

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CINDY MCGEE
Claimant

APPEAL NO. 19A-UI-08519-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HAZA BELL OF NEBRASKA LLC
Employer

**OC: 09/15/19
Claimant: Respondent (4/R)**

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.19(38)(b) – Partial Unemployment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 23, 2019, reference 01, decision that allowed benefits to the claimant effective September 15, 2019, provided she was otherwise eligible, based on the deputy's conclusion that the claimant was able to work, available for work, but partially unemployed. After due notice was issued, a hearing was held on November 21, 2019. Claimant Cindy McGee did not comply with the hearing notice instructions to register a telephone number for the appeal hearing and did not participate. Neelum Asma represented the employer and presented additional testimony through Jeanna Gargarella. Exhibits 1 through 6 and Department Exhibits D-1, D-2 and D-3 were received into evidence.

ISSUES:

Whether the claimant has been able to work and available for work since she established her claim for benefits.

Whether the claimant has been partially unemployed and/or temporarily unemployed since she established her claim for benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Cindy McGee established an original claim for unemployment insurance benefits that was effective September 15, 2019. Iowa Workforce Development set Ms. McGee's weekly benefit amount at \$191.00. At the time of the November 21, 2019 appeal hearing, Ms. McGee had made weekly claims for the three weeks between September 15, 2019 and October 5, 2019, as well as for the three weeks between October 27, 2019 and November 16, 2019. Ms. McGee reported wages that were less than her weekly benefit amount for the first five weeks in question. Ms. McGee reported zero wages for the week that ended November 16, 2019. Ms. McGee received unemployment insurance benefits for each of the six weeks in question.

Haza Bell of Nebraska, L.L.C., is Ms. McGee's current employer and the sole base period employer for purposes of Ms. McGee's unemployment insurance claim. Since September 5,

2018, Ms. McGee's hourly wage has been \$10.00. Ms. McGee's base period for purposes of the September 15, 2019 original claim consists of the second, third and fourth quarters of 2018 and the first quarter of 2019. Ms. McGee worked for the employer throughout the base period. Ms. McGee's base period wages were as follows:

| <u>Quarter</u> | <u>Total Wages</u> | <u>Average Weekly Wages</u> | <u>Average Weekly Work Hours</u> |
|----------------|--------------------|-----------------------------|----------------------------------|
| 2/18 | \$2,132.80 | \$164.06 | 16.41+ |
| 3/18 | \$4,403.90 | \$338.76 | 33.88+ |
| 4/18 | \$3,217.90 | \$247.53 | 24.75 |
| 1/19 | \$2,880.40 | \$221.57 | 22.16 |

Ms. McGee's more recent quarterly wages have been as follows:

| <u>Quarter</u> | <u>Total Wages</u> | <u>Average Weekly Wages</u> | <u>Average Weekly Work Hours</u> |
|----------------|--------------------|-----------------------------|----------------------------------|
| 2/19 | \$3,664.00 | \$281.85 | 28.18 |
| 3/19 | \$2,561.00 | \$197.00 | 19.70 |

Ms. McGee established her claim for unemployment insurance benefits in response to a reduction in the number of hours the employer had for her. Ms. McGee's scheduled work hours and actual hours worked for unemployment insurance claim weeks have been as follows.

For the benefit week of September 15-21, 2019, the employer scheduled Ms. McGee to work two shifts for a total of 9.25 hours, for which the employer paid Ms. McGee \$92.50 in wages. Ms. McGee worked all the hours the employer had for her that week.

For the benefit week of September 22-28, 2019, the employer scheduled Ms. McGee to work two shifts for a total of 9.25 hours, for which the employer paid Ms. McGee \$92.50 in wages. Ms. McGee worked all the hours the employer had for her that week.

For the benefit week of September 29 to October 5, 2019, the employer scheduled Ms. McGee to work three shifts for a total of 16.25 hours, for which the employer paid Ms. McGee \$162.50 in wages. Ms. McGee worked all the hours the employer had for her that week.

For the benefit week of October 27 to November 2, 2019, the employer scheduled Ms. McGee to work two shifts for a total of 10 hours. On October 28, 2019, Ms. McGee reported for work 52 minutes after the scheduled start of her 10:00 p.m. to 2:00 a.m. shift. Ms. McGee worked 3 hours and 8 minutes of the four-hour shift, for which the employer paid her \$31.33. On October 29, 2019, Ms. McGee reported for work 36 minutes after the scheduled start of her 8:00 p.m. to 2:00 a.m. shift. Ms. McGee worked five hours and 24 minutes of the shift, for which the employer paid her \$54.00. Ms. McGee's total wages for the week were \$85.33.

For the benefit week of November 3-9, 2019, the employer scheduled just one shift. That shift was one shift was on November 8, 2019 and Ms. McGee was scheduled to work from 10:45 p.m. to 4:00 a.m. for a total of 5.25 hours. Ms. McGee reported three minutes late for the shift. Ms. McGee worked five hours and 12 minutes, for which the employer paid her \$52.00.

For the benefit week of November 10-16, 2019, the employer scheduled Ms. McGee to work three shifts for a total of 17.25 hours. On November 11, Ms. McGee was scheduled to work from 10:00 p.m. to 3:00 a.m., for a total of five hours. Ms. McGee reported for work five minutes late. Ms. McGee worked 4 hours and 55 minutes of the shift, for which the employer paid her \$49.17. Ms. McGee was scheduled to work an 8:00 p.m. to 3:00 a.m. shift, seven hours, on November 12, 2019, but notified the employer she needed to be absent due to a family

emergency. Ms. McGee was scheduled to work a 10:45 p.m. to 4:00 a.m. shift, 5.25 hours, on November 15, 2019, but notified the employer she needed to be absent due to a family emergency.

The employer's decision to reduce Ms. McGee's scheduled work hours beginning in September 2019 followed a verbal reprimand regarding attendance.

On November 5, 2019, the employer issued a written reprimand to Ms. McGee for tardiness after Ms. McGee reported late for work on October 18, 21, 22, 28, 29 and November 1, 2019.

The chart below provides the wages Ms. McGee reported when she made her weekly claims, the unemployment insurance benefits she received based on the weekly wage report, and her actual wages for the week (rounded).

| <u>Week End Date</u> | <u>Wages Reported</u> | <u>Benefits Paid</u> | <u>Actual Wages</u> |
|----------------------|-----------------------|----------------------|---------------------|
| 9/21/19 | \$50.00 | \$188.00 | \$92.00 |
| 9/28/19 | \$60.00 | \$178.00 | \$92.00 |
| 10/5/19 | \$50.00 | \$188.00 | \$162.00 |
| 11/2/19 | \$60.00 | \$178.00 | \$85.00 |
| 11/9/19 | \$60.00 | \$178.00 | \$52.00 |

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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".

Iowa Admin. Code r. 871-24.22(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.

(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.

Iowa Admin. Code r. 871-24.23(26) and (29) provides:

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

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

...

(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

An individual shall be deemed partially unemployed in any week in which, while employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars. Iowa Code Section 96.19(38)(b).

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.

2. Contribution rates based on benefit experience.

a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.

(2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

(a) However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

The evidence in the record establishes that Ms. McGee was able to work, available for work, but partially unemployed during the benefit weeks that ended September 21, September 28, October 5, November 2, and November 9, 2019. For each of those weeks, the employer had reduced Ms. McGee's scheduled work hours. For each of those weeks, Ms. McGee worked all or at least the majority of the hours the employer had for her. Ms. McGee is eligible for benefits for each of these weeks, provided she meets all other eligibility requirements. The employer's account may be charged for benefits for each of these five benefit weeks.

The weight of the evidence establishes that Ms. McGee underreported her wages for the weeks that ended September 21, September 28, October 5, and November 2 when she made weekly claims for those weeks. Ms. McGee over reported her wages for the week that ended November 9, 2019. The wages that exceeded one-fourth of the \$191.00 weekly benefit amount (\$48.00 rounded) would result in a dollar-for-dollar reduction in the weekly benefit eligibility. Based on Ms. McGee's actual wages (rounded) for the weeks in question, her weekly benefit eligibility for each of the affected weeks would be as follows:

| <u>Week End</u> | <u>Wages Rptd.</u> | <u>Benefits Pd.</u> | <u>Actual Wgs</u> | <u>Eligibility</u> | <u>Difference</u> |
|-----------------|--------------------|---------------------|-------------------|--------------------|-------------------|
| 9/21/19 | \$50.00 | \$188.00 | \$92.00 | \$147.00 | -\$41.00 |
| 9/28/19 | \$60.00 | \$178.00 | \$92.00 | \$147.00 | -\$31.00 |
| 10/5/19 | \$50.00 | \$188.00 | \$162.00 | \$77.00 | -\$111.00 |
| 11/2/19 | \$60.00 | \$178.00 | \$85.00 | \$154.00 | -\$24.00 |
| 11/9/19 | \$60.00 | \$178.00 | \$52.00 | \$187.00 | +\$9.00 |

The evidence in the record fails to establish that Ms. McGee was available for work within the meaning of the law during the benefit week that ended November 16, 2019. During that week, Ms. McGee made herself available for only one of the three scheduled shifts. Ms. McGee is not eligible for the \$191.00 in unemployment insurance benefits she received for the week that ended November 16, 2019. The employer's account will not be charged for benefits paid to the claimant for the week that ended November 16, 2019.

This matter will be remanded to the Benefits Bureau for entry of an overpayment decision regarding the \$207.00 in excess benefits disbursed for four weeks between September 15 and November 2, 2019.

This matter will be remanded to the Benefits Bureau for entry of an overpayment decision regarding the \$191.00 in benefits disbursed for the week that ended November 16, 2019.

This matter will be remanded to the Benefits Bureau for determination of whether the claimant has been able to work, available for work, and partially unemployed for the period beginning November 17, 2019.

DECISION:

The October 23, 2019, reference 01, decision is modified in favor of the appellant as follows. The claimant was able to work, available for work, but partially unemployed during the weeks that ended September 21, September 28, October 5, November 2, and November 9, 2019. The claimant is eligible for benefits for each of those five weeks, provided she meets all other eligibility requirements. The employer's account may be charged for benefits for each of those five benefit weeks. The claimant did not meet the availability requirement during the benefit week that ended November 16, 2019 and is not eligible for benefits for that week. The employer's account will not be charged for benefits for the week that ended November 16, 2019.

This matter is remanded to the Benefits Bureau for determination of whether the claimant has been able to work, available for work, and partially unemployed for the period beginning November 17, 2019.

This matter is remanded to the Benefits Bureau for entry of an overpayment decision based on (1) the \$41.00 in excess benefits the claimant received for the week that ended September 21, 2019, (2) the \$31.00 in excess benefits the claimant received for the week that ended September 28, 2019, (3) the \$111.00 in excess benefits the claimant received for the week that ended October 5, 2019, (4) the \$24.00 in excess benefits that claimant received for the week that ended November 2, 2019, and (5) the \$191.00 in benefits the claimant received for the week that ended November 16, 2019.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn