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

PEG S NEMMERS	:	
	:	**HEARING NUMBER:** 10B-UI-09304
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
SPHERION STAFFING LLC	:	
Employer.		

N O T I C E

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: 96.5-3-A, 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claiman tappealed 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** as set forth below.

FINDINGS OF FACT:

The Claimant filed a claim for benefits with an original claim date of May 9, 2010. (Decision of Fact Finder ["Original Claim Date"]; Decision of Administrative Law Judge ["OC"]). On or before May 7, 2010 the Employer offered the Claimant a customer service position with flexible full-time hours at $8.50 per hour ($340.00 per week). (Tran at p. 2; p. 4-5). The Claimant declined. (Tran at p. 2; p. 4). She was not offered any other job by this Employer. (Tran at p. 5). The last communication between the Claimant and the Employer (other than in connection with the claim for benefits) was May 7, 2010. (Tran at p. 1; p. 3; p. 6).

Claimant's weekly benefit amount is $193.00. (Tran at p. 7). The claimant's average weekly wage is $343.04. (Tran at p. 7).

REASONING AND CONCLUSIONS OF LAW:

Standards Governing Disqualification For Refusal Of Suitable Work: 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 re-qualified. To re-qualify 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.

The Department of Workforce Development has promulgated rules addressing refusal of suitable work which provide in relevant part:

> **871—24.24 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(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. *b.* Upon notification of a job opening for a claimant, a representative of the department shall notify the claimant of the job referral. If the claimant fails to respond without good cause, the claimant shall be disqualified until such time as the claimant contacts the local workforce development center or unemployment insurance service center.
>
> **24.24(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.

871 IAC 24.24.

Rule 24.1(21) defines "benefit year" to be "a period of 365 days (366 in a leap year) beginning with and including the starting date of the benefit year. The starting date of the benefit year is always on Sunday and is usually the Sunday of the current week in which the claimant first files a valid claim unless the claim is backdated…"

Where the claimant actually refuses work, as opposed to not applying for work, the refusal of suitable work question involves whether the work was "suitable" and, if so, whether the refusal was for "good cause". In *Pohlman v. Ertl Co.*, 374 N.W.2d 253 (Iowa 1985) the Supreme Court placed the burden of proof on good cause on the claimant. Subsequently in *Norland v. Iowa Department of Job Service*, 412 N.W.2d 904, 910 (Iowa 1987) the Court ruled that the employer had the burden of proving suitability of the offer. On the issue of suitability the Employer has a burden of putting on a *prima facie* case. The Claimant has a burden to identify the suitability factors at issue, at least as to some of them. *Norland v. IDJS*, 412 N.W.2d 904, 911 (Iowa 1987). If the employer proves that a suitable offer was made and refused, then the claimant can avoid disqualification by showing that the refusal was for good cause. Suitability of an offer is a fact issue that must be resolved "in light of those facts peculiar to each given case." *Norland v. IDJS*, 412 N.W.2d 904, 912 (Iowa 1987). "The question of good cause, like that of suitability, is a fact issue within the discretion of the department to decide." *Norland v. IDJS*, 412 N.W.2d 904, 914 (Iowa 1987).

Customer Service Offer:

Since the offer was made within the Claimant's first week of unemployment it would be suitable only "if the gross weekly wages for the work equal or exceed [100 %] 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." Iowa Code §96.5(3)(a). Here the Claimant's average weekly wage was $343.04. The gross weekly wages offered was $340. Since this is not 100% of the average weekly wage the offer was not suitable by law.

A suitability factor is at issue if it may not be satisfied, not because it was a reason for the refusal. Specifically, "[i]n order for work to be considered "suitable" under section 96.5(3), it is mandatory that the gross weekly wages equal or exceed the statutorily prescribed percentages of base period wages. If gross weekly wages for the work do not equal or exceed those sums, the work is unsuitable as a matter of law and the actual motive of a claimant in refusing the work is immaterial." *Biltmore Enterprises, Inc. v. Iowa Dept. of Job Service*, 334 N.W.2d 284, 287 (Iowa, 1983). Thus it matters not if the Claimant turned down the customer service job because she objected to the duties of the job. The wage rate was inadequate, and as a matter of law the offer was not of "suitable" work. The work does not become suitable just because the Claimant did not base the refusal on the wage rate.

Warehouse Offer:

"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..." 871 IAC 24.24(1). This provision is in the passive voice and does not answer exactly who must establish that an offer was made. We recognize that sometimes an offer of work comes from someone other than the employer who is on the hook for benefits. In such cases the burden would normally be on Workforce. In cases such as this one, where the former employer responsible for benefits is the offering employer, then the burden is on the employer to prove an offer has been made. This is the most basic part of the *prima facie* burden imposed by *Norland*. *See* I.R. App. Pro. 6.904(3)("Ordinarily, the burden of proof on an issue is upon the party who would suffer loss if the issue were not established.").

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We have found credible the Claimant's testimony that she was not offered the warehouse job. Given that all the temporary employees were let go the same day, (Tran at p. 7), it is entirely plausible that the offer was made to another worker and a mistake was made in the records. The Claimant's testimony was firm and definite, and we credit it. With no written documentation of the offer in evidence, we find the Employer failed to carry its burden of proving that the warehouse job was offered to the Claimant as alleged.

Finally, even if we were to find that the warehouse offer was made, we would find that it was made on Friday, May 7, 2010. Here the Claimant first filed a valid claim sometime in the week starting on Sunday May 9, 2010. The Claimant has an original claim date of May 9, 2010. May 7 is before May 9. Thus the Employer does not even allege that it made the offer within the benefit year. For that reason alone we cannot find a refusal of suitable work. 871 IAC 24.24(8); *Dico, Inc., v. Iowa Employment Appeal Board*, 576 N.W.2d 352 (Iowa 1998). Of course, this alternative ground also holds true for the customer service offer which was made, at the latest, on May 7.

DECISION:
The administrative law judge's decision dated September 8, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant did not refuse an offer of suitable work without good cause. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

_____
John A. Peno

_____
Elizabeth L. Seiser

A portion of the Claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (statements) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

_____
John A. Peno

_____
Elizabeth L. Seiser

RRA/kjo