

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEAN MINOR
Claimant

APPEAL NO: 11A-UI-14433-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SHADE TREE SERVICE CO
Employer

OC: 09/04/11
Claimant: Respondent (2/R)

Iowa Code § 96.4-3 - Able and Available for Work
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Shade Tree Service Company (employer) appealed an unemployment insurance decision dated October 24, 2011, reference 03, which held that Dean Minor (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 2, 2011. The claimant participated in the hearing. The employer participated through Jeff Baker, Director of Operations. Employer's Exhibit One was admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant is able and available to work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed with Shade Tree Service Company until he voluntarily quit his employment on July 25, 2011 without good cause attributable to the employer according to a decision dated September 30, 2011, reference number 02. He was off work due to a non-work-related medical condition.

The claimant was released to return to work without restriction by his physician as of October 3, 2011. The employer sent him a letter dated October 7, 2011 with an enclosed work release that the claimant needed his physician to complete. Since the work the claimant performs with the employer can be dangerous, the employer needs a specific release before the claimant could be returned to work. The claimant never returned the Shade Tree Work Release Without Restrictions to the employer, although he did provide a physician signed copy to Iowa Workforce. Consequently, Iowa Workforce began paying weekly benefits to the claimant. This hearing was the first time the employer learned that the claimant's physician had released him to return to work to his former employment.

The claimant filed a claim for unemployment insurance benefits effective September 4, 2011 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue to be determined is whether the claimant is able and available for work. In order for an individual to be eligible to receive unemployment insurance benefits, the evidence in the record must establish that he is able to work, available for work, and earnestly and actively seeking work. See Iowa Code § 96.4(3) and 871 IAC 24.22.

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 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, (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.

(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.

(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.

The claimant has the burden of proof in establishing his ability and availability for work. *Davoren v. Iowa Employment Security Commission*, 277 N.W.2d 602 (Iowa 1979). His physician released him to return to work without restrictions as of October 3, 2011 so he was medically able to return to work at that time. However, the employer provided the claimant with a specific work release he had to take to his physician so that his physician could confirm he was released to work as a tree trimmer since the work is dangerous. The claimant never returned that release to the employer, although he provided it to Iowa Workforce. Consequently, the claimant is medically able to work but has not made himself available to the employer to return to work. Benefits are therefore denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

This case will be remanded for determination of the overpayment issue and for further determination. In a decision dated September 30, 2011, reference number 02, the claimant was disqualified from receiving benefits until he had earned wages for insured work equal to ten (10) times his weekly unemployment benefit amount after the separation. The claimant had not earned any wages since his separation yet he was paid weekly benefits because he subsequently met the availability requirement.

DECISION:

The unemployment insurance decision dated October 24, 2011, reference 03, is reversed. The claimant does not meet the availability requirements of the law and benefits are denied. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs