

# Section G

## What Constitutes "Suitable Work"?

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## WHAT CONSTITUTES “SUITABLE WORK”

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<p style="text-align: center;"><b>TERMINATION OF BENEFITS DUE TO FAILURE TO ACCEPT SUITABLE WORK [BEFORE 2017 CHANGES]</b></p>
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1. Language of Iowa Code Section 85.33(3) before 2017:
  - a. "If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of the injury offers to the employee **suitable work consistent with the employee's disability** the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal."
2. If the employer offers suitable work, and the employee refuses the work, then "the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal."
3. During such a period of refusal, temporary benefits are simply not payable; that is, they are forfeited. *McCormick v. North Star Foods*, File No. 1003296 (Appeal Dec., Sept. 1993)(aff'd, *McCormick v. North Star Foods, Inc.*, 533 N.W.2d 196 (Iowa 1995)). This is to be contrasted with permanent partial disability benefits which may be suspended in certain circumstances, but are not forfeited. *Id.*; 533 N.W.2d at 198-99.
4. The question in these cases turns on whether the work offered by the employer was "suitable."
  - a. At a minimum, in order to be "suitable" the offered employment must be consistent with any medical restrictions. If work is offered consistent with medical restrictions - and the injured worker refuses the work for no good reason - then temporary benefits will be terminated. *McCormick v. North Star Foods, Inc.*, 533 N.W.2d 196,

197 (Iowa 1995). See also, *Solis v. IBP*, File No. 1135322 (Arb. Dec., June 1999); *Morris v. IBP*, File No. 1059466 (Remand Dec., April 1999).

5. An offer of **unreasonable** work will not terminate benefits when not accepted. *Phillip Cordell v. Westside Transport, Inc.*, File No. 1164753 (Appeal Dec., Feb 2000); *West Side Transp. v. Cordell*, 601 N.W.2d 691, 693 (Iowa 1999).
6. Burden of Proof.
  - a. The "failure to accept suitable work" is treated as an affirmative defense by the Commissioner, for which the defendants have the burden of proving that both (1) defendants' offer was suitable under the statute and (2) claimant's refusal was unreasonable under *McCormick*, infra.
7. Actual Offer Required.
  - a. The statute speaks of an "offer" of employment. Generally speaking, it is not sufficient for the employer to claim suitable work **was** available. The employer must actually **offer** that suitable work to the injured worker. *Mitchell v. IBP, Inc.*, File No. 9980259 (Arb. Dec., March 1994).
8. The old statute did not require either the offer nor the refusal be in writing.

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9. Revisions to Iowa Code Section 85.33(3) via 2017 legislation (underscore):

Sec. 5. Section 85.33, subsection 3, Code 2017, is amended to read as follows:

- a. If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. Work offered at the employer's principal place of business or established place of operation where the employee has previously worked is presumed to be geographically suitable for an employee whose duties involve travel away from the employer's principal place of business or established place of operation more than fifty percent of the time.

If suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.

b. The employer shall communicate an offer of temporary work to the employee in writing, including details of lodging, meals, and transportation, and shall communicate to the employee that if the employee refuses the offer of temporary work, the employee shall communicate the refusal and the reason for the refusal to the employer in writing and that during the period of the refusal the employee will not be compensated with temporary partial, temporary total, or healing period benefits, unless the work refused is not suitable. If the employee refuses the offer of temporary work on the grounds that the work is not suitable, the employee shall communicate the refusal, along with the reason for the refusal, to the employer in writing at the time the offer of work is refused. Failure to communicate the reason for the refusal in this manner precludes the employee from raising suitability of the work as the reason for the refusal until such time as the reason for the refusal is communicated in writing to the employer.

10. If the employer offers the employee suitable work and the employee refuses to accept...

11. Removal of "the same employer" language.

a. Supported employment

12. Work offered at the employer's principal place of business ...

a. Likely overturns *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512 (2012)

i. Substantial evidence supported Workers' Compensation Commissioner's factual determination that light-duty work offered by employer to injured over-the-road flatbed truck driver was not suitable work, so that truck driver was not disqualified from receiving temporary disability benefits.

ii. Distance between proffered work and truck driver's residence was 387 miles, truck driver testified that before the injury he ordinarily spent each weekend at home with his wife and three children and occasionally he returned home during the week, if truck driver had accepted proffered work he would have only been able to return home every other weekend, and there was no evidence that truck driver agreed to any relocation as condition of

employment.

13. New subsection “b”

- a. The writing requirement is generally positive BUT:
  - i. Does not require employer to inform injured worker that
    - (1) any refusal must be in writing
    - (2) negative consequences of refusing
  - ii. If the injured worker does not put their refusal in writing **and** tell the reasons, the injured worker may not raise suitability as a reason for refusing the work - until that reason is given to the employer in writing.

**OTHER SCENARIOS**

14. MMI

15. New “Return to Work” Section