

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

TAMMY RICHARDS

Claimant

APPEAL NO: 12A-UI-03757-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TRI-STATE NURSING ENTERPRISES INC

Employer

OC: 05/29/11

Claimant: Respondent (2/R)

Iowa Code § 96.4-3 - Availability for Work
Iowa Code § 96.5-3-a - Refusal of Suitable Work
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Tri-State Nursing Enterprises, Inc. (employer) appealed an unemployment insurance decision dated April 5, 2012, reference 03, which held that Tammy Richards (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 26, 2012. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which she could be contacted, and therefore, did not participate. The employer participated through Nicole Moody, Staffing Supervisor. Based on the evidence, the arguments of the party, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant is able and available, and if so, whether she refused a suitable offer of work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant filed a claim for unemployment insurance benefits effective May 29, 2011 and began working for the temporary employment agency as a certified nursing assistant on December 5, 2011. Below is a list of the wages she earned with this employer and the amounts she reported to Iowa Workforce when filing her weekly claims:

Week ending	Amount earned	Amount reported
12/10/11	\$213.13	\$001.00
12/17/11	\$000.00	\$000.00
12/24/11	\$108.50	\$001.00
12/31/11	\$379.14	\$272.00
01/07/12	\$000.00	\$000.00
01/14/12	\$330.46	\$108.00

01/21/12	\$546.38	\$442.00
01/28/12	\$321.63	\$433.00
02/04/12	\$221.00	\$329.00
02/11/12	\$221.00	\$105.00
02/18/12	\$000.00	No weekly claim
02/25/12	\$000.00	No weekly claim
03/03/12	\$116.00	No weekly claim
03/10/12	\$108.75	\$441.00
03/17/12	\$105.00	\$000.00
03/24/12	\$000.00	\$105.00
03/31/12	\$120.00	\$000.00
04/07/12	\$108.75	\$120.00
04/14/12	\$217.50	\$326.00
04/21/12	\$244.44	\$001.00

There is an issue of whether the claimant received earned but unreported wages but that issue was not included in the notice of hearing. It is unknown whether the claimant was receiving wages from any other temporary employer. The employer tried to reach the claimant numerous times to offer her work but many of those calls were never returned. The employer offered the claimant an assignment with Lennox on January 12, 2012 and the claimant refused because she was going to Omaha. The claimant was offered another assignment on January 17, 2012 at the Friendship Home in Glenwood but refused that assignment without explanation.

The employer offered the claimant work with Tabor on four separate occasions and the claimant rejected each of these offers. The offers were made on February 27, March 13, April 10, and April 16, 2012. The employer offered the claimant work on March 14, 2012 with Florence and the claimant also rejected this offer of work. The offers were all within the claimant's training and expertise.

The claimant failed to participate in the hearing so the administrative law judge reviewed the notes from the fact-finding interview and read them to the employer. The notes confirm that the claimant admitted she refused job offers to go to Tabor during the weeks of February 27, 2012 and March 5, 2012. She indicated that she had issues at Tabor because the charge nurses and other nurses called the employer to complain about the claimant, told her to leave in the middle of her shift, and told the employer that she did not care about her patients. The claimant also stated that it was reported she had a bad attitude. The employer witness responded to these statements and said that she was unaware of any complaints about the claimant from the employees at Tabor with the exception that the claimant had a bad attitude. The claimant told the director of nursing that she needed to go on the floor and cut some toe nails and the director found this rude and inappropriate. The director contacted the employer and asked the employer to talk to the claimant about her attitude and behavior. The employer did this and thought that the matter was resolved. Additionally, the claimant did have issues with one nurse at Tabor but that nurse was no longer there when the employer made the job offer to the claimant.

The claimant filed a claim for unemployment insurance benefits effective May 29, 2011 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant is able and available for work.

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".

871 IAC 24.22(1), (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.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

(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.

The claimant failed to participate in the hearing and based on the claimant's wage records, she does appear to have been able and available to work. Another aspect of the able and available issue in this case is whether the claimant unreasonably rejected an offer of suitable work. An individual who refuses recall to suitable work is disqualified from receiving job insurance benefits.

Iowa Code section 96.5-3-a provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

(1) One hundred percent, if the work is offered during the first five weeks of unemployment.

(2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.

(3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.

(4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

The employer made the claimant numerous job offers at the same rate and pay as she had been receiving but she repeatedly refused these offers. The administrative law judge considers the work offered by the employer to be suitable work within the meaning of the law. Since the claimant did refuse a suitable offer of work, she is disqualified and benefits are denied as of March 3, 2012.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated

in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated April 5, 2012, reference 03, is reversed. The claimant did refuse a suitable offer of work. Benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for an investigation and determination of the overpayment issue and whether the claimant had earned but unreported wages.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs