

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RICHARD K MILLER**  
Claimant

**APPEAL NO. 09A-UI-00422-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**METRO READY MIX INC**  
Employer

**OC: 01/02/09 R: 03**  
**Claimant: Appellant (5-R)**

Iowa Code Section 96.4(3) – Able & Available

**STATEMENT OF THE CASE:**

Richard Miller filed a timely appeal from the January 2, 2009, reference 03, decision that denied benefits and that concluded he had refused recall to suitable work on November 3, 2008. After due notice was issued, a hearing was held on January 27, 2009. Mr. Miller participated. Wayne Kempf, Manager, represented the employer. The administrative law judge took official notice of the Agency's administrative database readout record (DBRO) pertaining to the benefit year that commenced February 3, 2008.

**ISSUE:**

Whether the claimant has been able to work and available for work since October 8, when he last performed work for the employer.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Richard Miller started working for the employer on April 13, 2005 and last performed work for the employer on October 8, 2008. Mr. Miller was a full-time cement mixer driver. The employer's business slows during the winter months and Mr. Miller would generally be temporarily laid off during the winter months. On October 9 2008, Mr. Miller did not report for work. Mr. Miller notified the employer that his mother was seriously ill and had been transported to Iowa City for treatment. Mr. Miller subsequently spoke to the employer about his need to care for his ailing mother. Manager Wayne Kempf told Mr. Miller that he was willing to place Mr. Miller on a temporary layoff status so Mr. Miller could attend to his mother's healthcare, but that the employer would be recalling Mr. Miller to the employment within a number of weeks. On October 31, Manager Wayne Kempf had direct contact with Mr. Miller and asked him to report for work on November 3. Mr. Miller agreed to report on November 3. However, on November 3, Mr. Miller notified the employer's dispatch that he was unable to report for work because he had to care for his mother. Since October 8, 2008, Mr. Miller had continued to be preoccupied with providing essential care to his ailing mother. Mr. Miller's mother requires his care 24 hours a day, seven days a week. Mr. Miller has attempted to make other arrangements for his mother's care so that he could return to work, but has been unable to make such arrangements. Due to his family concern, Mr. Miller has not been in a position to return to the

employer since he last performed work for the employer on October 8, 2008. Mr. Miller has not looked for other employment and intends to return to the employer at some point. The employer is open to Mr. Miller returning to the employment. Mr. Miller and Mr. Kempf continue to maintain contact about the status of Mr. Miller's mother.

Workforce Development's administrative records indicate that Mr. Miller established an "additional claim for benefits that was effective November 2, 2008. Mr. Miller received benefits for the period of November 2 through December 27, 2008. Mr. Miller did not receive benefits from October 8, 2008 until November 1, 2008 and did not have an active claim for benefits during that period.

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

Where a person refuses to accept suitable employment without good cause, the person is disqualified from unemployment insurance benefits until he has worked in and been paid wages equal to 10 times his weekly benefit amount, provided he is then otherwise eligible. See Iowa Code section 96.5(3)(A). Illness of a family member and the need to care for that family member is considered good cause for refusing work. See 871 IAC 24.24(4).

The weight of the evidence indicates that Mr. Miller did not unequivocally refuse recall to the employment. Instead, the evidence indicates that Mr. Miller was willing to return, but told the employer on November 3 that he was not able to return at that time because he had to care for his mother. To the extent that Mr. Miller refused the recall to the suitable employment, Mr. Miller had good cause for refusing. The refusal would not subject Mr. Miller to the disqualification referenced in Iowa Code section 96.5(3)(a). However, that is not the end of the story.

Workforce Development rule 871 IAC 24.24(4) provides as follows:

Failure to accept work and failure to apply for suitable work. Failure to accept work and failure to apply for suitable work shall be removed when the individual shall have worked in (except in back pay awards) and been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

24.24(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.

According to the law, the administrative law judge must further consider whether Mr. Miller has been available for work during the time he has requested unemployment insurance benefits. Because the additional claim for benefits was effective November 2, 2008, that date was the starting point of the period to be considered.

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.

Workforce Development rule 871 IAC 24.23(10) and (41) provides as follows:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

24.23(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

24.23(41) The claimant became temporarily unemployed, but was not available for work with the employer that temporarily laid the claimant off. The evidence must establish that the claimant had a choice to work, and that the willingness to work would have led to actual employment in suitable work during the weeks the employer temporarily suspended operations.

The weight of the evidence indicates that Mr. Miller has not been available for work with this employer or any other since October 8, 2008. Mr. Miller's full-time care for his mother continues and precludes Mr. Miller from performing work. Accordingly, Mr. Miller is disqualified for unemployment insurance benefits as of November 2, 2008, the effective date of his additional

claim for benefits. The weight of the evidence indicates that Mr. Miller continues to be ineligible for benefits as of the date of the appeal hearing, January 27, 2009.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The issue of overpayment of benefits was not set for hearing and was not addressed as part of the hearing. Because Mr. Miller received benefits during a period when he was not eligible for benefits, the overpayment will need to be addressed. This matter will be remanded to the Claims Division for entry of an overpayment decision,.

**DECISION:**

The Agency representative's January 2, 2009, reference 03, is modified as follows. The claimant had good cause for refusing a recall to suitable employment on November 3, 2008. The claimant has not been available for work since establishing the additional claim for benefits

that was effective November 2, 2008. The claimant continues to be unavailable for work as of January 27, 2009. The claimant is not eligible for benefits.

The matter is remanded to the Claims Division for entry of an overpayment decision.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs