

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GEORGE L FOSTER
Claimant

APPEAL NO. 07A-UI-03694-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

LERNER NEW YORK INC
Employer

**OC: 02/18/07 R: 02
Claimant: Respondent (2)**

Section 96.4-3 – Able and Available
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Lerner New York (employer) appealed a representative's March 29, 2007 decision (reference 03) that concluded George Foster (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 24, 2007. The claimant participated personally. The employer was represented by Jacqueline Jones, Hearings Representative, and participated by Alisha Carr, Manager.

ISSUE:

The issue is whether the claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 31, 2007, as a part-time sales person. The claimant has been employed 34 weeks. Eight of those weeks the claimant did not work any hours. Five of those weeks the claimant worked between twenty and thirty hours. During ten weeks the claimant worked between ten and nineteen hours. The claimant worked between one and nine hours during eleven weeks.

The claimant called the employer on or about January 30, 2007, and said his car was repossessed. The employer asked the claimant to let her know when he had transportation to work. The claimant did find transportation to work the week ending February 3, 2007, and worked twenty hours. The claimant told the employer that he could start working again on March 10, 2007. The employer put the claimant back to work.

Next the claimant told the employer he had stitches in his finger. His physician restricted his working. After this the claimant worked eight hours the week ending April 21, 2007.

The claimant filed for unemployment insurance benefits with an effective date of February 18, 2007. He is a part-time self-employed entertainer and paper carrier. The claimant limited his

availability on approximately March 10, 2007, due to his self-employment. The employer had fewer hours to give the claimant because of his reduced availability.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant is not able and available for work.

871 IAC 24.23(4) and (7) provide:

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

(4) If the means of transportation by an individual was lost from the individual's residence to the area of the individual's usual employment, the individual will be deemed not to have met the availability requirements of the law. However, an individual shall not be disqualified for restricting employability to the area of usual employment. (See subrule 24.24(7).

(7) Where an individual devotes time and effort to becoming self-employed.

871 IAC 24.23(16)and (26) provide:

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

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

When an employee is devoting time and effort to being self-employed, he is considered to be unavailable for work. The claimant was devoting his time and efforts to delivering papers and entertaining. The claimant's means of transportation was lost. When a claimant's has no means of transportation to employment, the claimant is deemed to not be available for work. When an employee requests and is granted time off, he is considered to be unavailable for work. The claimant requested time off and reduced his hours of availability. The employer granted his request. The change in hours was initiated by the claimant.

In addition the claimant was hired as a part-time worker and is still working part-time for the employer. He was still employed in a part-time position as was agreed to at the time he was hired. The claimant is disqualified from receiving unemployment insurance benefits because he is not available for work due to his self-employment, lack of transportation, requests for time off and unavailability for work.

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.

The claimant has received benefits since filing his claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

DECISION:

The representative's March 29, 2007 decision (reference 03) is reversed. The claimant is disqualified from receiving unemployment insurance benefits because he is not available for work with the employer. The claimant is overpaid benefits in the amount of \$645.00.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css