

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

MICHAEL A SHEETS
1101 GAINES ST
DAVENPORT IA 52803

LAWSON'S DRIVEWAYS LLC
JET BLACK DRIVEWAYS
2863 HALCYON DR
BETTENDORF IA 52722

Appeal Number: 05A-UI-04347-RT
OC: 01-09-05 R: 04
Claimant: Respondent (5)

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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-3 – Failure to Accept Work
Section 96.4-3 – Required Findings (Able and Available for Work)
Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Lawson's Driveways, L.L.C. doing business as Jet Black Driveways, filed a timely appeal from an unemployment insurance decision dated April 20, 2005, reference 04, allowing unemployment insurance benefits to the claimant, Michael A. Sheets. After due notice was issued, a telephone hearing was held on May 16, 2005, with the claimant participating. Steve Lawson, Owner, participated in the hearing for the employer. The administrative law

judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. When the administrative law judge first tried to call Mr. Lawson at 2:00 p.m., he reached his voice mail. The administrative law judge left a message that he was going to proceed with the hearing and if Mr. Lawson wanted to participate, he needed to call before the hearing was over and the record was closed. Mr. Lawson called the Appeals Section at 2:13 p.m. and the administrative law judge called Mr. Lawson back at 2:15 p.m. and he participated in the balance of the hearing.

Although not set out on the notice of appeal, the parties permitted the administrative law judge to take evidence on, and decide, if necessary, whether the claimant is disqualified to receive unemployment insurance benefits because he refused a recall or offer of suitable work under Iowa Code section 96.5-3-a and whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he was not able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3. The parties waived further notice of those issues.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time labor specialist from July 2004 until he was laid off temporarily for seasonal work on or about January 9 through the 14, 2005. The layoff was to be temporary but the claimant was not told when he could expect to be re-employed. The claimant left a contact number through his mother and the employer twice tried to contact the claimant through his mother to recall the claimant to work but the claimant never got the messages. These telephone calls to the mother occurred in the first week of April 2005. During the third week of April, the employer's witness, Steve Lawson, Owner, saw the claimant in a vehicle on the street. The claimant hollered out to Mr. Lawson a greeting and Mr. Lawson responded and asked the claimant to call him but the claimant did not hear Mr. Lawson ask him to call because the vehicle had passed Mr. Lawson. Although there was work at that time available for the claimant, Mr. Lawson arranged his work so that the claimant was not needed and there is not at this time work available for the claimant. Mr. Lawson did not call the claimant back because there was no longer work available for him. Mr. Lawson's crew went back to work at the beginning of April 2005 and work is continually picking up.

The claimant has placed no restrictions on his ability to work and has placed no restrictions on his availability for work but is not earnestly and actively seeking work by making two in-person job contacts each week. The claimant has not done so because he believes he is temporarily laid off and is waiting to hear from Mr. Lawson about re-employment.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. The claimant has not permanently separated from his employment and any separation would be as the result of a temporary layoff for seasonal work and would not be disqualifying.
2. Whether the claimant is disqualified to receive unemployment insurance benefits because he has refused to accept a recall or offer of suitable work. The claimant has not refused an offer or recall of suitable work and is not disqualified for that reason.

3. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he is and was not able, available, and earnestly and actively seeking work. The claimant is not ineligible for these reasons because the claimant is temporarily unemployed and is not subject to the requirements that he be able, available, and earnestly and actively seeking work.

4. Whether the claimant is overpaid unemployment insurance benefits. He is not.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The administrative law judge concludes that the evidence establishes that the claimant was laid off temporarily for seasonal and other reasons between January 9 and 14, 2005. Such a layoff is not disqualifying. There is no evidence that at that time the claimant was discharged for disqualifying misconduct or that he left work voluntarily without good cause attributable to the employer. Accordingly, the administrative law judge concludes that the claimant's separation was not disqualifying and, as a consequence, he is entitled to receive unemployment insurance benefits, provided he is otherwise eligible and not otherwise disqualified. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible and not otherwise disqualified.

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.

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.

The administrative law judge concludes that the employer has the burden to prove that the claimant has refused to accept an offer or recall of suitable work. Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 910 (Iowa 1987). The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant refused to accept a recall or offer of suitable work. In determining whether a claimant has failed to accept suitable work or recall to suitable work, it must first be established that a bona fide offer of work was made to the claimant by personal contact or that a referral was offered by the claimant by personal contact to an actual job opening. The administrative law judge concludes here that no such personal contact was made. The employer's witness, Steve Lawson, Owner, credibly testified that he called the claimant by contacting his mother on two different occasions in early April. However, this is not a personal contact. Further, the claimant testified that he was not aware of those contacts. Mr. Lawson then credibly testified that he saw the claimant on the street when the claimant was in a car and he was a pedestrian. Mr. Lawson told the claimant to call him. However, the claimant was in a

moving vehicle and Mr. Lawson was a pedestrian and the claimant yelled a greeting to Mr. Lawson but by the time Mr. Lawson told the claimant to call him, the claimant was past Mr. Lawson and did not hear this. Further, the administrative law judge is not convinced that such a request to call him confirms or establishes a personal contact of a job or recall to work. Although Mr. Lawson testified he had work available at that time, he did not make another attempt to contact the claimant because he worked out an arrangement where the claimant was not needed and work was not available and work is still not available to the claimant but the employer is continuing to take in work and get busier and work may be available to the claimant later. Accordingly, under the evidence here, the administrative law judge is constrained to conclude that the claimant was not offered suitable work or recalled to suitable work in such a way that a refusal could establish that the claimant would be disqualified to receive unemployment insurance benefits because he refused to accept a recall or offer of suitable work. Accordingly, the administrative law judge is constrained to conclude that the claimant did not refuse a recall or offer of suitable work and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant until or unless he requalifies for such benefits.

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".

The administrative law judge concludes that 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 met his burden of proof to demonstrate by a preponderance of the evidence that he is and was at relevant times able and available for work. The claimant credibly testified, and there is no evidence to the contrary, that he has placed no restrictions on his ability to work nor has he placed any restrictions on the times or days when he could not work. Accordingly, the administrative law judge concludes that the claimant is able and available for work. The claimant testified that he is not making two in-person job contacts each week and is, therefore, not actively and earnestly seeking work. The issue then becomes whether the claimant is excused from the provisions that require him to be earnestly and actively seeking work. The administrative law judge concludes that he is excused from the provisions requiring him to be earnestly and actively seeking work and, for that matter, available for work. The administrative law judge concludes that the claimant is temporarily unemployed as defined in Iowa Code section 96.19(38)(c). The evidence establishes that the claimant is temporarily unemployed for a lack of work from his regular job for whom he worked full-time and will again work full-time. There is no evidence that the claimant's employment has been terminated or that the claimant has been discharged or that he has voluntarily quit. Although there was at one point where there was work available for the claimant, Mr. Lawson credibly testified that he arranged things so that work is no longer

available to the claimant but that business is picking up and work may be available soon. The administrative law judge is constrained to conclude on the evidence here that the claimant remains temporarily unemployed. The administrative law judge also concludes that he remains job attached. The issue as to whether the claimant is able, available, and earnestly and actively seeking work can be raised at any time and the separation can be raised again if there is a permanent separation from the employer or refusal to accept suitable work if a recall or offer of suitable work has been made to the claimant and he has rejected it. Accordingly, the administrative law judge concludes that the claimant is able and available for work and is excused from the provisions requiring him to be earnestly and actively seeking work and, as a consequence, he is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible and remains able to work and is either available for work and earnestly and actively seeking work or remains temporarily unemployed but job attached.

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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$672.00 since separating from the employer herein on or about January 9 through the 14, 2005 and reopening his claim for benefits effective March 20, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of April 20, 2005, reference 04, is modified. The claimant, Michael A. Sheets, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was temporarily laid off for a lack of work and has not been recalled or offered suitable work which he has refused and he is able to work and is excused from the provisions that require him to be available for work and earnestly and actively seeking work. As a result of this decision, the claimant has not been overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

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