

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SHANNESSY MICHAEL**  
Claimant

**APPEAL NO: 17A-UI-03882-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**REHABCARE GROUP EAST INC**  
Employer

**OC: 11/27/16**  
**Claimant: Appellant (5/R)**

Iowa Code section 96.4(3) – Able, Available & Work Search

**STATEMENT OF THE CASE:**

Shannessy Michael filed an appeal from the April 5, 2017, reference 03, decision that denied benefits effective March 12, 2017, based on the claims deputy's conclusion that Ms. Michael did not meet the availability requirement and, therefore, was ineligible for unemployment insurance benefits. After appropriate notice was issued to the parties, an appeal hearing was held on May 3, 2017. Ms. Michael participated. The employer did not participate in the hearing. The employer registered a telephone number for the hearing and listed Zach Kanis as the employer's representative for the hearing. However, Mr. Kanis was not available for the hearing at the number the employer registered for the hearing. The administrative law judge took official notice of the following agency administrative records: KCCO, DBRO, WAGEA, WAGEB and WAGEC.

**ISSUES:**

Whether Ms. Michael has met the eligibility requirements set forth at Iowa Code section 96.4(3) since she established the additional claim for benefits that was effective March 12, 2017.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Shannessy Michael established an original claim for benefits that was effective November 27, 2016, but did not make weekly claims at that time. Ms. Michael established an additional claim for benefits that was effective March 12, 2017. Ms. Michael has made weekly claims since the additional claim for benefits went into effect.

Ms. Michael is a licensed physical therapist. In 2006, Ms. Michael commenced her most recent period of employment with Rehabcare Group East, Inc. From 2006 until December 16, 2016, Rehabcare provided Ms. Michael with regular weekly employment at Salem Lutheran Home in Elkhorn. Ms. Michael had at all relevant times resided in West Des Moines. The distance from West Des Moines to Elkhorn is approximately 80 miles and Ms. Michael's commuting time was 75 minutes. Until December 31, 2016, Ms. Michael's employment with Rehabcare had both a regular part-time component and an on-call or p.r.n. component. Ms. Michael provided physical therapy services to patients at the Salem Lutheran Home each Tuesday. Outside of those

regularly scheduled hours, Ms. Michael reported to Salem Lutheran Home as needed to evaluate or provide physical therapy services to residents. Ms. Michael advises that the practice standard required that she see a new patient in need of physical therapy evaluation and/or services within 24 to 48 hours of their admission a nursing home facility. Rehabcare paid Ms. Michael \$75.00 per hour for her Tuesday work and for the additional on-call work.

In November 2016, Rehabcare notified Ms. Michael that the company had lost its contract with Salem Lutheran Home and that there would be no more work for her at Salem Lutheran Home after December 31, 2016. In response to this news, Ms. Michael prematurely established an original claim for unemployment insurance benefits that was deemed effective November 27, 2016. Workforce Development set Ms. Michael's weekly benefit amount at \$480.00. Ms. Michael's base period for purposes of the claim year that started in November 2016 consists of the third and fourth quarters of 2015 and the first and second quarters of 2016. Ms. Michael's based period wages from Rehabcare averaged \$898.00 per week. Ms. Michael's highest earning base period quarter was the third quarter of 2015, when her weekly wages from Rehabcare averaged \$1,101.00 and her overall weekly wages averaged \$1,233.00. Ms. Michael's base period employers were Rehabcare and Select Rehabilitation, Inc. Ms. Michael's employment with Select Rehabilitation has consistently been on-call in nature.

When Ms. Michael established her claim for benefits, Workforce Development used the information she provided to categorize her as a Group 3, job-attached claimant. When Ms. Michael established her original claim for benefits, she did not immediately commence making weekly claims. Instead, Ms. Michael allowed the claim to lapse while she remained her regular part-time employment with Rehabcare for a month after she established the claim. Ms. Michael then delayed reactivating her claim in the hope that Rehabcare would provide her with a new work assignment under regular part-time conditions comparable to those she had at Salem Lutheran Home in Elkhorn. Rehabcare did not offer Ms. Michael work between January 1, 2017 and March 11, 2017. Ms. Michael reactivated her unemployment insurance claim effective March 12, 2017.

Select Rehabilitation has not offered Ms. Michael any work in 2017.

During the benefit week that ended March 18, 2017, Rehabcare offered Ms. Michael work at Regency Nursing Home in Norwalk. Ms. Michael accepted the work and worked for 4.5 hours. When Ms. Michael made her weekly claim for the week that ended March 18, 2017, she reported \$300.00 in wages from the work at Regency Nursing Home. Given the \$75.00 hourly wage and the 4.5 hours worked, the correct gross wages for that week were \$337.50.

During the benefit week of March 25, 2017, Rehabcare offered Ms. Michael work in Cedar Rapids. Rehabcare contacted Ms. Michael the day before Rehabcare wanted Ms. Michael to report to Cedar Rapids. The commute from West Des Moines to Cedar Rapids would take about two hours. Ms. Michael has two small children and did not have child care for the following day. Ms. Michael declined the offered work due to the commuting distance, the lack of child care, and the 10-hour workday that would result from the time spent providing therapist services and the round trip commute.

During the four-week period of March 26, 2017 through April 22, 2017, Rehabcare did not offer Ms. Michael any work.

During the benefit week that ended April 29, 2017, Rehabcare offered Ms. Michael 2.5 hours of that included two hours with a patient on April 24, 2017 and a half hour of training work that Ms. Michael completed from home. Ms. Michael reported the \$187.50 in wages from that work

when she made her weekly claim. Workforce Development rounded the weekly wages to \$188.00.

During the benefit week that ended May 6, 2017, the same week as the appeal hearing, Rehabcare offered work to Ms. Michael and Ms. Michael declined the work. At 8:00 a.m. on Sunday, April 30, 2017, Rehabcare sent Ms. Michael a text message asking her to see a new patient in Norwalk that day. Ms. Michael declined the work because it conflicted with her plan to leave for church at 10:30 a.m. and to travel to Anita, Iowa for a family gathering.

Since Ms. Michael established the additional claim for benefits that was effective March 12, 2017, she has not looked for other employment. Ms. Michael is not interested in regular part-time employment unless it provides the \$75.00 per hour wage she has enjoyed in the Rehabcare and Select Rehabilitation employments. Ms. Michael is aware that other regular employment as a physical therapist would pay a wage lower than the \$75.00 she received from Rehabcare and Select Rehabilitation.

### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code § 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".

Because the employer did not make itself available to participate in the hearing, the evidence in the record is limited to the testimony provided by Ms. Michael and Workforce Development records. Ms. Michael is correct in asserting that the determination of whether she has been available for work, partially unemployed or temporarily unemployed involves some uncommon facts. These uncommon facts include an above-market \$75.00 per hour wage that factored in a substantial commuting time and distance, as well as an agreement on the part of Ms. Michael to report to the workplace within on fairly short notice. The evidence indicates that the \$75.00 wage factored the on-call element and, over time, became the wage for the one-day-per-week regular part-time employment. Important to the determination of whether Ms. Michael is eligible for benefits is the question of whether it is reasonable for Ms. Michael to hold out for a similar high-paying arrangement while refraining from searching for physical therapy work that offers a lower, but market-appropriate wage. Also important to the determination of whether Ms. Michael is eligible for unemployment insurance benefits is the question of whether she can be deemed "available" for work, given her pattern of on-call employment, when she declines an offer of on-call work.

The evidence in the record clearly indicates that Rehabcare has not had the same amount of work available to Ms. Michael in 2017 as Ms. Michael enjoyed throughout the base period and until December 31, 2016. Before Ms. Michael established the additional claim that was effective March 12, 2017, she had been completely unemployed for 10 weeks. Given that period of time

without any work, it would be inappropriate to deem Ms. Michael to be job-attached to either Rehabcare or Select Rehabilitation as of March 12, 2017, when the additional claim for benefits took effect. Iowa Code Section 96.19(38)(c) provides that:

An individual shall be deemed temporarily unemployed if for a period, verified by the department, *not to exceed four consecutive weeks*, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

[Emphasis added.] This same principal regarding *temporary* unemployment from full-time employment applies to part-time employment.

Given the lengthy period of unemployment that preceded the additional claim for benefits, it would be inappropriate to deem Ms. Michael to be job-attached, but partially unemployed as of the March 12, 2017 effective date of the additional claim. Iowa Code Section 96.19(38)(b) provides as follows:

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.

Ms. Michael's physical and mental ability to perform work is not in question. Thus, the determination of whether Ms. Michael has met the eligibility requirements in Iowa Code section 96.4(3) involves determination of whether she has been available for suitable work and whether she has engaged in an active and earnest search for suitable work since she established the additional claim for benefits.

Iowa Administrative Code rule 871-24.22(2) provides, in relevant part, as follows:

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.

(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.

...

c. Intermittent employment. An individual cannot restrict employability to only temporary or intermittent work until recalled by a regular employer.

...

l. Available for work. To be considered available for work, an individual must at all times be in a position to accept suitable employment during periods when the work is normally performed. As an individual's length of unemployment increases and the individual has been unable to find work in the individual's customary occupation, the individual may be required to seek work in some other occupation in which job openings exist, or if that does not seem likely to result in employment, the individual may be required to accept counseling for possible retraining or a change in occupation.

m. Restrictions and reasonable expectation of securing employment. An individual may not be eligible for benefits if the individual has imposed restrictions which leave the individual no reasonable expectation of securing employment. Restrictions may relate to type of work, hours, wages, location of work, etc., or may be physical restriction

Iowa Administrative Code rule 871-24.23 provides, in relevant part, as follows:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

24.23(3) If an individual places restrictions on employability as to the wages and type of work that is acceptable and when considering the length of unemployment, such individual has no reasonable expectancy of securing work, such individual will be deemed not to have met the availability requirements of Iowa Code section 96.4(3).

...

24.23(8) Where availability for work is unduly limited because of not having made adequate arrangements for child care.

...

24.23(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

...

24.23(20) Where availability for work is unduly limited because the claimant is waiting to be recalled to work by a former employer or waiting to go to work for a specific employer and will not consider suitable work with other employers.

Ms. Michael's base period wage credits accrued from regular part-time and part-time on-call work as a physical therapist. To be eligible for benefits, Ms. Michael is required to be available for and to engage in an active and earnest search for regular part-time and on-call work within her profession. It is reasonable to limit the search, for now, to work within the physical therapy profession. Ms. Michael's base period wage credits accrued from service to an area that was a 75-minute commuting distance, approximately 80 miles, from her home. All of the Des Moines metropolitan area and much of central Iowa falls within that 75-minute commuting radius. Given the base period employment history, it is not sufficient to limit the work search to a 45-minute commuting distance. However, Ms. Michael has not made any meaningful search for work even within that smaller radius. During the period of March 12, 2017 through the benefit week that ended May 6, 2017, Ms. Michael did not look for work at all, despite having been completely unemployed for 10 weeks prior to filing the additional claim for benefits. Ms. Michael declined to explore other opportunities in the labor market while she waited for a particular employer, Rehabcare, to offer her what she knew was an exceptionally rare opportunity to make an above-market wage for very limited part-time work.

Given the absence of a work search and the undue restriction on availability, Ms. Michael did not meet the eligibility requirements set forth at Iowa Code section 96.4(3) during the period of March 12, 2017 through May 6, 2017 and is not eligible for benefits for that period. The

availability and work search disqualification continued as of the May 3, 2017 appeal hearing and will continue until Ms. Michael demonstrates availability for part-time work as a physical therapist and demonstrates an active and earnest search for such work. Ms. Michael must meet all other eligibility requirements.

This matter will be remanded to the benefits bureau for correction of the claimant group category to Group 6, unattached.

**DECISION:**

The April 5, 2017, reference 03, decision is modified as follows. The claimant has not been job-attached since she established the additional claim for benefits that was effective March 12, 2017. The claimant has unduly restricted her availability for work and has not engaged in a work search since she established the additional claim for benefits that was effective March 12, 2017. Benefits are denied effective March 12, 2017. The availability and work search disqualification will continue until the claimant demonstrates bona fide availability for work within her profession and an active and earnest search for new employment. The claimant must meet all other eligibility requirements.

This matter is remanded for correction of the claimant group code to Group 6, unattached. This matter is remanded for adjudication of the separation that occurred on or about December 31, 2016.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs