

August 28, 1998

L-98-19

***UNEMPLOYMENT BENEFITS - AVAILABILITY FOR WORK - SELF - IMPOSED RESTRICTIONS ON COMMUTING AREA.***

This is in reply to your request for advice regarding a claimant's eligibility for unemployment insurance. The claimant was awarded benefits, but his employer protested the award and on reconsideration, based on the information submitted by the employer, the Regional Director found that the claimant was not entitled to benefits prospectively but concluded that the original award should not be reopened. The base-year employer appeals the Director's refusal to reopen earlier payments. You inquire whether the Regional Director's decision regarding the finality of the original award is correct, whether there are legal opinions regarding the issue of whether the employee may be considered available for work if he claims that he is only available for work within a short commute of his home in winter months, and whether you may decide waiver of the overpayment absent a prior decision on this issue.

***FINALITY.***

Section 320.10(a) of the RRB's regulations provides in pertinent part that:

\* \* \* The base-year employer(s) shall have the right to request reconsideration of an initial determination under § 320.5 of this part which awards in whole or in part a claimant's claim for benefits. \* \* \*

It follows from the foregoing provision that where the employer has requested reconsideration of an award, that entire award is subject to reconsideration. Therefore, there is no issue in this case regarding reopening, and the propriety of the entire award is before you on this appeal.

This being the case you have two options. You may remand this case to the Regional Director for consideration as to whether the employee was available for the period during which the Director determined that the award of benefits was not subject to reopening. If the Director were to find that the employee was available for work, then there is no overpayment, but the employer could appeal that determination. If the Director were to find that the employee was unavailable, then an overpayment is created which the employee could protest. On the other hand, you can simply decide the issue of availability yourself with respect to the entire period in question. The following is an analysis of the availability issue which you raised.

### ***AVAILABILITY FOR WORK.***

The following provisions represent the authority for determinations regarding availability for work. Section 327.5 of the RRB's regulations defines "available for work".

- (a) General definition. A claimant for unemployment benefits is available for work if he is willing and ready to work.
  
- (b) Willing to work. A claimant is willing to work if he is willing to accept and perform for hire such work as is reasonably appropriate to his circumstances in view of factors such as:
  - (1) The current practices recognized by management and labor with respect to such work;
  - (2) The degree of risk involved to the claimant's health, safety, and morals;
  - (3) His physical fitness and prior training;
  - (4) His experience and prior earnings;
  - (5) His length of unemployment and prospects for obtaining work; and
  - (6) The distance of the work from his residence and from his most recent work.
  
- (c) Ready to work. A claimant is ready to work if he:
  - (1) Is in a position to receive notice of work which he is willing to accept and perform, and
  - (2) Is prepared to be present with the customary equipment at the location of such work within the time usually allotted.

The dispute in this case centers around the fact that the claimant marked off from his job as a locomotive engineer for the winter months allegedly because the long commute to his place of work in the winter months aggravated an arthritic condition. The claimant was initially paid benefits presumably on the basis of a finding that his locomotive job was unsuitable in the winter months because it involved an unreasonable degree of risk to his health and, therefore, his failure to accept that assignment did not make him unavailable. The base-year employer's position is that unless the claimant is physically unable to do his job, which apparently is not the case, then he was required to report to his regular assignment and his failure to do so makes him unavailable for work.

The Railroad Unemployment Insurance Act Adjudication Instruction Manual (AIM) provides in pertinent part as follows.

803.04 Unreasonable restriction on work. A claimant who places unreasonable restrictions on the work he or she is willing to accept and perform for hire is not willing to work.

- a. Unreasonable restriction is to be determined from a consideration of all factors considered in determining good cause and suitability of work.
- b. It is not necessary that a claimant be willing to accept all suitable work he or she does not have good cause to refuse. The claimant is allowed some freedom of choice. However, as the length of unemployment increases and prospects of securing work diminish, a claimant may be expected to increase the sphere of work he or she is willing to accept.
- c. A claimant who is willing to accept work only with a particular employer or in a particular occupation, job, or location is not placing unreasonable restriction on his or her willingness to accept and perform work if:

1. the claimant is so employed at substantial work, or
2. the claimant has good prospects of being so employed within one month.

Work may be considered substantial if the claimant averages three days' employment per registration period during the over-all period in which availability is in question, although the substantiality of work will in part depend upon comparison with the income and security of work which can be obtained from other job opportunities.

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804.08 Domestic or other personal circumstances. Whenever information is received that a claimant failed to take advantage of a job opportunity because of domestic or personal circumstances, his or her availability for work is to be investigated. If the claimant is willing to work, readiness may be established:

- a. by showing that arrangements have been made or would be made to have someone else take over the responsibilities arising out of such circumstances if work were obtained; or
- b. by showing that he or she performed work in the past while affected by such circumstances; or
- c. by otherwise showing that such circumstances do not prevent him or her from being ready to work.

\* \* \* \* \*

804.29 Restriction on area of employment. A claimant is considered unavailable for work during the time he or she is willing to work only in an area where there is usually no work he or she is ready and willing to perform.

\* \* \* \* \*

Section 327.5 of the RRB's regulations and the above provisions of the AIM require a judgment as to the reasonableness of the employee's actions (in not accepting certain requirements of work); if the employee was reasonable, then he or she is available for work. Support for this conclusion is found in section 1404.14 of the AIM regarding suitability of work. That section provides that:

Work is not suitable for an employee who has no means of transportation to the work or who would be required to travel an unreasonable distance. In determining what would be reasonable for a particular employee, consideration shall be given to the distance of the work from his residence, the distance he has customarily traveled to work, and any change in his circumstances supporting his decision to hold himself out for work closer to home.

Accordingly, it appears to me that in order to decide whether the employee was available for work in this case you must, after determining the facts of the case, make a determination as to whether the actions of the employee were reasonable.

**WAIVER.**

There has been no request for waiver in this case because there has not been any overpayment assessed. If your decision is that there is an overpayment in this case, that decision would result in a remand to the Office of Programs. Ordinarily that office would notify the claimant of the overpayment and if waiver is requested, the Debt Recovery Division would decide the issue of waiver. In my opinion, a decision by you on that issue would be legally sufficient if adequate notice is provided and a hearing is held on that issue.