

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GARANG C GARANG
Claimant

APPEAL NO. 13A-UI-08113-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 06/02/13
Claimant: Respondent (3-R)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.4(3) – Still Employed Same Hours and Wages
Iowa Code Section 96.7(2) – Employer Liability
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 2, 2013, reference 01, decision that allowed benefits effective June 2, 2013, based on an agency conclusion that Mr. Garang was partially unemployed from Hy-Vee. After due notice was issued, a hearing was held on September 12, 2013. Claimant Garang Garang participated. Bruce Burgess of Corporate Cost Control represented the employer and presented testimony through Joe Farley. Exhibits One through Three were received into evidence. The administrative law judge took official notice of the agency's administrative record (DBRO) of wages reported by or for the claimant and benefits approved but offset by the agency.

ISSUES:

Whether Mr. Garang was able to work and available for work during the period of June 2, 2013 through July 6, 2013.

Whether Mr. Garang was partially unemployed during the period of June 2, 2013 through July 6, 2013.

Whether the employer's account may be assessed for benefits paid to Mr. Garang for the period of June 2, 2013 through July 6, 2013.

Whether Mr. Garang was overpaid benefits for the period of June 2, 2013 through July 6, 2013.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Garang Garang began his part-time employment with Hy-Vee in 2008. Mr. Garang began at the West Lakes store in West Des Moines, but subsequently transferred to the store on West Lincoln Way in Ames. Mr. Garang's transfer to the Ames store coincided with the beginning of his college

studies at Iowa State University. Mr. Garang worked as a courtesy clerk in the bottle return room. Mr. Garang graduated from ISU on May 11, 2013. Prior to May 18, 2013, Mr. Garang had generally worked day shift hours, but on rare occasions also worked a Sunday evening shift. Prior to May 18, 2013, Mr. Garang had averaged about 20 hours per week. The employer provided an old, outdated availability schedule for the hearing that did not accurately reflect Mr. Garang's work availability in the months leading up to May 18, 2013.

On May 18, 2013, Mr. Garang provided the scheduler at the West Lincoln Way Hy-Vee with a new availability schedule. The new availability schedule expanded Mr. Garang's work availability and reflected his desire to work additional hours after he completed his studies. Mr. Garang's new availability schedule indicated that he was available for work from 8:00 a.m. to 4:00 p.m. on Monday through Thursday, 7:00 a.m. to 4:00 p.m. on Friday and Saturday. However, the new availability statement indicated that Mr. Garang was not available for Sunday work. Ironically, the employer began to make substantially *fewer* hours available to Mr. Garang subsequent to Mr. Garang providing an expanded availability schedule. Mr. Garang asked Joe Farley, Human Resources Manager, for more hours. Mr. Farley cited an unspecified incident as the basis for cutting back Mr. Garang's work hours. Mr. Garang asked for specifics about the incident that prompted the employer to cut his hours, but the employer did not provide further explanation. As high school students became available to work day shift hours, Mr. Garang witnessed hours going to the high school students while his hours remained reduced.

In response to the reduction in hours, Mr. Garang established a claim for unemployment insurance benefits that was effective June 2, 2013. Workforce Development set Mr. Garang's weekly benefit amount at \$113.00. During the week that ended June 8, 2013, the employer initially scheduled Mr. Garang for just one shift, a 2:00 p.m. to 10:00 p.m. shift on Thursday, June 6, 2013. When Mr. Garang explained that he could not work beyond 4:00 p.m., the employer gave the entire shift to someone else. Mr. Garang was sharing a vehicle with his girlfriend, who worked in the Des Moines metropolitan area and had arrangements to pick her up from her job in the early evening. During the week that ended June 15, 2013, the employer did not schedule Mr. Garang to work any hours. During the week that started June 16 and that ended June 22, 2013, the employer scheduled Mr. Garang to work seven hours and Mr. Garang worked the hours.

Out of frustration with his inability to get hours at the West Lincoln Way store, Mr. Garang contacted the West Lakes store in West Des Moines. Mr. Garang worked his last shift at the Ames store on June 19, 2013. Mr. Garang started working at the West Lakes store during the week that ended June 29, 2013.

Once Mr. Garang started back at the West Lakes store he was able to get 27 hours or more per week. The employer utilizes a Monday through Sunday work week. For the work week that ended Sunday, June 23, Hy-Vee paid Mr. Garang \$66.10 for seven hours work. For the work week that ended Sunday, June 30, Hy-Vee paid Mr. Garang \$253.89 for 27.3 hours work. For the work week that ended Sunday, July 7, 2013, Hy-Vee paid Mr. Garang \$325.50 for 35 hours work.

Mr. Garang's claim for unemployment insurance benefits was only active for five weeks, from June 2, 2013 through July 6, 2013. Mr. Garang discontinued his claim for unemployment insurance benefits after the benefit week that ended July 6, 2013. For the weeks ending June 8, 15 and 29, Mr. Garang reported zero wages and was approved for \$113.00 in weekly benefits. For the week ending June 22, 2013, Mr. Garang over-reported his wages as \$130.00, when the wages were in fact \$65.00 for that week. In light of the over-reported wages, Workforce Development did not approve benefits for the week ending June 22, 2013 because

the reported wages exceeded the weekly benefit amount by more than \$15.00. For the week that ended July 6, 2013, Mr. Garang significantly under-reported his wages as \$121.00 and was approved for \$20.00 in benefits. The actual wages for that week exceeded Mr. Garang's weekly benefit amount by more than \$15.00.

The \$359.00 in total benefits that were approved for Mr. Garang were not actually disbursed to him. Instead, Workforce Development withheld all of the approved benefits and offset them against a prior overpayment of benefits.

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".

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).

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. 871 IAC 24.23(26). Contract for hire merely means the established conditions of the employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986).

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.

[Emphasis added.]

The weight of the evidence indicates that Mr. Garang was able and available for work, but partially unemployed from Hy-Vee during the weeks that ended June 8, 15, and 22, 2013. The substantial cut in hours was attributable to staffing decisions made by Hy-Vee, and not attributable to changes in Mr. Garang's availability. Mr. Garang was eligible for \$113.00 in benefits for the weeks ending June 8 and 15, 2013, provided he was otherwise eligible. Mr. Garang was also eligible for benefits for the week ending June 22, 2013, provided he was otherwise eligible, but the exact benefit amount for which he was eligible would have to factor his \$65.00 in gross wages for that week. This matter will be remanded for determination of the exact amount of benefits for which Mr. Garang would be eligible for the week ending June 22, 2013.

Mr. Garang was able and available for work, but *not* partially unemployed during the benefit weeks that ended June 29, 2013 and July 6, 2013.

The \$113.00 in benefits erroneously approved for the week ending June 29, 2013 constitutes an overpayment of benefits that Mr. Garang must repay to Workforce Development. The \$20.00 in benefits erroneously approved for the week ending July 6, 2013, represent an overpayment of benefits that Mr. Garang must repay to Workforce Development.

Because the employment that Hy-Vee provided during the three-week period of June 2, 2013 through June 22, 2013 was not the same as had been provided earlier, Hy-Vee's account with Workforce Development may be charged for any benefits paid to the claimant for those three weeks.

DECISION:

The agency representative's July 2, 2013, reference 01, decision is modified as follows. The claimant was able and available for work, but partially unemployed for Hy-Vee during the weeks that ended June 8, 15, and 22, 2013. The claimant was eligible for \$113.00 in benefits for the weeks ending June 8 and 15, 2013, provided he was otherwise eligible. The claimant was also eligible for benefits for the week ending June 22, 2013, provided he was otherwise eligible, but the exact benefit amount for which he was eligible would have to factor his \$65.00 in wages for that week. This matter will be **remanded** for determination of the exact amount of benefits for which Mr. Garang would be eligible for the week ending June 22, 2013.

The claimant was able and available for work, but *not* partially unemployed during the benefit weeks that ended June 29, 2013 and July 6, 2013. The claimant was not eligible for benefits for either week.

The \$113.00 in benefits erroneously approved for the week ending June 29, 2013 constitutes an overpayment of benefits that the claimant must repay to Workforce Development. The \$20.00 in benefits erroneously approved for the week ending July 6, 2013, represents an overpayment of benefits that the claimant must repay to Workforce Development.

Hy-Vee's account with Workforce Development may be charged for any benefits paid to the claimant for the three-week period of June 2-22, 2013.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs