

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

CHARLES M STROWMATT

Claimant,

and

DYERSVILLE SALES COMPANY INC

Employer.

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HEARING NUMBER: 10B-UI-08352

**EMPLOYMENT APPEAL BOARD
DECISION**

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:

Charles Strowmatt (Claimant) worked for Dyersville Sales Co. (Employer) until he was laid off at the end of April 2010. (Tran at p. 2). On May 1, 2010, he began work as an independent contractor for the Employer. (Tran at p. 3). The Claimant continues to be self-employed working for the Employer. (Tran at p. 2-3). He typically works for one day a week. (Tran at p. 2-3).

REASONING AND CONCLUSIONS OF LAW:

Although the Administrative Law Judge seems to find a bright-line rule denying benefits to the self-employed, we find neither the law nor the policy behind the law supports such an approach.

The Claimant, in order to eligible for benefits, must be able and available for and earnestly seeking work. The rules of the Department explain the requirements:

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.

(1) [regulations on ability to 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.

....

24.22(3) Earnestly and actively seeking work. Mere registration at a workforce development center does not establish that the individual is earnestly and actively seeking work. It is essential that the individual personally and diligently search for work. **It is difficult to establish definite criteria** for defining the words earnestly and actively. Much depends on the estimate of the employment opportunities in the area. The number of employer contacts which might be appropriate in an area of limited opportunity might be totally unacceptable in other areas. When employment opportunities are high an individual may be expected to make more than the usual number of contacts. Unreasonable limitations by an individual as to salary, hours or conditions of work can indicate that the individual is not earnestly seeking work. The department expects each individual claiming benefits to conduct themselves as would any normal, prudent individual who is out of work.

a. Basic requirements. [describing methods of applying for work]

b. Number of employer contacts. It is difficult to **determine criteria in which earnestly and actively may be interpreted**. Much depends on the estimate of employment opportunities in the area. The number of employer contacts which might be appropriate in an area of limited opportunities might be totally unacceptable in another area of unlimited opportunities. The number of contacts that an individual must make is dependent upon the condition of the local labor market, the duration of benefit payments, a change in the individual's characteristics, job prospects in the community, and other factors as the department deems necessary.

871 IAC 24.22(emphasis added). The general rules on availability emphasize how individualized the issue is. Meanwhile, the issue of working while collecting benefits is addressed in rule 24.23:

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

24.23(7) Where an individual devotes time and effort to becoming self-employed.

....

24.23(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

871 IAC 24.23. We first note about the self-employment rule that the disqualification applies if the individual devotes "time and effort" to "becoming" self-employed. This is not a bright line rule. Had the law meant all self-employment is *per se* disqualifying it would read simply "where an individual is self-employed." Instead the focus is on time and effort. The question is, how much time and effort? This is answered by context. The general rule on availability requires that a claimant be "genuinely attached to the labor market." In this context the "time and effort" standard is whether so much time and effort is devoted to self-employment that the Claimant is no longer genuinely attached to the labor market.

We bolster this conclusion by looking to rule 24.23(23). Under that rule a claimant who is working odd jobs while collecting benefits becomes unavailable if "working to such a degree that removes the claimant from the labor market." So what is the difference between a claimant working odd jobs and a claimant being "self-employed?" If a claimant does snow removal and gets paid as an independent contractor this is "self-employment." If the same claimant does the same work, but is placed on payroll as a casual employee, this is an odd-job. We cannot see why the independent contractor would be unavailable, but the casual employee doing the same amount of work would be available. We can think of no legal or practical reason why, all other things being equal, the name given to work should decide whether the worker is available to do *other* work. The touchstone is genuine attachment to the labor market, and there is no a bright-line rule for self-employment. *See e.g. Jones v. VIP Management*, 10A-UI-07638 (ALJ Ackerman 8/9/10); *Blacksmith-Davis v. P&M Monogramming*, 07A-UI-02735 (ALJ S Wise 2007); *Koenig MEL Easton*, 08A-UI-06061 (ALJ S. Wise 2008)("a claimant becomes unavailable for work when he is working full time on his self-employment venture and is no longer seeking or willing to accept full-time work."); *Arenholtz v. IWD*, 05A-UI-00858-H2 (ALJ Hillary 2005); *Ven Der Ver v. IWD*, 05-IWDUI-0944 (ALJ Anderson 2005); *Locksperts v. EAB*, Black Hwk Co. LACV102674 (April 7, 2008).

Basic fairness also weighs in favor of our individualized approach. When the Claimant applied for benefits he must remain available for work, and must look for work. If he is making an adequate job search, and is willing to accept suitable work, then what he does with the time he is not looking for work is not a concern of the law. Assuming an adequate number of job contacts the Claimant can spend the rest of his time by the phone watching his favorite TV shows yet still collect benefits – so long as he is willing to accept work when the phone does ring. The law does not punish a claimant for drumming up contract work rather than watching TV when not looking regular work.

Any doubt is eliminated by the rules of the Department pertaining to income that is deducted from benefits on a dollar for dollar basis:

24.13(4) Nondeductible payments from benefits. The following payments are not considered as wages and are not deductible from benefits:

a. Self-employment income. However, the individual must meet the benefit eligibility requirements of Iowa Code section 96.4(3).

871 IAC 24.13(4)(a). This rule describes what monies are not to be deducted from the benefit amount paid to a claimant. It is thus clear that the rule describes income which may be collected by a claimant while collecting benefits. If self-employment caused an automatic finding of ineligibility the rule would be unnecessary. Why provide that income that is paid for an activity that causes ineligibility from benefits will not be deducted from the benefits – under a bright line rule the self-employed claimant would not be collecting benefits and so it would be pointless to discuss possible reduction of those non-existent benefits. Clearly the rules anticipate that a claimant may be self-employed and yet remain eligible for benefits. *See also* 871 24.2(1)(c)(2)(group 2 claimants include “self-employment assuming otherwise eligible”).

The evidence shows that this Claimant devotes almost no time and effort to being self-employed other than the time he spends actually working. He isn’t advertising for clients, or looking for employees, or anything of the sort. He picks up the phone when called, and works when he’s being paid to work. This is no more than one day a week. He is not devoting so much time and effort to self-employment as to remove himself from the labor market, and benefits are allowed if the Claimant is otherwise eligible.

DECISION:

The administrative law judge’s decision dated August 9, 2010 is **REVERSED**. The Employment Appeal Board concludes that the Claimant is able and available for work for the weeks covered by the decisions at issue. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. The issue of the separation is remanded to Iowa Workforce, Claims Section to address, if this issue has not been otherwise addressed.

John A. Peno

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.

Monique F. Kuester

RRA/fnv