

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHARLES K COLE

Claimant

APPEAL 15A-UI-13628-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARVEYS IOWA MANAGEMENT CO INC

Employer

OC: 11/01/15

Claimant: Respondent (2)

Iowa Code § 96.4(3) – Able and Available

Iowa Code § 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed an appeal from the December 1, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 4, 2016. Claimant did not participate. Employer participated through Katrina Jones, Human Resources Manager.

ISSUE:

Is the claimant able to and available for work or is he on an approved leave of absence?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was initially hired to work full time as a table games dealer beginning on June 26, 2015 through date of hearing as he remains employed. The claimant opted to go to an on-call schedule on August 28, 2015. While in an on-call position the claimant had a set schedule each week. The claimant worked a schedule more properly classified as part time than as on call due to the regular scheduling of shifts.

The claimant has extensive work restrictions due to a non-work-related back problem that limits his ability to stand and sit for extended periods of time. As of October 30, the claimant could no longer perform his job duties as a table games dealer. The employer attempted to accommodate his restrictions but was unable to do so. The claimant was given some time to find another position in the company that he could perform. He was offered and accepted a job as an on-call surveillance monitor on December 10. He was to start the new position on December 18, but on December 17, he called and rejected the position. He is still on leave while he looks for a new position within the company that will meet his work restrictions. The claimant is still on an extended leave of absence. The claimant did not accept a new position that complied with his work restrictions.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work effective November 1, 2015.

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 § 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

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

Iowa Admin. Code r. 871-24.23(10) provides:

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

(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.

Iowa Admin. Code r. 871-24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

The claimant has work restrictions that prevent him from working at the job he was hired to perform that of a table games dealer. He has rejected other work that would comply with his work restrictions. The work restrictions arise from a non-work-related back problem. The employer attempted to accommodate the claimant's work restrictions so that he could remain as a table game dealer but has not been able to do so. Employer is not obligated to accommodate a non-work-related medical condition. The claimant rejected a position that would have complied with his extensive work restrictions. Since he has not been released to perform his full work duties, claimant was not considered able to or available for work effective November 1, 2015. Benefits are denied.

Iowa Code § 96.3(7)a-b, 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.

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 § 96.8, subsection 5.

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 § 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 § 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 states pursuant to § 602.10101.

The administrative law judge concludes that the claimant has been overpaid unemployment insurance benefits in the amount of \$2152.00 pursuant to Iowa Code Section 96.3-7 as the claimant is ineligible to receive unemployment insurance benefits as he is not considered able to and available for work.

DECISION:

The December 1, 2015, reference 01, decision is reversed. The claimant is not able to and available for work effective November 1, 2015. He has been overpaid unemployment insurance benefits in the amount of \$2152.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css