

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

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Appeal Number: 04A-UI-01239-RT  
OC: 12-14-03 R: 01  
Claimant: Appellant (4)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Tim L. Rardin, filed a timely appeal from an unemployment insurance decision dated January 30, 2004, reference 01, denying unemployment insurance benefits to him, as of December 14, 2003 and continuing until he provides proof that he is able to work. After due notice was issued, a telephone hearing was held on March 17, 2004, with the claimant participating. The claimant was represented by Joe Heidenrich, Attorney at Law. Barb Kruthoff participated in the hearing for the employer, WLVA (Wall Lake View Auburn) Community School. Employer's Exhibit 1 and Claimant's Exhibit A were admitted into evidence.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit 1 and Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer as a full-time custodian and part-time bus driver working 17 ½ hours per week as a part-time bus driver. On or about May 20, 2003, the claimant was injured at school and has not worked for the employer since. Prior to that time the claimant had noticed that the bus seat was bothering his back. On May 21, 2003, the claimant consulted a physician, who told the claimant to take a week off from work and he did so. An MRI was administered, which revealed problems requiring surgery, which was performed on June 12, 2003. On or about December 1, 2003, the claimant was released from his position as full-time custodian when the position was eliminated because of economic cut-backs. The employer does not contest this separation, nor does the employer contest any benefits arising out of that separation. The claimant remains job attached as a part-time bus driver but has not worked yet in that capacity. There was a period of time when the claimant was totally unable to perform his occupation, from June 12, 2003 to August 14, 2003, and then a further period of time when the claimant was partially unable to perform his occupation, from August 14, 2003 to January 15, 2004, as shown by the request for medical report at Claimant's Exhibit A. The claimant underwent a functional capacity evaluation on December 9, 2003, and that resulted in the restrictions, as shown in that evaluation in Claimant's Exhibit A. The claimant was then released to work with the restrictions outlined in the functional evaluation as of January 15, 2004, as shown in the Request For Medical Report and the letter from his physician, dated January 15, 2004, as shown at Claimant's Exhibit A. The claimant does have clear restrictions, as shown in those documents. The employer has obtained a new bus containing a new driver's seat, which the employer believes may meet the claimant's needs, as shown at Employer's Exhibit 1, but the claimant has not, as yet, tried out the new bus seat. The claimant has placed no restrictions on his availability for work and he is earnestly and actively seeking work.

#### REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant is ineligible to receive unemployment insurance benefits because he is and was at all material times hereto, not able to work. The administrative law judge concludes that the claimant was ineligible to receive unemployment insurance benefits through January 15, 2004, but is eligible to receive unemployment insurance benefits thereafter.

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(1)a 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.

(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.

The claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has not met his burden of proof to demonstrate by a preponderance of the evidence that he is either temporarily unemployed or partially unemployed, meeting the definitions of Iowa Code Section 96.19(38), which would excuse the claimant from such requirements. The administrative law judge further concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he was able to work before January 16, 2004. Finally, the administrative law judge concludes that the claimant was and is able to work after January 15, 2004. The request for a medical report at Claimant's Exhibit A indicates that the claimant was either totally or partially unable to work to January 15, 2004 and further states that the claimant was released on January 15, 2004 with the restrictions outlined in the functional capacity evaluation, which is also at Claimant's Exhibit A. The administrative law judge concludes that the restrictions in the functional capacity evaluation do not unreasonably or impossibly restrict or prohibit the claimant from working. The administrative law judge concludes that after January 15, 2004 the claimant was and is physically and mentally able to work in some gainful employment, notwithstanding the restrictions in the functional capacity evaluation. This is confirmed by the letter from the claimant's physician dated January 15, 2004, which also appears at Claimant's Exhibit A. At all material times hereto the administrative law judge concludes that the claimant was available for work and earnestly and actively seeking work. Accordingly, the administrative law judge concludes that the claimant was not able to work through and including January 15, 2004 and is ineligible to receive unemployment insurance benefits to that date. Thereafter, and beginning with January 16, 2004 and continuing thereafter, the administrative law judge concludes that the claimant is able to work and is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant beginning January 16, 2004 or benefit week ending January 24, 2004 and continuing thereafter so long as the claimant remains otherwise eligible to receive unemployment insurance benefits and remains able to work.

The evidence establishes that the claimant separated from his full-time position as janitor on or about December 1, 2003 as a result of a job elimination for budgetary cutbacks and the employer does not contest such benefits. The administrative law judge concludes that although the issue of a separation from employment is not before the administrative law judge because it

was not set out on the notice of appeal, it is not necessary now to remand this matter to Claims on that issue concerning the separation from his position as custodian because the employer does not contest unemployment insurance benefits and concedes that the claimant was basically laid off for a lack of work because of budget cutbacks. Although the administrative law judge reaches no conclusion on that separation, it appears that that separation was not disqualifying. The administrative law judge also reaches no conclusion on whether the claimant has separated from his part-time position as a bus driver. The parties testified that he had not and the administrative law judge accepts that characterization and finds that it is not now necessary to remand this matter to Claims for an investigation and determination as to the separation from his bus driving part-time position. The administrative law judge reaches no conclusion as to whether the claimant has separated from his part-time position as bus driver or whether that separation would be disqualifying. If the employer wishes to contest that separation it may do so by filing a protest with Iowa Workforce Development either as a disqualifying separation or a refusal to accept suitable work. The administrative law judge also reaches no conclusion as to whether the claimant is actually able to work as a bus driver for the employer but concludes that the claimant is able to work under relevant rules applicable hereto, as noted above.

#### DECISION:

The representative's decision of January 30, 2004, reference 01, is modified. The claimant, Tim L. Rardin, is not entitled to receive unemployment insurance benefits through January 15, 2004, or benefit week ending January 17, 2004 because he was not able to work prior to that time. The claimant, Tim L. Rardin, is entitled to receive unemployment insurance benefits beginning January 16, 2004, or benefit week ending January 24, 2004 and continuing thereafter because he was and is able to work from date. The claimant is entitled to receive these unemployment insurance benefits, provided he is otherwise eligible and is not otherwise disqualified to receive unemployment insurance benefits.

b/b