

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LARRY J SIMKO
Claimant

APPEAL NO. 11A-UI-07956-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEBRA SEIBERT
Employer

**OC: 04/03/11
Claimant: Respondent (2R)**

Section 96.4-3 – Able and Available
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated June 8, 2011, reference 02, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 20, 2011. Claimant participated. Employer participated by Debra Seibert, president. The record consists of the testimony of Larry Simko; the testimony of Debra Seibert; and Employer's Exhibits 1-2.

ISSUES:

Whether the claimant is able and available for work; and
Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer provides trucks and drivers for clients, such as contractors. The claimant was hired in May 2009 as a truck driver. The employer required each employee to call in every work day at approximately 6:30 a.m. to find out whether work was available. Trucks and drivers were dispatched to constructions sites or where needed early in the morning. This call in procedure was in writing and the claimant signed a written acknowledgement that he was aware of that policy.

On April 3, 2011, the claimant's wife passed away. The employer was deeply sympathetic and knew the claimant would need some time off work, which the employer was willing to give. The employer tried to contact the claimant by telephone several times, but all calls were unanswered and no messages were returned. On April 27, 2011, the employer sent the claimant a letter asking him to call to let them know what his intentions were. The claimant was asked to call by May 6, 2011. The claimant did not call the employer until either June 5, 2011 or June 6, 2011, which was right before the fact-finding interview. Ms. Seibert told the claimant that work was available and that he needed to call every day.

The claimant only worked one day for the employer on June 30, 2011. He failed to call every day as he was required to do. He did speak to Ms. Seibert on July 11, 2011, and asked her to drop her objection to his receiving unemployment benefits. The claimant is physically capable of working as a truck driver.

The claimant established a claim for unemployment insurance benefits with an original claim date of April 3, 2011. The claimant stated he was laid off. The claimant has never been laid off and work has been available for the claimant.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.23(16) provides:

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

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

The evidence in this case established that the claimant filed a claim for unemployment insurance benefits at the time his wife died on April 3, 2011. He was not laid off. The employer, in effect, gave the claimant a leave of absence due to his wife's death. Ms. Seibert knew that the claimant had a child and that many arrangements needed to be made. The employer wanted the claimant to return to work and was remarkably patient with him, even after he ignored the May 6, 2011, deadline for calling the employer concerning his work status.

The claimant testified that he was physically capable of working. He also said that he had no idea why he was not working. When asked whether he called in every day as he was required to do, he admitted that he did not do so and could not offer an explanation on why he failed to do so. He made sporadic calls and apparently worked on June 30, 2011. The greater weight of the evidence is that work was available and that the claimant was physically capable of working. He chose for personal reasons not to work. The administrative law judge is deeply sympathetic and can understand how painful the death of a spouse must be. The claimant's decision not to work is likely associated with that event. That being said, the evidence shows that the claimant has not been able and available for work since April 3, 2011, and is not eligible for unemployment insurance benefits effective April 2, 2011.

The next issue is overpayment of benefits.

Iowa Code § 96.3-7, 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.

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 section 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 section 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 state pursuant to section 602.10101.

The overpayment issue is remanded to the claims section for determination.

DECISION:

The decision of the representative dated June 8, 2011, reference 02, is reversed. The claimant was not able and available for work effective April 3, 2011. Benefits are denied. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs