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

MARSHA L MOOTHART	:	
	:	**HEARING NUMBER:** 10B-UI-07310
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
CHJ LLC	:	
Employer.		

N O T I C E

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: 96.4-3

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Marsha Moothart (Claimant) worked for When Pigs Fly BBQ (Employer) as a part-time general worker from April 2008. (Tran at p. 3; p. 5). The Claimant filed a claim for partial unemployment insurance benefits with an effective date of March 28, 2010, and thus her base period is October 2008 through September 2009. During this time the Claimant generally worked part-time during daytime hours. (Tran at p. 4; p. 5; p. 7; p. 8; p. 10; p. 11; p. 12; p. 13). The Claimant filed for partial benefits because at the time of filing the Employer did not have job openings or sufficient working hours available during the times that the Claimant preferred to work. (Tran at p. 5; p. 8; p. 9-10). The Claimant has limited her work hour to daytime hours with no nights or evenings. (Tran at p. 6; p. 8; p. 10-11). The restrictions of the number of hours the Claimant could work, which was imposed because of a work-related injury, was lifted prior to the Claimant filing for benefits. (Tran at p. 5; p. 7; p. 8; p. 15, ll. 3-5; p. 16).

The Claimant was subsequently separated from employment around May 5, 2010. (Tran at p. 3; p. 12).

REASONING AND CONCLUSIONS OF LAW:

Timeliness of Appeal Issue: The issue of timeliness was raised when the Claimant filed his appeal on August 26, 2010, thirty days beyond the statutory deadline. The reason for the late filing was that the Claimant did not receive the Administrative Law Judge's decision before the deadline to appeal. For this reason, we shall consider his appeal timely for further review.

Standards For Able & Available: Iowa Code section 96.4(3) (2009) 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:

> 871—24.22 Benefit 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.
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> 24.22(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.
>
> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.
>
> b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides.

Among the reasons that can render an individual no longer able and available are self-imposed and voluntary work restrictions:

> a. Shift restriction. The individual does not have to be available for a particular shift. If an individual is available for work on the same basis on which the individual's **wage credits were earned** and if after considering the restrictions as to hours of work, etc., imposed by the individual there exists **a reasonable expectation of securing employment,** then the individual meets the requirement of being available for work.
> …
> f. Part-time worker, student—other. …. In other words, if an individual is available to the same degree and to the same extent as when the **wage credits were accrued,** the individual meets the eligibility requirements of the law.
> …
> m. An individual may not be eligible for benefits if the individual has imposed restrictions which leave the individual **no reasonable expectation of securing employment**. Restrictions may relate to type of work, hours, wages, location of work, etc., or may be physical restrictions."

871 IAC 24.22(2)(emphasis added). Similarly 871 IAC 24.23(16) states that a claimant is unavailable for work if the claimant "is **unduly** limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available."

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). To be found able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1).

Application of Standards: We emphasize that this is an able and available case, where benefits are denied on a week-to-week basis. It is not a refusal of suitable work case.

When a claimant is limited in the hours of work the availability issue is focused on the *effect* the limitation has on the claimant's ability to find work. Thus the question is whether restrictions "leave the individual no reasonable expectation of securing employment." 871 IAC 24.22(2)(m). We do not read rule 871 IAC 24.23(16) as contradicting this idea. Rule 24.23(16) finds a claimant not *able and available* if the claimant's "availability" is "unduly limited" because the claimant is not willing to work "during" the hours in which suitable work is available. We note that 24.23(17) refers to an undue limitation caused by a limit on the *number* of hours required by the claimant's "occupation." It is clear that these rules are saying that if a claimant has unduly limited her availability by not being able (or willing) to work the schedule required to get a job, then the claimant is not able and available so long as the restrictions last. The focus of the rule is clearly on whether the limitation is "undue," that is, how limiting it is to the ability to work.

To be explicit rule 24.23(16) is not a back-door open-ended refusal of suitable work disqualification. We explain the distinction. If someone refuses suitable work without good cause they are disqualified, period. The *limitation to the availability to work* caused by the refusal does not come into play. Suppose the job is to work as a cashier at an opera and the claimant refuses the work because she just doesn't like opera.

This is not good cause to turn down a cashier job, and thus it would be a refusal of suitable work without good cause. The claimant in such a case would be disqualified for refusing work. Then if she got a subsequent job, she could requalify by earning 10-times her benefit amount. But it is not very limiting to refuse to work at an opera, at least not in Iowa. The claimant would still have plenty of work in the general workforce she was willing and able to do. She would be able and available for work, even though she had refused suitable work without good cause. Consider if we ruled otherwise. The claimant turns down the opera job, requalifies in a subsequent job, and then loses that job. Would we continue to say that she cannot get benefits so long as she refuses to work at the opera? Not unless refusing to work opera is a criteria that leaves "no reasonable expectation of securing employment." Otherwise the opera refusal would continue the inability to get benefits past the requalification period, which makes the requalification provision pointless. In short, in an able and available case the focus is on the effect of the limitation, not on its reasons.

Here the Claimant is willing to work the same hours at the same time as she worked during the base period. She wants to work only during the day. In common experience, this is the normal work time. Since the limitation is the same time and amount as the Claimant worked during her base period, the remaining issue is whether given the restriction "there exists a reasonable expectation of securing employment." 871 IAC 24.22(2)(a). We find that there is such a reasonable expectation, and that the Claimant has not "unduly limited" the Claimant's "availability for work." 871 IAC 24.23(16). The limitation by itself is not one which would leave the Claimant with no "reasonable expectation of securing employment." 871 IAC 24.22(2)(m). We find that the Claimant has not unduly limited her availability by refusing to work nights. We emphasize that this is only a determination of availability and we have not engaged in an evaluation of whether the offer was "suitable" nor whether the reasons for refusal were "good cause." Those are not issues in this case.

Finally, it does appear that the Claimant was partially unemployed from the time of filing for benefits until she was separated. Iowa Code §96.19(38); 871 IAC 24.1(139). This being the case she was not required to be able and available during that period, no matter what her restrictions were. Iowa Code §96.4(3). And after that period our holding that she did not unduly restrict her employment prospects merely by restricting herself to days still holds. Naturally, we do not address the question of the separation since that has been remanded.

DECISION:

The administrative law judge's decision dated July 12, 2010 is **REVERSED**. The Employment Appeal Board concludes that the Claimant is able and available for work during the weeks in question. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. The Board concurs with the Administrative Law Judge's decision to remand the separation issue.

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John A. Peno

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RRA/fnv Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

RRA/fnv