

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GLANDER, NATHAN, J
Claimant

APPEAL NO. 13A-UI-02361-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AVENTURE STAFFING & PROFESSIONAL
Employer

OC: 01/20/13
Claimant: Respondent (4)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.5(3) – Refusal of Suitable Work
Iowa Code Section 96.4(3) – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 26, 2013, reference 02, decision that allowed benefits, based on an agency conclusion that the employer had not made an offer of employment on January 24, 2013. After due notice was issued, a hearing was held on March 25, 2013. Claimant Nathan Glander did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Kayla Neuhalfen represented the employer and presented additional testimony through Sheryl Lee and Danielle Shaughnessy. Exhibits One and Two were received into evidence. The administrative law judge took official notice of the agency's administrative record (DBRO) of the claim for benefits the claimant established effective January 20, 2013 and the record of benefits disbursed to the claimant in connection with that claim.

ISSUES:

Whether Mr. Glander refused an offer of suitable work on or about January 24, 2013 without good cause.

Whether Mr. Glander has been able to work and available for work since he established a claim for unemployment insurance benefits that was affected January 20, 2013.

Whether Mr. Glander has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nathan Glander established a claim for unemployment insurance benefits that was effective January 20, 2013. In connection with that claim, Mr. Glander has so far received unemployment insurance benefits totaling \$2,688.00 for the eight-week period between January 20, 2013 and March 16, 2013. Mr. Glander's weekly benefit amount was set at \$336.00.

Aventure Staffing & Professional is one of Mr. Glander's base period employers for purposes of the claim Mr. Glander established on January 20, 2013. Mr. Glander's highest earning base period quarter was the third quarter of 2012, when he had earnings of \$7,728.30. Mr. Glander's average weekly wage for that quarter was \$594.48.

Aventure Staffing & Professional is a temporary employment agency. Mr. Glander most recently performed work for the employer in a full-time temporary work assignment that ended January 18, 2013. On that same day, the employer arranged for Mr. Glander to be interviewed by a client business, Southshore, regarding potential placement in a forklift operator assignment. Mr. Glander performed well in the interview and Southshore notified Aventure Staffing that they wanted to use Mr. Glander. Danielle Shaughnessy promptly contacted Mr. Glander with this information and to offer the assignment. The assignment would pay \$10.00 per hour and offer 40 to 60 hours per week. Ms. Shaughnessy spoke to Mr. Glander and told him that Southshore wanted him to start on Thursday, January 24, 2013. Mr. Glander expressed interest in the assignment, but said he could not start on January 24, 2013. Mr. Glander said he had family visiting from Germany. Mr. Glander agreed to start the new assignment on Monday, January 28, 2013.

On January 25, 2013, Mr. Glander contacted Aventure Staffing and said he could not start the new assignment on Thursday, January 24, 2013 or during the week that followed. Mr. Glander said his birthday was on January 25 and he would be celebrating his birthday with his family. Mr. Glander said he would continue to have out-of-town company until Wednesday, January 30, 2013, and would probably not be available to start the new assignment until Monday, February 4, 2013.

On January 31, 2013, Ms. Shaughnessy telephoned the contact number the employer had for Mr. Glander and had used to contact him previously. Mr. Glander did not answer. Ms. Shaughnessy left a message asking Mr. Glander whether he was back and when he could start the new assignment. Ms. Shaughnessy asked for a return call. As of the appeal hearing on March 25, 2013, Mr. Glander had made no further contact with Aventure Staffing.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-3-a provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for

securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

- (1) One hundred percent, if the work is offered during the first five weeks of unemployment.
- (2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.
- (3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.
- (4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

871 IAC 24.24(1)a provides:

- (1) Bona fide offer of work.

a. In deciding whether or not a claimant failed to accept suitable work, or failed to apply for suitable work, it must first be established that a bona fide offer of work was made to the individual by personal contact or that a referral was offered to the claimant by personal contact to an actual job opening and a definite refusal was made by the individual. For purposes of a recall to work, a registered letter shall be deemed to be sufficient as a personal contact.

871 IAC 24.24(4) provides:

(4) Work refused when the claimant fails to meet the benefit eligibility conditions of Iowa Code section 96.4(3). Before a disqualification for failure to accept work may be imposed, an individual must first satisfy the benefit eligibility conditions of being able to work and available for work and not unemployed for failing to bump a fellow employee with less seniority. If the facts indicate that the claimant was or is not available for work, and this resulted in the failure to accept work or apply for work, such claimant shall not be disqualified for refusal since the claimant is not available for work. In such a case it is the availability of the claimant that is to be tested. Lack of transportation, illness or health conditions, illness in family, and child care problems are generally considered to be good cause for refusing work or refusing to apply for work. However, the claimant's availability would be the issue to be determined in these types of cases.

The weight of the evidence establishes that the employer made a bonafide offer of employment to Mr. Glander and that offer was most likely made early in the week that began January 20, 2013, rather than on January 25, 2013 as testified to by the employer. The employer testified that the client business interviewed Mr. Glander on January 18, 2013 and wanted Mr. Glander to start on January 24, 2013. It would not make any sense for the employer to be in contact

with Mr. Glander on January 25, 2013 to offer a position that was to start the previous day. In any event, the offer was made at a time when Mr. Glander had an active claim for unemployment insurance benefits. The claim for benefits was effective Sunday, January 20, 2013. The work offered during the first week of Mr. Glander's claim was not "suitable" work within the meaning of the law because it did not offer Mr. Glander a weekly wage that equaled 100 percent of his average weekly wage during his highest base period earning quarter. The average weekly wage during the highest earning base period quarter was \$594.00. The wage offered in the new position could be as low as \$400.00 per week. The wage offered in the new position could be as high as \$600.00 per week or more, but there was no guarantee. If Mr. Glander had refused to accept the offer of employment, the refusal would not disqualify him for unemployment insurance benefits. However, the evidence fails to establish a definite refusal. Instead, the evidence indicates that Mr. Glander was interested in the assignment, but insisted on pushing back the start date so that he could spend time with his family.

Thus, the work refusal issue would not disqualify Mr. Glander for unemployment insurance benefits. The employer's account will not be relieved of liability for benefits.

Iowa Administrative Code rule 871 IAC 24.24(4) states as follows:

Work refused when the claimant fails to meet the benefit eligibility conditions of Iowa Code section 96.4(3). Before a disqualification for failure to accept work may be imposed, an individual must first satisfy the benefit eligibility conditions of being able to work and available for work If the facts indicate that the claimant was or is not available for work, and this resulted in the failure to accept work ... such claimant shall not be disqualified for refusal since the claimant is not available for work. In such a case it is the availability of the claimant that is to be tested. Lack of transportation, illness or health conditions, illness in family, and child care problems are generally considered to be good cause for refusing work or refusing to apply for work. However, the claimant's availability would be the issue to be determined in these types of cases.

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.

Mr. Glander did not appear for the hearing and thereby did not present any evidence to support his burden of proving that he has been able to work and available for work during each week he has claimed unemployment insurance benefits. The weight of the evidence establishes that Mr. Glander was not available for work during the weeks that ended January 26, 2013 and February 2, 2013 because he was spending time with his family in lieu of reporting for a work assignment in which he had expressed interest. Mr. Glander has presented no evidence to suggest that he was looking for other work during those two weeks or that he was available for work those two weeks. Mr. Glander has also failed to present evidence to indicate he has been available for work since those two weeks. The administrative law judge concludes that Mr. Glander has not satisfied the work availability requirement since he filed his claim for benefits and is not eligible for benefits. Benefits are denied effective January 20, 2013. The availability disqualification continued as of the March 25, 2013 appeal hearing and will continue until Mr. Glander contacts Workforce Development and provides proof that he has been available for work and actively and earnestly engaged in a search for new employment.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a

continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because Mr. Glander has failed to demonstrate that he has been available for work since he established his claim for benefits, the benefits disbursed to him constitute an overpayment that he must repay to Workforce Development. To date, Mr. Glander has been overpaid \$2,688.00 for the eight-week period between January 20, 2013 and March 16, 2013.

DECISION:

The Agency representative's February 26, 2013, reference 02, decision is modified as follows. The employer made a bonafide offer of employment during the week that ended January 26, 2013. The offered work was not suitable because the wage offered did not meet or exceed the claimant's average weekly wage during his highest earning base period. The claimant did not refuse the offer. No work refusal disqualification will enter and the employer's account will not be relieved of liability.

The claimant has failed to demonstrate work availability since he established his claim for benefits. Benefits are denied effective January 20, 2013. The availability disqualification continued as of the March 25, 2013 appeal hearing and will continue until the claimant contacts Workforce Development and provides proof that he has been available for work and actively and earnestly engaged in a search for new employment.

The claimant has been overpaid \$2,688.00 for the eight-week period between January 20, 2013 and March 16, 2013.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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