

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATHEW M MOELLER
Claimant

APPEAL NO. 15A-UI-08853-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

QPS EMPLOYMENT GROUP INC
Employer

OC: 06/21/15
Claimant: Respondent (4/R)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 28, 2015, reference 02, decision that allowed benefits to the claimant effective June 21, 2015, provided he was otherwise eligible, based on an Agency conclusion that the claimant was able to work and available for work within the meaning of the law. After due notice was issued, a hearing was held on August 26, 2015. Claimant Mathew Moeller participated. Rhonda Hefter De Santisteban represented the employer. Exhibit One was received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits paid to the claimant.

The claimant declined to waive formal notice on the issue of whether he had refused suitable work without good cause and on the issue of whether he separated from the employment for a reason that would disqualify him for benefits or relieve the employer of liability for benefits.

ISSUES:

Whether Mr. Moeller has been able to work and available for work within the meaning of the law since June 21, 2015.

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mathew Moeller established a claim for unemployment insurance benefits that was effective June 21, 2015. As of the August 26, 2015 appeal hearing date, Mr. Moeller had received \$244.00 in unemployment insurance benefits for each of the weeks between June 21, 2015 and August 22, 2015. The total amount of benefits disbursed to Mr. Moeller for that period was \$2,196.00.

Mr. Moeller began getting work through QPS Employment Group in September 2014. QPS is a temporary employment and staffing agency. In September 2014, QPS placed Mr. Moeller in a full-time, long-term work assignment at Fratco in Mount Pleasant. The assignment came to an end on June 17, 2015, when Mr. Moeller suffered injury in the course of the employment.

Mr. Moeller had been operating a pipe coiling machine, meant to slow the device but turned it in a direction to speed it up. Mr. Moeller suffered substantially bruising on his left upper thigh when a metal pipe made contact with that area of his body. Mr. Moeller immediately reported the injury to Megan Shay, a QPS recruiter, who told Mr. Moeller to contact a nursing hotline. The nursing hotline representative directed Mr. Moeller to go home, ice his leg, take some over-the-counter pain reliever and contact QPS in the morning with a status update. Instead, Mr. Moeller drove himself to an emergency room. An emergency room doctor ordered x-rays, diagnosed a contusion/bruise and possible torn thigh muscle, and referred Mr. Moeller for physical therapy. In addition, the emergency room doctor prescribed pain medication and directed Mr. Moeller to follow up with the employer's worker's compensation physician.

On June 18, 2015, QPS's worker's compensation carrier made contact with Mr. Moeller and arranged for him to be evaluated by Dr. Linwood Miller, D.O., that same day. Doctor Miller is a general practitioner. Dr. Miller prescribed the pain medication hydrocodone. On that same day, a QPS representative notified Mr. Moeller that the Fratco could not accommodate light-duty work and that Mr. Moeller's assignment at Fratco was ended. The QPS representative told Mr. Moeller that she would contact Mr. Moeller if she located light-duty work for him. QPS did not have a light-duty assignment for Mr. Moeller at the time.

Mr. Moeller discontinued use of the hydrocodone a week or two after his injury. Mr. Moeller continued with physical therapy two times a week and, at the time of the August 26, 2015 appeal hearing, was still participating in physical therapy.

Effective June 30, 2015, Dr. Miller released Mr. Moeller to perform light-duty work with limited lifting, bending and stooping. On July 6, 2015, QPS received a copy of the June 30, 2015 cursory restrictions document that Dr. Miller, or someone on his behalf, had written on a prescription pad. On July 7, Kim Cleaver, QPS Branch Manager, left a voice mail message for Mr. Moeller indicating that QPS has a light-duty program at the Fairfield Branch office and directing Mr. Moeller to call for more details. On Monday, August 24, 2015, Ms. Cleaver, telephoned Mr. Moeller's phone and left a similar message. On August 25, 2015, Mr. Moeller returned the call, spoke to a recruiter and was instructed to contact the employer's Fairfield Branch. As of the hearing on August 26, 2015, Mr. Moeller had not made contact with the Fairfield branch office. Work at the employer's Fairfield office would require Mr. Moeller to commute from his home in Mt. Pleasant to the work Fairfield. Mr. Moeller's driver's license is revoked. Mr. Moeller relies on a family member for transportation. The work Mr. Moeller had previously performed for the employer was work located in Mt. Pleasant.

At the time of the August 26, 2015 hearing, Mr. Moeller was unsure what types of work he could perform with his light-duty medical restrictions. Mr. Moeller conceded that he could not perform his previous regular duties at Fratco, but speculated that he might be able to perform janitorial duties or answer a phone. Mr. Moeller completed 10th grade and, at the time of the appeal hearing, indicated he was working on a General Education Diploma. Mr. Moeller had completed the NCRC evaluation process and his evaluation result indicated that he has the skills a "bronze" worker.

At the time of the hearing, Mr. Moeller was unable to provide complete information regarding his work search activities. During the week that ended June 27, 2015, Mr. Moeller made employer contacts with a steak house and a gas station. During the week that ended July 4 2015, Mr. Moeller made employer contact with a McDonald's restaurant and a Casey's store in Mt. Pleasant. During the week that ended July 11, Mr. Moeller made employer contact with a Comfort Inn. Mr. Moeller was unsure whether he made a second job contact that week. Mr. Moeller could not provide job search information for the weeks that ended July 18, July 25,

August 1, or August 8, 2015. During the week that ended August 15, 2015, Mr. Moeller had one employer contact with a Quiznos. During week that ended August 22, Mr. Moeller made an employer contact with at a Best Western and at one more retail outlet. As of Wednesday afternoon, August 26, 2015, Mr. Moeller had not made any employer contacts for the week of August 23-29, 2015.

REASONING AND CONCLUSIONS OF LAW:

Because Mr. Moeller declined to waive formal notice on the separation and alleged work refusal, the administrative law judge's decision is confined to whether Mr. Moeller had been able and available for work and, if not, whether he has been overpaid unemployment insurance benefits.

Iowa Code § 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".

Iowa Admin. Code r. 871-24.22(1)a and (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.

(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.

(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.

The employer contacted Mr. Moeller regarding light-duty work that the employer has at its Fairfield branch office. However, such work would require Mr. Moeller to commute from Mt. Pleasant to Fairfield, whereas his previous work for the employer was in his home community of Mt. Pleasant. Mr. Moeller was not required to be available for work in Fairfield in order to demonstrate that he was available for work within the meaning of the law. A claimant will not be disqualified for restricting employability to the area of usual employment. See Iowa Administrative Code rule 871-24.23(4).

Mr. Moeller established a claim for benefits during the week that started June 21, 2015. The weight of the evidence indicates that Mr. Moeller had not yet been released to return to work at that time, as indicated by the language of Dr. Miller's June 30, 2015 note: "*At this time* he may do light work. Limit lifting, bending stooping." [Emphasis added.] The language in the note strongly suggests that prior to June 30, 2015, Mr. Moeller was unable to perform work. Thus, Mr. Moeller would not meet the work ability or availability requirement during the week that ended June 27, 2015 and is not eligible for benefits for that week. A claimant who is unable to work, is under the care of a medical practitioner, and has not been released as being able to work, does not meet the availability requirement and is not eligible for benefits. See Iowa Administrative Code rule 871-24.23(35).

On the other hand, the June 30, 2015 note indicates that Mr. Moeller was as of that date able to perform some types of work. Mr. Moeller cannot be faulted for Dr. Miller's failure to more specifically state what type of work. Dr. Miller is a physician selected by the employer, not by Mr. Moeller. The weight of the evidence establishes that Mr. Moeller had met the work *ability* requirement since June 30, 2015, as indicated by Dr. Miller's note.

Mr. Moeller was required to make a minimum of two employer job contacts each week he claims unemployment insurance benefits. Mr. Moeller demonstrated his awareness of this requirement by reporting, when making his weekly claims, that he had indeed been consistently making two job contacts per week. Mr. Moeller has however presented insufficient evidence to establish a consistent, week-by-week, active and earnest search for new employment. During the week that ended June 27, 2015, Mr. Moeller made employer contacts with a steak house and a gas station. A reasonable person would be hard pressed to identify work that Mr. Moeller could do at a steakhouse or at a gas station without violating his work restrictions. Mr. Moeller has presented insufficient evidence to establish an active and earnest search for work for the week ending June 27, 2015 and is not eligible for benefits for that week. During the week that ended July 4 2015, Mr. Moeller made employer contact with a McDonald's restaurant and a Casey's store in Mt. Pleasant. A reasonable person would be hard pressed to identify work that Mr. Moeller could do at a McDonalds or at a Casey's without violating his work restrictions. During the week that ended July 11, 20215, Mr. Moeller made employer contact with a Comfort Inn, but was unsure whether he made a second job contact. Mr. Moeller could not provide job search information for the weeks that ended July 18, July 25, August 1, or August 8, 2015. During the week that ended August 15, 2015, Mr. Moeller had one employer contact with a Quiznos. During week that ended August 22, Mr. Moeller made an employer contact with at a Best Western and at one more retail outlet. The only week for which Mr. Moeller has thus far

demonstrated an active and earnest search for work that he could reasonably expect to be able to perform with his work restrictions was the week that ended August 22, 2015. Mr. Moeller is eligible for benefits for that week, provided he meets all other eligibility requirements. Mr. Moeller is not eligible for benefits for the weeks ending June 27, July 4, July 11, July 18, July 25, August 1, August 9, and August 15.

Iowa Code section 96.3(7) provides that if a claimant receives benefits and is deemed ineligible for benefits, Workforce Development must recover the benefits and the claimant must repay the benefits, even if the claimant was not at fault in receiving the benefits. Because Mr. Moeller has been deemed ineligible for the benefits he received for the eight weeks between June 21, 2015 and August 15, 2015, the benefits he received for those weeks constitute an overpayment of benefits. Mr. Moeller is overpaid \$1,952.00 for eight weeks between June 21, 2015 and August 15, 2015. Mr. Moeller must repay that amount.

DECISION:

The July 28, 2015, reference 02, decision is modified as follows. The claimant did not meet the work ability or availability requirements during the week that ended June 27, 2015 and is ineligible for benefits for that week. The claimant was able to work, but not available for work within the meaning of law due to a less than active and earnest search for new employment during the seven weeks between June 28, 2015 and August 15, 2015. The claimant is ineligible for benefits for those weeks. The claimant was able to work and available for work during the week that ended August 22, 2015 and is eligible for benefits for that week, provided he meets all other eligibility requirements. The claimant is overpaid \$1,952.00 for eight weeks between June 21, 2015 and August 15, 2015. The claimant must repay that amount.

This matter is remanded to the Benefits Bureau to address whether the claimant met the able and available requirements for the period of August 23, 2015 through September 19, 2015 and to adjudicate the separation from the employment.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs