

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROBERT K OLIVER**  
Claimant

**APPEAL NO. 09A-UI-09708-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MOSS FARMS TRUCKING INC**  
Employer

**OC: 01/04/09**  
**Claimant: Appellant (1)**

Section 96.5-3-a – Refusal of Suitable Work

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from a representative's decision dated June 29, 2009, reference 03, which denied benefits upon a finding the claimant refused a recall to suitable work with Moss Farms Trucking, Inc. on April 6, 2009. After due notice, a telephone conference hearing was scheduled for and held on July 22, 2009. The claimant participated personally. Participating as witnesses for the claimant were Mr. Jeffrey Wolfe and Mr. Jody Penry. The employer participated by T. J. Patterman, Attorney at Law and witness, Jason Moss, Company Owner/President. Employer's Exhibits One through Three were offered but not received into evidence.

**ISSUE:**

The issue is whether the claimant failed to accept an offer of suitable work.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and having considered the evidence in the record, finds: Robert Oliver was previously employed by Moss Farms Trucking, Inc. as an over-the-road tractor/trailer driver on a full-time basis until December 23, 2008 when he voluntarily left his employment due to health issues. Subsequently, the claimant indicated that the health issues had been resolved and on March 30, 2009, the employer initially made Mr. Oliver an offer to return to employment. Subsequently the parties exchanged information via telephone and in person. It was indicated to Mr. Oliver that he could return to work as a truck driver. The employer noted, however, that since the claimant's leaving the company was routing its trucks differently requiring most drivers to remain out of town for the majority of the week leaving on Sunday evening and returning on Fridays. Mr. Oliver initially accepted the offer. The claimant agreed to provide a doctor's statement and undergo DOT drug testing. Subsequently the claimant indicated on April 6, that he wished to delay the beginning date of his re-employment for personal reasons.

On April 10, 2009, Mr. Oliver contacted the company stating that he would not accept the offer of work that he had previously accepted as he conferred with his wife and did not wish to be out

of town the majority of the week. During this time the employer was making efforts to make a tractor available for the claimant for his return to work. Another driver had wrecked a tractor, and therefore a tractor unit would not be available for Mr. Oliver until the week ending April 13, 2009. The tractor unit that the employer planned to give the claimant is equipped to accept a portable refrigerator for the claimant's personal use. The tractor had been inspected and passed DOT safety inspections.

A short time later Mr. Oliver concluded for a number of additional reasons that he would not accept employment. The claimant maintained that he needed to be home most nights of the week as he is required to take injectable prescription medication twice per week, that the tractor is not suitable for certain toll roads as it is equipped with tires that make trailers slightly too high for toll road clearance and that the employer's offer was a "sham offer."

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes that the claimant has refused a bona fide offer of suitable work effective the week ending April 13, 2009.

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.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

(1) One hundred percent, if the work is offered during the first five weeks of unemployment.

(2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.

(3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.

(4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

871 IAC 24.24(4) provides:

(4) Work refused when the claimant fails to meet the benefit eligibility conditions of Iowa Code section 96.4(3). Before a disqualification for failure to accept work may be imposed, an individual must first satisfy the benefit eligibility conditions of being able to work and available for work and not unemployed for failing to bump a fellow employee with less seniority. If the facts indicate that 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. In such a case it is the availability of the claimant that is to be tested. 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. However, the claimant's availability would be the issue to be determined in these types of cases.

871 IAC 23.19 provides:

Employer-employee and independent contractor relationship.

(1) The relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. An employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right to discharge or terminate a relationship is also an important factor indicating that the person possessing that right is an employer. Where such discharge or termination will constitute a breach of contract and the discharging person may be liable for damages, the circumstances indicate a relationship of independent contractor. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools, equipment, material and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, that individual is an independent contractor. A individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, occupation, business or profession, in which they offer services to the public, are independent contractors and not employees.

(2) The nature of the contract undertaken by one for the performance of a certain type, kind, or piece of work at a fixed price is a factor to be considered in determining the status of an independent contractor. In general, employees perform the work

continuously and primarily their labor is purchased, whereas the independent contractor undertakes the performance of a specific job. Independent contractors follow a distinct trade, occupation, business, or profession in which they offer their services to the public to be performed without the control of those seeking the benefit of their training or experience.

(3) Employees are usually paid a fixed wage computed on a weekly or hourly basis while an independent contractor is usually paid one sum for the entire work, whether it be paid in the form of a lump sum or installments. The employer-employee relationship may exist regardless of the form, measurement, designation or manner of remuneration.

(4) The right to employ assistants with the exclusive right to supervise their activity and completely delegate the work is an indication of an independent contractor relationship.

(5) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

(6) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(7) All classes or grades of employees are included within the relationship of employer and employee. For example, superintendents, managers and other supervisory personnel are employees.

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 evidence in the record establishes that the claimant had previously quit this employer based upon health reasons. When the claimant indicated those health reasons no longer existed, Moss Farms Trucking, Inc. offered the claimant the opportunity to return to work for the company. The evidence in the record establishes that the parties spoke both by telephone and in person and that the claimant was informed that he would be driving for the company but the driving schedule would not be exactly as it had been in the past. The claimant would be required to be out of town the majority of each week leaving on Sunday evenings and returning on Friday. The evidence establishes that the claimant nevertheless accepted the employer's offer but requested that his start date be delayed as he wished to visit his father. The claimant also had to secure a medical release and undergo a DOT drug testing. Because of factors beyond the employer's control, the tractor unit that was going to be assigned to Mr. Oliver could

not be immediately assigned because another driver had wrecked a tractor and a replacement had to be made available. The evidence in the record establishes that the employer had a suitable tractor available for the claimant effective the week ending April 13, 2009. After initially accepting the offer, the claimant then reconsidered and subsequently informed the employer that he would not accept the offer solely on the basis of the length of time that the claimant would be required to be away from home performing services for the company. Later, the claimant determined that there were a number of other reasons for not accepting including the need for a refrigerator to maintain prescription medications that the claimant was to take two times a week, the unsuitability of the truck the claimant was going to be assigned to, the manner in which the claimant believed the company had treated other drivers and the claimant's perception that the offer was not bona fide.

Based upon the evidence in the record, the administrative law judge concludes that the employer did make the claimant a bona fide offer of suitable work, based upon the claimant's experience, the length of Mr. Oliver's unemployment as well as his prospects for securing local work in his individual customary occupation.

In determining the suitability of work an objective rather than subjective viewpoint must be used. When viewed objectively, the offer was bona fide and the equipment and schedule offered by the employer were reasonable based upon economic factors and the claimant's length of unemployment. The administrative law judge thus concludes that the claimant refused an offer of suitable work effective April 13, 2009 the date that the replacement tractor was available for Mr. Oliver's use.

**DECISION:**

The representative's decision dated June 29, 2009, reference 03, is affirmed as modified. The claimant refused on April 13, 2009 a recall to suitable work. The claimant is disqualified from the receipt of unemployment insurance benefits until he has worked in and earned wages for insured work equal to ten times his weekly benefit amount, providing that he meets all other eligibility requirements of Iowa law.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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