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

APRIL D DUMERMUTH	:	
	:	HEARING NUMBER: 09B-UI-09419
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
AXMEAR FABRICATING SERVICES INC	:	
Employer.		

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: 96.5-3-a

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:

April Dumermuth (Claimant) was laid off for lack of work from Axmear Fabricating Services Inc. (Employer) on March 20, 2009. (Tran at p. 2; p. 4). After this the Claimant decided to go back to school. (Tran at p. 2-3). The Claimant had applied for Department approved training. (Tran at p. 5). By the week of May 19 the Claimant was registered to attend classes that were to commence the following week. (Tran at p. 3). On the 19th the Claimant called Workforce and was told that the training was approved and the official decision would be out the next day. (Tran at p. 6).

The Employer made an offer of work to the claimant on May 19, 2009. (Tran at p. 3). That offer was, under the applicable law, a suitable offer of work. (Tran at p. 3; p. 5). The Claimant refused the offer

of work because she was going back to school. (Tran at p. 3).

Official notice is taken of the following facts that are readily capable of certain verification through reference to the computer records which the Board is authorized to access. Fairness to the parties does not require that they be given the opportunity to contest these facts:

> On May 19, 2009 the decision to approve the Claimant for training had been made. The decision was entered into the computer as of that day but not printed and mailed until the next day.

REASONING AND CONCLUSIONS OF LAW:

Official Notice: Iowa Code section 17A.14 provides:

> Rules of evidence -- official notice.
> In contested cases: …
>
> 4. Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. Parties shall be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their source, including any staff memoranda or data, and the parties shall be afforded an opportunity to contest such facts before the decision is announced unless the agency determines as part of the record or decision that fairness to the parties does not require an opportunity to contest such facts.

Under the rules of court the matters of which judicial notice may be taken are:

> Rule 5.201 Judicial notice of adjudicative facts.
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> a. Scope of rule. This rule governs only judicial notice of adjudicative facts.
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> b. Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Iowa Rule of Evidence 5.201.

The Claimant testified that she had been approved for Department approved training at the time of the job offer. We have taken official notice of the computer records because those records are a "sourc[e] whose accuracy cannot reasonably be questioned." I. R. Evid. 5.201. We need not give notice to these parties that we intend to take this notice since "fairness to the parties does not require an opportunity to contest such facts." Iowa Code §17A.14. This is true because there really is no point to contesting the contents of these records, but also because *the Employer's account will not be charged as a result of our*

decision today.

Analysis of Claim: If the Claimant was on Department approved training (DAT) the Claimant would not be disqualified for benefits when she turned down the Employer's offer to re-employ her on May 19. This is because when someone is on DAT that person is exempted from the usual job search and able and available requirements.

871–24.39 provides:

> 24.39 Department-approved training or retraining program. The intent of department approved training is to exempt the individual from the work search requirement for continued eligibility for benefits so individuals may pursue training that will upgrade necessary skills in order to return to the labor forces. In order to be eligible for department-approved training programs and to maintain continuing participation therein, the individual shall meet the following requirements:
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> …
>
> 24.39(2) A claimant may receive unemployment insurance while attending a training course approved by the department. While attending the approved training course, the claimant need not be available for work or actively seeking work. …

871–24.43(7) provides:

> 23.43(7) Department– approved training. A claimant who qualifies and is approved for department– approved training (see rule 871–24.39(96)) shall continue to be eligible for benefit payments. No contributing employer shall be charged for benefits which are paid to the claimant during the period of the department– approved training…

These rules implement the provisions of Iowa Code Section 96.4(6)"a":

> 6. a. An otherwise eligible individual shall not be denied benefits for any week because the individual is in training with the approval of the director, **nor shall the individual be denied benefits with respect to any week in which the individual is in training** with the approval of the director by reason of the application of the provision in subsection 3 of this section relating to availability for work, and an active search for work or **the provision of section 96.5, subsection 3, relating to failure to apply for or a refusal to accept suitable** work. However, an employer's account shall not be charged with benefits so paid.

It is clear that a claimant need not be able and available for work, need not be actively seeking work, and need not accept offers of suitable work while attending DAT and further that the Employer may not be charged for benefits paid while the Claimant is attending DAT. What is not clear is what is a "week in which the individual is in training." We think it's clear that it does not mean one must actually be attending classes. For example, we would hardly expect someone in mid-semester break to have to quit the training because that week an offer of suitable

employment was made. Here the Claimant was registered for school, had her books, and knew from staff at

Workforce that the decision was made and she was set to be approved. She was officially notified in writing the next. For the majority of the week ending May 24, 2009 the Claimant was approved for DAT. We think under these circumstances a Claimant can be considered on DAT for that week before school starts. This being the case she was not required to accept suitable work, and she was not required to be available for work that week.

Even if we were not to find that the Claimant was not on DAT on the day she refused the suitable work a disqualification would not necessarily follow. A Claimant can avoid a refusal of work disqualification by proving that the refusal was for good cause. This avoids disqualification even if the offered work has been proven by the Employer to be suitable.

"Good cause for refusing work must involve circumstances which are real, substantial, and reasonable, not arbitrary, immaterial, or capricious." Norland v. IDJS, 412 N.W.2d 904, 914 (Iowa 1987). "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." 871 IAC 24.24(4)(emphasis added). Being employed elsewhere and distance to the job site can also be good cause for refusing otherwise suitable work. 871 IAC 24.24(7) & (10). If these sorts of things can be good cause for refusing work then being enrolled in school and knowing that approval of DAT is on the way is most certainly good cause for refusing work.

Finally if "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." 871 IAC 24.24(4). In such cases a finding that the Claimant was not able and available for the week in question would be the only issue. Generally a full time student is deemed to be not able and available for work. 871 IAC 24.23(5). Since the Claimant turned down the job because she was enrolled as a full-time student this was a refusal of work during a period that the Claimant was not able and available. Under this provision also the refusal would not be disqualifying.

DECISION:

The administrative law judge's decision dated July 17, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was eligible for benefits because she was in training in Department Approved Training at the time the Employer requested her to return to work. The Claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside *The Employer's account is not subject to charge for benefits* paid to the Claimant during her period of Department Approved Training.

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John A. Peno

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Elizabeth L. Seiser

RRA/fnv

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.

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Monique F. Kuester

RRA/fnv