

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN C BROWN

Claimant

APPEAL NO. 14A-UI-02522-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GREG'S LAWN SERVICE INC

Employer

OC: 09/08/13

Claimant: Respondent (1)

Iowa Code section 96.5(3)(a) – Refusal of Recall

Iowa Code section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 3, 2014, reference 02, decision that allowed benefits to the claimant provided he was otherwise eligible based on an agency conclusion that no offer of work was made on February 1, 2014. After due notice was issued, a hearing was held on March 28, 2014. Claimant Justin Brown did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Linda Simon represented the employer and presented additional testimony through Greg Scharf and Zach Loeffler. Exhibits One through Four were received into evidence. The administrative law judge took official notice of the agency's record of benefits paid to the claimant.

ISSUE:

Whether the claimant has been able to work and available for work since establishing his claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a lawn care and snow removal business. Justin Brown was employed by Greg's lawn service as a full-time laborer. Mr. Brown started in the employment in June 2013 and last performed work for the employer on Thursday, January 30, 2014. The employer had laid Mr. Brown off from his full-time employment effective September 9, 2013. At the time of that layoff, the employer indicated to Mr. Brown that it would recall him as needed to assist with snow removal. After the layoff, the employer summoned Mr. Brown to assist with snow removal 26 times between November 22, 2013 and January 30, 2014. During the week that ended February 1, 2014, Mr. Brown made himself available to perform snow removal services for the employer on Sunday, January 26 and on Thursday, January 30. Prior to Saturday, February 1, 2014, those were the only two days that week when the employer had work available for Mr. Brown.

On Saturday, February 1, 2014, the employer attempted to summon Mr. Brown to assist with snow removal work to be performed that same day. At 4:46 a.m., the employer's automated

phone system dialed Mr. Brown's number and played a pre-recorded message directing employees to report to the employer shop to immediately run snow removal routes. The employer's automated system documented that someone answered at Mr. Brown's phone number. The employer does not know whether it was Mr. Brown who answered the phone or whether Mr. Brown received the message that the employer wanted him to report for work. Under the employer's regular procedure, employees who received the automated phone call were expected to report for work within 30 minutes. Mr. Brown did not report for work or otherwise respond to the automated message. At 6:00 a.m., Zach Loeffler, Sales Operations Manager, telephoned Mr. Brown's phone number and left a message asking where Mr. Brown was. At 8:35 a.m., Mr. Loeffler again telephone Mr. Brown's number, but did not leave a message. At 10:15 a.m. Greg Scharf, President, telephoned Mr. Brown's number and left a message. Mr. Scharf said, "just in, great here, what they heck's with you not showing? You are a foreman. You know your job description." At 1:20 p.m., Mr. Scharf called Mr. Brown's number and left another message. Mr. Scharf said, "This is ridiculous. No telephone call. No nothing. Unless you are on your deathbed you need to call me." Mr. Brown did not respond to any of the voicemail messages or telephone calls made to his phone number that day. After the last phone call, the employer sent another foreman, Casey Summers to Mr. Brown's home. Mr. Brown's car was in the driveway. Mr. Brown did not answer his door. Employer had no further contact with Mr. Brown after that.

Mr. Brown had established a claim for unemployment insurance benefits that was effective September 8, 2013. Mr. Brown received unemployment insurance benefits that included \$277.00 in benefits for the week ending February 1, 2014. Mr. Brown discontinued his claim for unemployment insurance benefits after the week that ended February 1, 2014.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-3-b 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.

b. Notwithstanding any other provision of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(3) If as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

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(8) provides:

(8) Refusal disqualification jurisdiction. Both the offer of work or the order to apply for work and the claimant's accompanying refusal must occur within the individual's benefit year, as defined in subrule 24.1(21), before the Iowa code subsection 96.5(3) disqualification can be imposed. It is not necessary that the offer, the order, or the refusal occur in a week in which the claimant filed a weekly claim for benefits before the disqualification can be imposed.

The employer's actions in attempting to recall Mr. Brown to the employment on Saturday, February 1, 2014, did not comply with the requirements of the statute. While the evidence indicates an attempt to establish personal contact with Mr. Brown that day, the evidence fails to establish personal contact with Mr. Brown that day. The record generated by the employer's automated system was insufficient to establish that the system made contact with Mr. Brown. In any event the workings of that automated system were insufficient to establish the personal contact required by the administrative rule. The evidence fails to establish why Mr. Brown did not answer or return the employer's calls that day. That same evidence also is insufficient to establish a work *refusal* within the meaning of the law. Based on the evidence in the record, the administrative law judge concludes there was no bonafide offer of work and no work refusal on Saturday, February 1, 2014. The alleged offer and refusal would not disqualify Mr. Brown for unemployment insurance 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".

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.

Because the alleged offer and alleged refusal occurred during the benefit week that ended February 1, 2014, the administrative law judge need only consider Mr. Brown's availability for work that week. The evidence indicates that from Sunday, January 26, 2014 through Thursday, January 30, 2014, Mr. Brown was available for the actual work the employer had for him. The evidence indicates that Mr. Brown was available for work within the meaning of the law for the majority of the week and, accordingly, met the work availability that week. Mr. Brown was eligible for benefits for the week ending February 1, 2014, provided he was otherwise eligible.

DECISION:

The claims deputy's March 3, 2014, reference 02, is affirmed. There was not bona fide offer of work on February 1, 2014 and not disqualifying refusal of work that day. The claimant was available for work within the meaning of the law during the week that ended February 1, 2014. The claimant was eligible for benefits for the week that ended February 1, 2014 provided he was otherwise eligible.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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