

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

GAIL L DERRY

Claimant

and

HIGHWAY MAIL COMPANY

Employer

HEARING NUMBER: 19BUI-02871

EMPLOYMENT APPEAL BOARD
DECISION

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: 96.4-3, 24.22-2

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

From 1998 through March 1, 2019 Gail Derry (Claimant) worked as a full-time truck driver for Highway Mail Company (Employer). He was laid off on March 17, 2019. For the past ten years, Claimant drove a route that required him to leave Des Moines at 11:00 a.m. for four consecutive days. Claimant then had the next four days off of work. The Claimant was paid \$27.89 per hour. The Claimant has been driving mail trucks for about 40 years. The route took about 10 hours of driving.

During his employment, the Claimant kept a long-term stay hotel room in Des Moines since his home is a one-hour drive from Des Moines. Claimant gave up his hotel room in Des Moines after his route was cancelled, and is therefore not interested in any offers of temporary work that requires commuting to Des Moines during the overnight, or that requires overnight stays in Des Moines.

The Claimant is looking for driving work with a similar schedule to that which he had with Employer during the previous ten years.

On March 23, 2019, the Employer asked the Claimant to work one shift leaving Des Moines at 9:00 p.m. for \$27.89 per hour. Claimant stated he was not interested in the offer of work because it was temporary.

On March 27, 2019, the Employer asked Claimant to fill in for an employee on medical leave on a route that left Des Moines at 2:30 a.m. for the same rate of pay. The route ran three days on, and three days off. Claimant declined the offer of work because of the schedule and the temporary nature of the offer.

REASONING AND CONCLUSIONS OF LAW:

Availability

Iowa Code section 96.4(3) (2019) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds:

(3) The individual is able to work, is available for work, and is earnestly and actively seeking work....

871 IAC 24.22 expounds on this:

871—24.22 Benefit 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.

a. Shift restriction. The individual does not have to be available for a particular shift. If an individual is available for work on the same basis on which the individual's wage credits were earned and if after considering the restrictions as to hours of work, etc., imposed by the individual there exists a **reasonable expectation** of securing employment, then the individual meets the requirement of being available for work.

...

m. An individual may not be eligible for benefits if the individual has imposed restrictions which

leave the individual **no reasonable expectation of securing employment**. Restrictions may relate to type of work, hours, wages, location of work, etc., or may be physical restrictions.”

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871 IAC 24.22(2)(emphasis added). Similarly 871 IAC 24.23(18) states that a claimant is unavailable for work “Where the claimant's availability for work is **unduly limited** because such claimant is willing to work only in a specific area although suitable work is available in other areas where the claimant is expected to be available for work.”

The burden is on the claimant to establish that he is able and available for work within the meaning of the statute. 871 IAC 24.22; *Davoren v. Iowa Employment Sec. Comm'n*, 277 N.W.2d 602, 603 (Iowa 1979). To be found able to work, “[a]n 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.” *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1).

When a claimant is limited in the hours or geography of work the availability issue is focused on the *effect* the limitation has on the claimant's ability to find work. Thus the question is whether restrictions “leave the individual no reasonable expectation of securing employment.” 871 IAC 24.22(2)(m). We do not read rule 871 IAC 24.23(18) as contradicting this idea. Rule 24.23(18) finds a claimant not *available* if the claimant's “availability” is “unduly limited” because the claimant is only willing to work “in a specific area.” It is clear this rule is saying is that if a claimant has unduly limited his availability by not being able (or willing) to work the geographic area required to get a job, then the claimant is not able and available so long as the restrictions last. The focus of the rule is clearly on whether the limitation is “undue,” that is, how limiting it is to the ability to work.

The Claimant lives in Bagley and seeks driving jobs that do not require him to move. He is willing to work in Des Moines if the hours are such that he is not having to leave in the middle of the night *and then* drive for hours at work. Thus the reason he turned down the 9 p.m. job was that it was temporary, and not because it was in Des Moines. The restriction the Claimant imposes is that he does not want the timing *combined with* the location to be such that he is forced into all-night driving on a regular basis, or forced to move. We do not find this to be the sort of restriction that is “unduly limiting” within the meaning of the regulations. We find the Claimant is available for work on the same basis as in his base period.

Refusal of Suitable Work

Iowa Code section 96.5-3 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 requalified. To requalify 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.

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a. (1) 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:

(a) One hundred percent, if the work is offered during the first five weeks of unemployment.

(b) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.

(c) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.

(d) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

(2) However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

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).

"In 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 why the Claimant turned down the work if the offer was monetarily insufficient.

Here the Claimant's high quarter average weekly wage was about \$1,090. The offer of a single shift at \$27.89 was within the five weeks of unemployment would not meet the minimum 100%

requirement and so the Employer has not proven the offer to be monetarily suitable.

The next offer was also within the first five weeks of unemployment and was at the same hourly rate of pay, and was three days on and three days off. So in in a six day cycle the Claimant would be paid for three days' work. Formerly in an eight day cycle he was paid for four days' work. Over time it works out the same. The least common multiple of 6 and 8 is 24. So at the end of 24 days both cycles will have ended a period of days off, and be ready to start over again. In 24 days there are three 8-day cycles. He would be paid 4 days for each 8-day cycle, which is 12 days of pay in 24 since 3 cycles times 4 days per cycle is 12. In those same 24 days there are *four* 6-day cycles and he would be paid *three* days per 6-day cycle, again he'd make 12 days of pay since 4 cycles times 3 days per cycle is 12. In other words, on the 6-day cycle the consecutive days of pay are fewer, but the days of no pay are fewer as well. Thus in any period of 8 days under the 8-day cycle the Claimant would get four days' pay. Under the 6-day day cycle the number of days of pay over those same 8-days depends on where we start the cycle in those six days. Of the six possibilities two result in one extra day of pay with the 3-day cycle, two result is one day less of pay, and two have the same number of days of pay. So, looking at 24 days:

	3 day Cycle		4 Day Cycle		Difference In Days Worked
	Work/Off	Days Worked	Work/Off	Days Worked	
1	Work	1	Work	1	SAME
2	Work	2	Work	2	SAME
3	Work	3	Work	3	SAME
4	off	3	Work	4	6-day -1
5	off	3	off	4	6-day -1
6	off	3	off	4	6-day -1
7	Work	4	off	4	SAME
8	Work	5	off	4	6-day +1
9	Work	6	Work	5	6-day +1
10	off	6	Work	6	SAME
11	off	6	Work	7	6-day -1
12	off	6	Work	8	6-day -2
13	Work	7	off	8	6-day -1
14	Work	8	off	8	SAME
15	Work	9	off	8	6-day +1
16	off	9	off	8	6-day +1
17	off	9	Work	9	SAME
18	off	9	Work	10	6-day -1
19	Work	10	Work	11	6-day -1
20	Work	11	Work	12	6-day -1
21	Work	12	off	12	SAME
22	off	12	off	12	SAME
23	off	12	off	12	SAME
24	off	12	off	12	SAME

So in a 24 day cycle the pay is less at the end of 9 days, more at the end of 4 days, and the same at the end of the remaining 11. So what this means is that depending on when the pay periods hits in a 24 day cycle, the Claimant would be more likely to make at least as much as on the three day cycle. And whenever he made less it would even out at the next pay period. So long as the employment continued the pay would be the same. Another way to look at is that in 360 days there 15 break-even 24-day cycles. For the remaining 5 days of the year the biggest difference that could occur would be two days of pay a year. And then it would be made up the next year. Only at the end of the employment could there be some difference, depending on which day of the 24 day cycle the job ends. For example, if the job ended on the 18th day of a 24 day cycle the Claimant would get one fewer days of pay on the 6-day cycle, but if it ended on the 17th he'd get the same. And it would only be this one time. So suffice it, that the offer met the minimum earnings requirement.

But the offer would have required the Claimant to leave home around midnight, and then start his driving day at 2:30 a.m., get to Des Moines at around 1 pm, and start over. In order to do this, and get needed rest, he would have to get a room in Des Moines. Either that or move. And if he took the room in Des Moines, again he would be driving back and forth 33% more than before (*i.e.* 4 times in 24 days instead of 3). Plus he'd be working the overnight instead of being done by 9 p.m. or so. We find that the Employer failed to prove that this offer was suitable because of the potential effect of health and physical fitness of the Claimant, and the distance to his residence.

In the alternative, we find that the Claimant has proven good cause for refusing the offer. See 871 IAC 24.24(7) (Good cause when "the claimant did not reside in the area where the job was offered"); see *also* 24.24(3) (" Each case shall be determined on its own merits as established by the facts"). Based on the facts and circumstances of this particular case we find the Claimant had good cause for refusing the March 27 offer based on the combination of its hours and location. We do caution the Claimant that "[a]s the period of unemployment lengthens, work which might originally have been unsuitable may become suitable." 871 IAC 24.24(2).

DECISION:

The administrative law judge's decision dated May 1, 2019 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was able and available for work and did not refuse 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.

Ashley R. Koopmans

James M. Strohman

DISSENTING OPINION OF KIM D SCHMETT:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Kim D. Schmett

RRA/fnv