

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRIS M WIEDOW

Claimant

APPEAL NO. 11A-UI-07463-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLEN ROOFING & CONSTRUCTION INC

Employer

OC: 03/13/11

Claimant: Respondent (2R)

Section 96.4-3 – Able and Available

Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated June 3, 2011, reference 01, which held claimant eligible for unemployment insurance benefits as of March 13, 2011. After due notice, a telephone conference hearing was scheduled for and held on June 29, 2011. Claimant participated. Employer participated by Nathan Trappe, president, and Cody Raynard, foreman. The record consists of the testimony of Nathan Trappe; the testimony of Cody Raynard; and the testimony of Chris Wiedow. Official notice is taken of agency records.

ISSUES:

Whether the claimant is able and available for work; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer does roofing and construction. The claimant was hired on July 12, 2010, as a full-time laborer. The claimant was a full-time employee. The claimant last worked for the employer in December 2010. His final paycheck, which covered the period of December 12, 2010, through December 25, 2010, was for eight hours. The employer always has full-time work available for employees who want to work. During the winter months, employees are given the option of whether to work or not. There is no layoff. All an employee has to do is show up for work or call and work will be provided.

The claimant thought he had been laid off because he heard Nathan Trappe, the president, say he was going to Florida for two weeks. Even though Mr. Trappe was gone, all employees worked during those two weeks. The claimant elected not to show up for work and did not call his employer ever to inquire about his status or whether work was available. The claimant began caring for a relative who was seriously ill in early April 2011. The employer believes that the claimant quit his job.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.1(113)a provides:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status (lasting or expected to last more than seven consecutive calendar days without pay) initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

871 IAC 24.23(16) provides:

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.

This decision was set up by the representative as an able and available issue. Agency payment records show that the claimant was receiving full or partial unemployment insurance benefits while he was working for this employer based on a claim established on March 14, 2010. What the claimant told the agency about his employment with this employer since July 12, 2010, is not known, although wages are shown as reported in most weeks. The evidence in this case established, however, that full-time work was always available for the claimant from this employer, even during weeks the claimant reported no wages beginning the week ending December 25, 2010. The able and available issue came up when the claimant re-filed on March 13, 2011.

The evidence in this case established that the claimant was not laid off by this employer and that work was always available for the claimant had he chosen to come to work. The claimant admitted that he did not go to work and did not even make a call as to whether work was available or what his status might be. His testimony that he was told he was laid off and that the employer would call if work was not available is simply not credible based on the employer's testimony and the fact that all other employees were working. The claimant chose to be unemployed. He is not available for employment as he was unwilling to work the hours that were available. Benefits are denied as of March 13, 2011.

The next issue is overpayment of benefits.

Iowa Code § 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.

The overpayment issue is remanded to the claims section for determination.

The testimony from the employer's witnesses and the claimant both suggest that there has been a separation of employment from this employer that has not yet been considered by the agency. Accordingly, on remand the agency will consider whether there has been a separation of employment and if so whether the separation disqualifies the claimant from receiving benefits. This issue was not listed as an issue at the hearing and the agency has not yet had an opportunity to consider whether and how any separation of employment affects the claimant's ongoing claim for unemployment insurance benefits.

DECISION:

The decision of the representative dated June 3, 2011, reference 01, is reversed. The claimant was not able and available for work beginning March 13, 2011. This matter is remanded to the claims section to consider both the overpayment issue and the effect of any separation of employment from this employer (342807) on the claimant's claim for benefits.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs