

**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**

**HARRY KENKEL  
1107 – 12<sup>TH</sup> ST  
LEMARS IA 51031**

**HDR & T CAR WASH INC  
708 CORALYN DR  
MORRISON IL 61270**

**Appeal Number: 05A-UI-08077-RT  
OC: 07-03-05 R: 01  
Claimant: Appellant (5)**

**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)

STATEMENT OF THE CASE:

The claimant, Harry Kenkel, filed a timely appeal from an unemployment insurance decision dated August 2, 2005, reference 01, allowing unemployment insurance benefits to him because he was dismissed from work because of a staff reduction or elimination of his position. After due notice was issued, a telephone hearing was held on August 23, 2005, with the claimant participating. The employer, HDR & T Car Wash, Inc., did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice

of appeal. 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 claimant permitted the administrative law judge to take evidence on and decide, if necessary, the following two issues: Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he was not able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 and if the claimant is entitled to benefits, whether the employer should be charged for such benefits because the claimant is receiving the same employment that he received during his base period. The claimant waived further notice of this issue. Although the administrative law judge would not ordinarily accept additional issues without the employer's consent, the administrative law judge does so here because the decision hereinafter relieves the employer's account of any charges for benefits to which the claimant is entitled.

#### FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant is and has been, for six and a half years, employed by the employer as a part-time wash attendant averaging 16 hours per week. The claimant has not separated from that employment. The claimant is still employed part-time averaging 16 hours per week and occasionally more as a fill-in person as needed. The claimant did separate from another employer, Select Feeds in 2005 and the claimant after that separation filed for unemployment insurance benefits effective July 3, 2005. That separation is not before the administrative law judge and the administrative law judge reaches no conclusion as to whether that separation was disqualifying. However, the administrative law judge refers to it so as to establish why the claimant filed for unemployment insurance benefits and is hereinafter determined to be eligible for unemployment insurance benefits. Pursuant to his claim for unemployment insurance benefits filed effective July 3, 2005, the claimant has received unemployment insurance benefits in the amount of \$275.00 as follows: \$55.00 per week for five weeks from benefit week ending July 23, 2005 to benefit week ending August 20, 2005 (earning \$130.00 for each week). The claimant's weekly benefit amount is \$148.00.

#### 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 he was not able, available, and earnestly and actively seeking work. The claimant is not ineligible to receive unemployment insurance benefits.
2. Whether the account of the employer should be charged for any unemployment insurance benefits to which the claimant is entitled because the claimant was not receiving the same employment that he received during his base period. The claimant is receiving the same employment from this employer as he did in his base period and, therefore, the employer herein should not be charged for any unemployment insurance benefits to which the claimant is entitled.

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 administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is 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 his burden of proof to demonstrate by a preponderance of the evidence that he is able, available, and earnestly and actively seeking work. The claimant so testified and there is no evidence to the contrary. The claimant testified that he has placed no physical restrictions or training restrictions on his ability to work and has placed no day or time restrictions on his availability for work except Thursdays and Sundays when he is working part-time for the employer herein. However, the claimant does not have to be available for work for a particular shift and it is sufficient if the claimant is available for work on the same basis as which his wage credits were earned and there exists a reasonable expectation of securing employment. See 871 IAC 24.22(2)(a). The administrative law judge concludes that the claimant is available for work on the same basis as his wage credits were earned and there exists a reasonable expectation of securing employment and, therefore, he is available for work. The claimant credibly testified that he is earnestly and actively seeking work and making at least two in-person job contacts each week. Accordingly, the administrative law judge concludes that the claimant is able, available, and earnestly and actively seeking work and, as a consequence, he is not ineligible to receive unemployment insurance benefits. The administrative law judge further notes that the claimant is partially unemployed as defined in Iowa Code section 96.19(38)(b) and would be excused from the provisions requiring him to be available for work and earnestly and actively seeking work. Unemployment insurance benefits are allowed to the claimant provided he remains able, available, and earnestly and actively seeking work and is otherwise entitled to such benefits.

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 his employer since his initial employment six and a half years ago. The claimant at all material times hereto has been part-time working approximately 16 hours per week and filling in as needed. This has never changed. Accordingly, since the claimant is receiving the same employment from the employer as he did during his base period, 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 and the account of the employer herein shall be relieved of any such charges.

**DECISION:**

The representative's decision of August 2, 2005, reference 01, is modified. The claimant, Harry Kenkel, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he is able, available, and earnestly and actively seeking work. He has not separated from the employer herein but his employment with the employer herein is only part time. Since the claimant is receiving the same employment from the employer herein as he received in his base period, the account of the employer herein shall not be charged for any unemployment insurance benefits to which the claimant is entitled and the employer's account shall be relieved of any such charges.

pjs/pjs