubauer as a seasonal truck driver during the 2011 harvest season. Mr. Peterson commenced working for Mr. Neubauer in September 2011 and continued to perform work for the employer until the first week of November 2011. Mr. Peterson possesses a commercial driver's license. Mr. Neubauer put Mr. Peterson to work hauling grain from the farm to various ethanol plants and river shipping terminals. Mr. Neubauer provided the semi-tractor trailer. Mr. Neubauer set the work hours. For each day Mr. Neubauer needed Mr. Peterson to work, Mr. Neubauer would notify Mr. Peterson the day before. Mr. Neubauer paid Mr. Peterson by the load and set the payment for each load depending on the destination. Mr. Neubauer issued payment to Mr. Peterson on

September 20, October 7, and October 17, and November 9. Mr. Peterson did not have the authority to hire assistants to help him with the work. Mr. Peterson did not hold himself out as a businessman offering grain hauling services to the general public. Rather than call Mr. Peterson an employee, Mr. Neubauer elected to call Mr. Peterson an independent contractor and issued a 1099 tax form to Mr. Peterson for the work.

As of the first week of November 2011, Mr. Peterson had performed all of the work Mr. Neubauer had available for him. At that point, Mr. Peterson and Mr. Neubauer had a mutual understanding that Mr. Neubauer would contact Mr. Peterson if and when he again needed his services and that Mr. Peterson would make himself available.

After Mr. Peterson completed all the work Mr. Neubauer had for him, he established an additional claim for unemployment insurance benefits that was effective November 27, 2011. That claim was a claim for emergency compensation benefits (EUC) based on an original claim for benefits that was effective December 12, 2010.

Since Mr. Peterson established the additional claim for benefits, he has continued to look for additional work as a commercial driver and has made two job contacts per week. Mr. Peterson is 79 years old, but characterizes himself as semi-retired.

Mr. Neubauer recalled Mr. Peterson to perform two days of grain hauling in early February 2012. Mr. Peterson performed the work that Mr. Neubauer had available.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether Mr. Peterson was an employee or an independent contractor.

Iowa administrative Code section 871 IAC 23.19(6) provides that:

Services performed by an individual for remuneration are presumed to be employment unless and until it is shown to the satisfaction of the department that the individual is in fact an independent contractor. Whether the relationship of employer and employee exists under the usual common law rules will be determined upon an examination of the particular facts of each case.

Iowa administrative Code section 871 IAC 23.19(7) provides that:

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

Iowa administrative Code section 871 IAC 23.19(1) through (5) sets forth the factors to be considered in determining whether a worker is an employee or an independent contractor. Based on those factors, Mr. Peterson was Mr. Neubauer's employee, not an independent contractor. Mr. Neubauer provided the equipment, set the work hours, assigned the loads, and determined the pay. Mr. Peterson was not free to hire assistants, made no financial investment in the venture, could experience no profit or loss beyond the wages set by Mr. Neubauer, and did not offer his services to the public as a businessman.

Iowa Workforce Development rule 871 IAC 24.1(113) provides as follows:

24.1(113) Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

During the first week of November 2011, Mr. Peterson had performed all the work the employer had for him. The employer laid him off at that time. In contrast to a discharge for misconduct or a voluntary quit without good cause attributable to the employer, a layoff would not disqualify Mr. Peterson for unemployment insurance benefits. See Iowa Code section 96.5(1) and (2)(a). Mr. Peterson would be eligible for benefits, provided he met all other eligibility requirements. The employer may be assessed for benefits.

The remaining issue is whether Mr. Peterson has been able to work and available for work since he established his claim for benefits.

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.

The weight of the evidence indicates that Mr. Peterson has indeed been able to perform part-time work and available for part-time work since he established the additional claim for benefits that was effective November 27, 2011. Mr. Peterson is eligible for benefits effective November 27, 2011, provided he is otherwise eligible.

DECISION:

The Agency representative's January 11, 2012, reference 01, decision is reversed. The claimant was laid off effective November 9, 2011. The claimant has been able to work and available for work since he established the additional claim for benefits that was effective November 27, 2011. The claimant is eligible for benefits effective November 27, 2011, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw