

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

DEAN R SMITH

Claimant,

and

**WINNEBAGO TRIBE OF
NEBRASKA/WINNEVEGAS**

Employer.

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HEARING NUMBER: 10B-UI-09471

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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: 96.5-1D, 24.22-2J

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES IN PART AND AFFIRMS IN PART** as set forth below.

FINDINGS OF FACT:

Dean Smith (Claimant) worked for the Winnebago Tribe (Employer) as a full-time count team member from April 23, 2008. (Tran at p. 2; p. 6). The Claimant last worked on September 28, 2009. (Tran at p. 2; p. 6). The Claimant requested and was granted FMLA due to a non-work-related illness for the period from September 29 to December 29, 2009. (Tran at p. 2; p. 6).

The Claimant talked with employer representative Yellowbanks after his FMLA had expired in January 2010. (Tran at p. 6-7; p. 8). In this conversation the Claimant told Yellowbanks that he had not been released to return to work without restriction. (Tran at p. 8). The Employer was provided a doctor's statement on January 2 that Claimant had a 20-lb lifting restriction that meant he couldn't perform his

regular job. (Tran at p. 4-5; Ex 1, p. 10). The Claimant was told his leave had expired and he understood he would be terminated, so he turned in his ID on January 26. (Tran at p. 3; p. 7; p. 8; p. 9; p. 10; Ex 1, p. 3-4). The Claimant was never told that the employer had continued him on personal leave. (Tran at p. 7; p. 8; p. 9).

At the time of hearing the Claimant proved that he was able to work with the only restriction being his 20 pound restriction. (Tran at p. 10). He is qualified for commercial driving in drop (off) and hook (up) driving. (Tran at p. 10 [semi-trailers that are dropped at a designated location and cargo is unloaded. The carrier then leaves the semi-trailer and picks up another semi-trailer for the return trip.]).

REASONING AND CONCLUSIONS OF LAW:

Separation: The Employment Appeal Board adopts the Administrative Law Judge's reasoning and conclusions contained in the first three full paragraphs of page 3 of his decision. We concur with the Administrative Law Judge's decision on the separation. In addition the Board notes that Iowa Code §96.5(1)(d) does not require a claimant to return to the employer to offer services after a medical recovery or release if the employment has already been terminated. *Porazil v. IWD*, 2003 WL 22016794, No. 3-408 (Iowa Ct. App. Aug. 27, 2003). Finally, and independent of our other reasons, we affirm on the separation because the Employer did not appeal the issue. The Claimant prevailed on this issue and so he only appealed on the able and available question. Despite this appeal the Employer did not appeal the separation question, nor did it submit any argument, thus the separation question became final when not appealed.

Able and Available: Iowa Code section 96.4(3) (2009) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds:

The individual is able to work, is available for work, and is earnestly and actively seeking work....

871 IAC 24.22 expounds on this:

871—24.22 Benefit 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.

24.22(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.
- b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, **but able to work in some reasonably suitable, comparable, gainful, full-time endeavor**, other than self-employment, which is generally available in the labor market in which the individual resides.

...

24.22(2) Available for work...

- m. Restrictions and reasonable expectation of securing employment. An individual may not be eligible for benefits if the individual has imposed restrictions which leave the individual no reasonable expectation of securing employment. Restrictions may relate to type of work, hours, wages, location of work, etc., or may be physical restrictions.

The burden is on the claimant to establish that he is able and available for work within the meaning of the statute. 871 IAC 24.22; *Davoren v. Iowa Employment Sec. Comm'n*, 277 N.W.2d 602, 603 (Iowa 1979). It is not required that the Claimant be released to work in his previous employment. All that is required is that the Claimant be 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". 871 IAC 24.22(1). Here the record shows that the Claimant was able to work jobs not requiring heavy lifting, including drop and hook driving jobs. We do not think this restriction is sufficient to restrict the Claimant so that he cannot work in "some gainful activity." Furthermore we do not think the restriction is such that the Claimant has "no reasonable expectation of securing employment." 871 IAC 24.22(2). We find that the Claimant has established that he was able and available for work during the relevant time frame.

DECISION:

The administrative law judge's decision dated August 20, 2010 is **REVERSED IN PART AND AFFIRMED IN PART**. The Employment Appeal Board concludes that the claimant was discharged no disqualifying reason and affirms the Administrative Law Judge's decision on the separation issue. The Employment Appeal Board reverses the Administrative Law Judge's finding that the claimant is not able,

available, and earnestly and actively seeking work. The Board finds that the Claimant proved he was able and available for work during the time frame at issue. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

RRA/fnv