

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LANCE D BERTRAND
Claimant

APPEAL NO. 07A-UI-04747-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

NEUMANN BROS INC
Employer

**OC: 03-18-07 R: 02
Claimant: Respondent (4)**

Section 96.4-3 – Able and Available
Section 96.3-7 – Recovery of Benefit Overpayment
Section 96.5(1) – Voluntary Leaving - Layoff

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 26, 2007, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on May 29, 2007. The claimant did participate. The employer did participate through Erin Davis, Payroll Clerk and John Neumann, Vice President. Employer's Exhibits One through Three were entered and received into the record.

ISSUE:

Is the claimant able to and available for work?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a journeyman carpenter full-time beginning April 21, 2006 through date of hearing as the claimant remains employed by Neumann Brothers.

On September 9, 2006, the claimant left work to deal with a brain tumor and cancer issue that was non-work-related. The claimant was released to return to work with light duty on March 26, 2007. The claimant contacted Mr. Neumann who told him he could not return to work unless he had a full work release from his doctor. The claimant's treating physician released him to return to work without work restrictions on March 30, 2007. The employer was not given the work release until April 3, 2007. The claimant actually returned to work on April 10, 2007. The employer had no work available for the claimant between April 3, 2007 and April 10, 2007.

Claimant has received unemployment benefits since filing a claim with an effective date of March 18, 2007.

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 from September 9, 2006 through April 3, 2007, when he turned in to his employer his release to return to work full-time without work restrictions.

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(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.

871 IAC 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 physician and has not been released as being able to work.

Inasmuch as the illness was not work-related and the treating physician did not release the claimant to return to work, without restrictions until April 3, 2007, the claimant has not established ability to work. The employer does not allow any employee to return to work from a non-work-related illness or injury until they are given a full release with no work restrictions by their physician.

For the reasons that follow, the administrative law judge concludes the claimant was laid off due to a lack of work from April 3, 2007 through April 10, 2007.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

There was not work available for the claimant from April 3 through April 10, 2007, therefore, the separation was attributable to a lack of work by the employer. Benefits are allowed for the week ending April 7, 2007. No claim for benefits was filed after the week ending April 7, 2007.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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 section 96.8, subsection 5.

Because claimant's separation was disqualifying, benefits were paid to which claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The April 26, 2007, reference 02, decision is modified in favor of the appellant. The claimant is not able to work and available for work effective September 9, 2006 through April 3, 2007. Benefits are withheld during that time period. The claimant was released to return to work on April 3, 2007 but no work was available for him until April 10, 2007. The claimant is entitled to unemployment insurance benefits for the week ending April 7, 2007. Claimant is overpaid benefits in the amount of \$758.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css