BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

MICHAEL T HANSEN	:	
	:	**HEARING NUMBER:** 17BUI-07828
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
AVEKA NUTRA PROCESSING	:	
	:	
Employer	:	

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.4-3, 24.22-2

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES IN PART**, **AFFIRMS IN PART**, and **REMANDS** as set forth below.

FINDINGS OF FACT:

The Board adopts the Administrative Law Judge's findings of fact as its own.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.4(3) (2017) provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds:
>
> The individual is able to work, is available for work, and is earnestly and actively seeking work….

871 IAC 24.22 expounds on this:

> 871—24.22 Benefit 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.
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> 24.22(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.
>
> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.
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> b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, **but able to work in some reasonably suitable, comparable, gainful, full-time endeavor**, other than self-employment, which is generally available in the labor market in which the individual resides.
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> 24.22(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 first issue in this case is whether the Claimant is able and available for work. The Administrative Law Judge ruled that he was not because he was not available for the same shifts as in his base period. The Claimant argues that he is and that under *Tuthill v. IDES,* 408 N.W.2d 391 (1987) it is forbidden to compare the base period availability to the benefit year availability. We decline to follow either approach.

Starting with *Tuthill* the Claimant is off base, although not exactly for the reason set out by the Administrative Law Judge. What happened in *Tuthill* is almost nothing like this case, but not because Mr. Tuthill was a student. The issue there was whether Mr. Tuthill, at the time he applied for benefits, was devoting so much time to his studies that he was not available for work. For the 4 months leading up to his application for benefits Mr. Tuthill was working full-time. Prior to that he was less available. The agency decided that since Mr. Tuthill was devoting too much time studying during his *base period* then he must not be available for work during his *benefit year*. And yet, there was a lag quarter and a month of the filing quarter to consider. The Court ruled that when deciding if the Claimant is devoting too much time to school in order to be available for work you look at what he is

doing *at the time he files for benefits* and you do not look to his availability in the past. So the level of

current availability is not determined by looking at the base period or any other period in the past. *Tuthill* did not turn on the question of whether the Claimant was available during his benefit year on the same basis as in his base period. The agency in *Tuthill* did not argue that benefit year availability must be compared to base period availability. The argument in *Tuthill* was that the law must use the claimant's base period work hours, and not his benefit year work hours, to determine the current level of availability. The agency seemed to think this was appropriate in the case of students. *Tuthill* rejected the use of the base period for determining the level of availability, and in so ruling merely established that when deciding *how many hours* the claimant is *currently available* to work we look at the present, not the past.

So it's a two part question. Part one, what hours during a week is the Claimant currently available to work? Following *Tuthill* we look at what jobs the Claimant is available to work by looking at what shifts he was willing to work at the time he applied for benefits. It's the first shift only. All agree on that. It's Monday through Friday, full-time. So now *Tuthill* is satisfied. Now part two, is that current level of availability sufficient to satisfy the availability requirement? When answering this question we, among other things, look to whether the Claimant is available to work during the benefit year on the same basis as when the wage credits were earned. Part two simply was not an issue in *Tuthill*.

The "same basis" requirement is set out by law:

> 24.22(2)(a) Shift restriction. **The individual does not have to be available for a particular shift.** If an individual is available for work on the **same basis** on which the individual's wage credits were earned and if after considering the restrictions as to hours of work, etc., imposed by the individual there exists a reasonable expectation of securing employment, then the individual meets the requirement of being available for work.
> ….
> f. Part-time worker, student—other. Part-time worker shall mean any individual who has been in the employ of an employing unit and has established a pattern of part-time regular employment which is subject to the employment security tax, and has accrued wage credits while working in a part-time job. If such part-time worker becomes separated from this employment for no disqualifiable reason, and providing such worker has reasonable expectation of securing other employment for the same **number** of hours worked, no disqualification shall be imposed under Iowa Code section 96.4(3). In other words, if an individual is available to the same degree and to the same extent as when the wage credits were accrued, the individual meets the eligibility requirements of the law.

871 IAC 24.22(2)(a); (f) (emphasis added).

The reason for the "same basis" requirement is plain. The Board would not expect someone who has only performed part-time work in the base period to have to be available for full-time work. If they have only part-time credits they are a part-time worker and only have to be available part-time during the benefit year. On the other hand, a worker with full-time credits has to be available for full-time work in order to collect benefits. For example, a full-time worker who is laid off cannot decide to take it easy for a while, seek only part-time work, and ask the Employer and the taxpayers to supplement his lifestyle choice. After all, if full-time workers need only be available for part-time work then we wouldn't need a specific provision in 24.22(2)(f) saying that part-time workers need only be available for part-time work. And this issue of "same basis" has nothing to do with

the question posed by *Tuthill*. Mr. Tuthill made himself *more* available than in the base period and just wanted to get credit for this. The Claimant here has made himself *less* available and argues that the agency should ignore this. But, by such reasoning, the unemployment law ceases its function of encouraging employment, and instead becomes a means to supplement the income of those who, for whatever reason, seek to reduce their attachment to the labor market. *C.f. Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)("the legislature has merely determined not to provide maternity leaves" under chapter 96); *White v. Employment Appeal Board*, 487 N.W.2d 342, 345 (Iowa 1992) ("the Employment Security Law is not designed to provide health and disability insurance…"). This is not the law, and it would be bad policy.

That said, we think that the Administrative Law Judge is incorrect in concluding that the Claimant must be available for the same number of shifts in order to satisfy the "same basis" requirement. The law specifically says that a worker "does not have to be available for a particular shift…." 871 IAC 24.22(2). The key is that the worker "is available for work on the same basis on which the individual's wage credits were earned" and "if after considering the restrictions as to hours of work, etc., imposed by the individual there exists a reasonable expectation of securing employment…" But if we interpreted "same basis" to mean "same shifts" then the first sentence makes little sense. It should just read "The individual must be available for the same particular shifts as when the individual's wage credits were earned." This it does not say. Further, if there were a "same shift" requirement it would make little sense to talk about "if after considering the restrictions as to hours of work, etc., imposed by the individual…" A "same shift" requirement would not contemplate the individual "imposing" hours of work restrictions in the first place. Further given the use of "basis" elsewhere when referring to "part-time" and "full-time" we think it fairly clear that the "same basis" requirement only means that a full-time worker must continue to be available for full-time work, regardless of shift. And if the shift is restricted the question is then whether "if after considering the restrictions as to hours of work, etc., imposed by the individual there exists a reasonable expectation of securing employment…"

Applying the approach outlined above we find that the Claimant has shown that is he available for full-time first-shift work. True, more jobs would be available if he were willing to work more shifts. But the fact is there are sufficient full-time weekday first shift jobs in the marketplace that we can say that the Claimant has proven he is genuinely attached to the labor market. Thus we disagree with the Administrative Law Judge that the Claimant is made unavailable by the "same basis" requirement. We do not, however, end our analysis there.

A problem with simply granting benefits in this fact pattern is policy. At a policy level the Claimant's position creates an undesirable incentive. Had the Employer simply insisted that the Claimant must work the shift he was hired to work, that is, if the Employer had stuck to its legal rights then the Claimant would have had limited choices if he wished to have the modified schedule. He could have kept on with the Employer, missed work, and eventually been fired for absenteeism. Under the usual rule absences caused by issues of personal responsibility, such as lack of child care, are not excused. *Higgins v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984); c.f. 871 IAC 24.23(4); *Harlan v. IDJS*, 350 N.W.2d 192, 194 (Iowa 1984); *Spragg v. Becker-Underwood, Inc.* 2003 WL 22339237 (Iowa App. 2003)("personal family emergency" unexcused); *Ray v. Iowa Dept. of Job Service*, 398 N.W.2d 191 (Iowa App. 1986)(moving unexcused); *Clark v. IDJS*, 317 N.W.2d 517 (Iowa App. 1982) (eyeglasses repair, job interview, and "family problem" unexcused). The Claimant would then be disqualified for excessive unexcused absences, and the Employer would not be charged for benefits. Or, the Claimant could have quit. But if the Claimant quits under these circumstances it may well be a quit for good cause but it would not be a quit for good cause *attributable to the Employer*. 871 IAC 24.25(17)(lack of child care not good cause attributable to employer). So the quit would also be disqualifying and the Employer would

not be charged for benefits. So the inflexible Employer ends up not paying benefits. But this Employer was different. This Employer worked with the Claimant in an attempt to keep him employed at some level. Both parties knew the Claimant would very possibly end up with reduced hours. Still, with the consent of both the Employer agreed to give the new schedule an opportunity. The Claimant now seeks a rule that would punish the Employer for this.

Of course, the Claimant's purpose is to obtain necessary income, not punishment, but the effect of the rule he urges would be to *discourage* employers from attempting to maintain employment through accommodation of schedules in such cases. An employer who works with employees in such situations would run the risk of paying benefits – benefits based on full-time credits – to a worker who is no longer willing to perform full-time work for the Employer. The Employer concerned with paying benefits would therefore choose the inflexible approach: stick to the contract of hire, and require the worker to show up to work when scheduled. The net result is workers receiving *less* accommodation in such situations, thus resulting in *more* unemployment. This is the exact opposite of what the Employment Security Law is designed to accomplish.

The key circumstance of this case, setting it apart from most, is that the Claimant *asked* to move to a shift and could reasonably foresee that this would mean a reduction in hours or a layoff. Looking to courts outside Iowa, many take the view that such a request is a quit of the old job, and disqualifying if requalifying credits are not earned. *E.g. Hogenson v. Brian Knox Builders*, 361 N.W.2d 163 (Minn. Ct. App. 1985); *Freeman v. D.C. Dept. of Employment Services*, 568 A.2d 1091, 1093 (D.C. 1990); *Fisher v. Bd. of Review & Advanced Chiropractic Assocs*., P.A. No. No. A-4194-12T2 (N.J. Super. App. Div. 1/6/2015); *Senkinc v. Unemployment Compensation Bd. of Review,* 601 A.2d 418, 144 Pa.Cmwlth. 175 (Pa. Cmwlth., 1991); *Havrilchak v. Unemployment Comp. Bd. of Review*, 133 A.3d 800 (Pa. Commw. Ct., 2015); *Tolin v. Director, Dept. Of Indus. Rel*., 775 So.2d 837 (Ala. Civ. App., 2000); *Coyne v. Cargill, Inc*., 167 S.W.3d 800 (Mo, 2005) (*citing Bergmann v. Labor & Indus. Relations Com'n,* 604 S.W.2d 811 (Mo. App., 1980)). In this analysis the Claimant quit the full-time job and starts a new job, and a new "contract of hire," with the limited schedule.

This approach, in the specific circumstances of this case, has much to recommend it. First, it is technically defensible. In other settings, a change in hours is treated like a new contract. For example, if the parties consent to a reduction in hours the claimant cannot later quit claiming a change in the "original contract of hire." On the other hand, we have ruled that claimants who start part-time, move to full-time, and then have their hours reduced back to part-time may quit and collect benefits because of the change in the contract of hire. *E.g. Wood v. Hampton Motel,* 16B-UI-08195 (affirming 16A-UI-08195-JTT). Such approaches treat an agreed move to part-time or to full-time as a new contract, i.e., a new job. Second, this has more fair results in the most common scenarios where such part-time moves take place. More commonly a case like this comes up when a claimant moves to part-time with a base period employer so that the claimant can take another full-time job. Such a claimant would then be working more than full-time. If this industrious claimant is laid off from the new full-time job shortly after taking it he is then left with only the part-time job, but with full-time credits with his original employer. Now had this claimant quit altogether to go from one full-time job to another full-time job he would then be allowed benefits, which would be charged to the fund. Iowa Code §96.5(1)(a). But the industrious claimant did not quit altogether. If we deny that claimant benefits then he ends up worse off for wanting to work more. But if we allow benefits charged to the original employer of the industrious worker then the employer ends up being charged because it was willing to be flexible. If we treat the move to reduced schedule as a quit in order to take other employment then the fund would be charged just as with the less industrious worker.

We set out some principles governing this sort of analysis.

First, the requested move to part-time, when treated as a separation from the full-time work, is resolved as any other quit. The reasons for it may be disqualifying or may not just as with any other quit.

Second, following a disqualification the claimant's requalification would be as usual and would include wages earned while part-time with the base period employer. The date of the quit, for requalification purposes, would ordinarily be the date that the request to limit availability was approved.

Third, since the worker would be under a new contract of hire the question of partial unemployment would be resolved in the context of this new contract. Thus whether a worker was working a reduced schedule different than contemplated in the contract of hire would refer to the new *part-time* contract of hire. *See Powell v. EAB,* 861 N.W.2d 279 (2014); 871 IAC 24.23(26). This means that ordinarily the worker would *not* be partially unemployed during any week he received a level of employment consistent with what he himself had requested. An exception to this would be a worker who moves to part-time only so he could take other full-time employment, and who maintained the part-time employment as a supplemental "moonlighting" job. In such a case rule 24.23(26) would not apply to the moonlighting job, but as we have said the partial benefits would be charged to the fund per Iowa Code §96.5(1)(a) in the event that the worker is laid off from the new full-time job.

Fourth, a claimant who remains employed with the Employer and who experiences a week of *total* unemployment, as with a layoff, would not be subject to the "same hours and wages" analysis. Such a worker could collect benefits *if* the move to part-time was not disqualifying, or *if* the worker had since requalified. Such a worker would also have to continue searching for full-time work since, as the Administrative Law Judge found, this would not be an instance of temporary unemployment under Iowa Code §96.19(38)(c). Benefit charging would be as per usual.

Fifth, how a subsequent complete separation from employment would be resolved depends on whether the subsequent separation is causally linked to the request to limit availability. Where the subsequent complete separation is not causally linked to the request to limit shifts then only that subsequent separation needs to be addressed. There would not be a reason to address the request to limit shifts when determining whether the claimant could collect benefits following such an unrelated complete separation. So if a claimant moves to part-time *per* his request, is laid off permanently for reasons unrelated to the part-time move, and after that files for benefits then only the complete separation need be resolved. On the other hand, if the complete separation *is* the result of the request to reduce availability then only the request to limit shifts needs to be addressed. If that request is disqualifying then this disqualification is *not* lifted just because followed by a subsequent causally-linked layoff.

Finally, we are aware that it may be impractical to adjudicate every move to part-time as a distinct separation. We do not think this is necessary. The analysis we suggest can be limited to cases where (1) a full-time worker requests a move to part-time, or to move to a schedule that the worker understands will result in reduced hours (including a layoff), (2) then the worker seeks benefits during a benefit year containing full-time credits from the Employer in question, and (3) either the worker seeks these benefits while still employed with that Employer or the reason the worker is subsequently permanently separated from the employer is because his

reduced availability resulted in the separation. In other situations the “part-time move as quit analysis” is unnecessary and need not be employed.

Since the parties waived notice on the issue of temporary unemployment, we can address this issue at this time. We do affirm the Administrative Law Judge on the issue of temporary unemployment based on the analysis she set out on this issue on page 4 of her decision. We note that the only effect of temporary unemployment is to relieve a claimant of the need to be available for work, and to be looking for work. Since he was looking for full-time work, and since we find him available for full-time work, our affirmance of the Administrative Law Judge on the issue of temporary unemployment has no adverse effect on the Claimant. We also note that the Claimant has not yet filed a claim for partial benefits, and so there is no need at this time to address the same hours and wages issue.

With our analysis we could rule on the separation issue, likely resulting in at least some level of disqualification, but are legally unable to. Generally, "[i]f new issues appear, different from those which are noticed in the appeal, the board …in the interest of prompt administration of justice and without prejudicing the substantive rights of any party, may hear and decide any issue material to the appeal, even if not specifically indicated as a ground for appeal or not noticed for the administrative hearing." 486 IAC 3.1(6). Thus the fact that an issue is not raised does not necessarily preclude consideration of that issue at a later stage of the proceedings so long as due process is satisfied. *Id.; Swanson v. Employment Appeal Board*, 554 N.W.2d 294, 297 (Iowa App. 1996); *Kehde v. Iowa Dept. of Job Service*, 318 N.W.2d 202, 206 (Iowa 1982); *Flesher v. Iowa Dept. of Job Service*, 372 N.W.2d 230, 233 (Iowa 1985). Despite this, however, due process does require some notice to the parties of what issues are to be decided. For example, notice of a disqualification based on a discharge is not adequate notice that the issue of disqualification based on a quit will be adjudicated. *Silva v. Employment Appeal Bd*. 547 N.W.2d 232 (Iowa App. 1996); Iowa Code § 17A.12(2)(c) and (d). Also Iowa Code §17A.12(2)(c) *requires* that the notice of hearing refer to the "particular sections of the statutes and rules involved." Availability and partial unemployment issues are found in Iowa Code §96.4. The section for a job separation disqualification is Iowa Code §96.5, and this was not included on the notice of hearing, nor was notice waived by the parties. A remand for an additional hearing is therefore mandatory so that the parties can address the issue of disqualification based on the request to change shifts, with knowledge that the request would likely result in a reduction of work with the Employer, as a job separation.

On remand, the Administrative Law Judge, who did an excellent job in conducting this case so far, should address the separation issue we have identified. The parties may also wish to address whether the Claimant has earned ten times his weekly benefit amount following the separation from full-time work.

DECISION:

The administrative law judge's decision dated August 30, 2017 is **REVERSED** on the issue of whether the Claimant has so limited his availability that he is no longer able and available for work. The Employment Appeal Board concludes that the Claimant's limitation to the first shift, Monday through Friday, was not so limiting as to render the Claimant not able and available for work. In addition, the Administrative Law Judge's decision dated August 30, 2017 is **AFFIRMED** on the issue of whether the Claimant was temporarily unemployed. Accordingly, the Claimant is for the time being allowed benefits.

We **REMAND** this matter to an Administrative Law Judge with the Appeals Bureau to address the issue of a separation resulting from the request to limit shifts and any resulting limitation of hours worked. The Administrative Law Judge shall conduct a new hearing addressing these issues and issue a decision providing for appeal rights. We caution that the result of this remand may be to reimpose a claim lock and that any benefits collected between now and any subsequent disqualification would then become overpayments.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv
DATED AND MAILED:_____