

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

DENISE D HARMS  
PO BOX 272  
KELLOGG IA 50135

ROGER OSBORN  
D/B/A R & J BAR & GRILL  
230 JUNIPER AVE  
KELLOGG IA 50135-8680

Appeal Number: 06A-UI-00110-RT  
OC: 12-04-05 R: 02  
Claimant: Respondent (4)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.4-3 – Required Findings (Able and Available for Work)  
Section 96.7-2-a-2 – Employer Contributions and Reimbursements (Same  
Employment-Benefits Not Charged)  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Roger Osborn, doing business as R & J Bar & Grill, filed a timely appeal from an unemployment insurance decision dated December 27, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Denise D. Harms, and charging benefits to the employer. After due notice was issued, a telephone hearing was held on January 19, 2006, with the claimant participating. Mary Osborn, Manager, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development

Department unemployment insurance records for the claimant. Although not set out on the Notice of Appeal, the parties permitted the administrative law judge to take evidence on, and decide, if necessary, the following issues: Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times she was not able, available, and earnestly and actively seeking work and was not excused from those provisions under Iowa Code section 96.4-3 and whether the employer should be charged for any unemployment insurance benefits to which the claimant may be entitled because the claimant is receiving the same employment as she had during her base period under Iowa Code section 96.7-2-a-2.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was and still is employed by the employer R & J Bar & Grill, part-time as a bartender or cook, since December 15, 1999. Roger Osborn sold the business on or about June 1, 2005 but the claimant continued to work for the new owner part-time as a bartender or cook. She has never permanently separated from her employment. At all material times hereto the claimant was part-time and remains part-time. The claimant also has a regular full time job with Jeld-Wen. However, the claimant was temporarily laid-off for the season on December 10, 2005 but fully expects to be reemployed by the employer shortly. The claimant has placed no physical or training restrictions on her ability to work and remains able to work. Pursuant to her claim for unemployment insurance benefits filed effective December 4, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,596.00 for seven weeks from benefit week ending December 10, 2005 to benefit week ending January 21, 2006. In most of those weeks the claimant reported earnings which in some cases reduced her unemployment insurance benefits. Workforce Development records show substantial earnings in the first, second, and third quarters of 2005, from Jeld-Wen. Records also show minor earnings from the employer herein in the first and second quarters of 2005. The new owner is having some difficulties with Workforce Development in getting an employer number but as soon as that number is obtained there will be earnings reflected for the claimant in the third quarter of 2005 because the claimant did remain similarly employed in the third quarter of 2005 as she did prior thereto and thereafter.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times she was not able, available, and earnestly and actively seeking work and was not excused from those requirements. The administrative law judge concludes that the claimant is not ineligible to receive unemployment insurance benefits for these reasons.
2. Whether the claimant, at relevant times, was receiving the same employment that she received during her base period and, as a consequence, the employer should not be charged for any unemployment insurance benefits to which the claimant is entitled. The administrative law judge concludes that the claimant, at all relevant times herein, was receiving the same employment as she had received during her base period and, as a consequence, the employer should not be charged for any unemployment insurance benefits to which the claimant is entitled.

3. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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".

The evidence is clear that the claimant has never separated from her employment with R & J Bar & Grill. The evidence establishes that at all material times hereto, the claimant was employed part-time as a bartender or cook. The prior owner, Roger Osborn sold the business on or about June 1, 2005 but the claimant has remained similarly employed with the new owner under the same employer name, R & J Bar & Grill. Under these circumstances where the claimant has remained employed part-time for both the old owner and the new owner, the administrative law judge concludes that the sale makes no difference to the matters herein.

The administrative law judge concludes that the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or as otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met her burden of proof to demonstrate by a preponderance of the evidence that she is and was, at relevant times, temporarily unemployed and is therefore excused from the requirement that she be available for work and earnestly and actively seeking work. The evidence establishes that the claimant has a regular full-time employer, Jeld-Wen, for whom she is employed full time but is on a temporary lay-off for a lack of work. The claimant fully expects to return to work full time for Jeld-Wen in the near future. The claimant has not been terminated from that employment. Accordingly, the administrative law judge concludes that the claimant is temporarily unemployed as defined by Iowa Code section 96.19 (38) (c), and, as a consequence, she is excused from the provisions that require her to be available for work and earnestly and actively seeking work. The administrative law judge further concludes that the evidence establishes that the claimant is able to work. The claimant credibly testified that she has placed no physical restrictions or training restrictions on her ability to work and further Iowa Workforce Development records show that the claimant remains employed part-time with the employer herein which indicates that she is in fact able to work. Accordingly, the administrative law judge concludes that the claimant does not have to be available for work and earnestly and actively seeking work and is able to work and is therefore not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she remains excused from the provisions that require her to be available for work and earnestly and actively seeking work or is available for work and earnestly and actively seeking work and remains able to work.

Iowa Code section 96.7-2-a(2) provides:

2. Contribution rates based on benefit experience.

a. (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.

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.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge concludes that the claimant is receiving the same employment from the employer that she received during her base period and therefore any unemployment insurance benefits paid to the claimant shall not be charged against the account of the employer herein. It is true that the owner of the business changed on or about June 1, 2005 but that the claimant has remained employed similarly as a part-time bartender or cook, both before and after the change in ownership and her employment has not changed in any regard for the employer R & J Bar & Grill. Accordingly, the administrative law judge concludes that any unemployment insurance benefits to which the claimant is entitled shall not be charged against the account of the employer herein.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,596.00 since filing for such benefits effective December 4, 2005. The administrative law judge further concludes that in so far as her employment with the employer herein is concerned, the claimant is entitled to those benefits and is not overpaid such benefits. However, those benefits shall not be charged to the account of the employer herein.

DECISION:

The representative's decision of December 27, 2005, reference 01, is modified. The claimant, Denise D. Harms, is entitled to receive unemployment insurance benefits in so far as the employer herein is concerned, because the claimant has not been separated from her employment and she remains able to work and is excused from the provisions requiring her to be available for work and earnestly and actively seeking work because she is temporarily unemployed with her employment with her regular full time employer, Jeld-Wen. Since the claimant, at all material times hereto, is and was receiving the same employment that she received during her base period, the employer herein, Roger Osborn, doing business as R & J Bar & Grill, should not be charged for any unemployment insurance benefits to which the claimant is entitled and the account of such employer shall be relieved of any such charges. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her employment with the employer herein.

kkf/tjc