

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LINDA D YBARRA

Claimant

APPEAL NO. 10A-UI-08149-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DR ALBERT N BROWN

Employer

OC: 04/25/10

Claimant: Appellant (1-R)

Section 96.4(3) – Able & Available

Section 96.4(3) – Still Employed Same Hours and Wages

Section 96.7(2) – Employer Liability

STATEMENT OF THE CASE:

Linda Ybarra filed a timely appeal from the June 1, 2010, reference 01, decision that denied benefits effective April 25, 2010 based on an Agency conclusion that she was not partially unemployed. After due notice was issued, a hearing was held on July 22, 2010. Ms. Ybarra provided a telephone number for the hearing, but was not available at that number at the scheduled start of the hearing. Jodee Martin, Office Manager, represented the employer. The administrative law judge took official notice of the Agency's administrative record of benefits paid to the claimant, wages reported by the claimant in connection with her claim, and base period wages reported by the employer.

ISSUES:

Whether the claimant has been able to work and available for work since establishing her claim for benefits.

Whether the claimant was partially unemployed from her employment since she established her claim.

Whether the employer's account may be assessed for benefits paid to the claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a dental office formerly operated by Dr. Albert N. Brown, D.D.S. Dr. Brown passed away in January 2010. Pursuant to an agreement with Dr. Brown's family and the family's attorney, the practice formerly operated by Dr. Brown is now operated by Dr. Fatemh Jabbari, D.D.S., who continues the practice in the same location and who continues to employ claimant Linda Ybarra.

Ms. Ybarra started with the employer in 2001. Ms. Ybarra's base period for unemployment insurance purposes consisted of the first through fourth quarters of 2009. During the base

period, there was a steady decline in Ms. Ybarra's quarterly earnings, from \$4,871.00 in the first calendar quarter to \$3,114.00 during the fourth calendar quarter.

Dr. Brown moved to New Mexico at the beginning of 2009. In connection with that event, Ms. Ybarra's work hours went to three days per week and then two days per week. In 2010, Ms. Ybarra has worked one to three days per week.

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.]

Ms. Ybarra did not participate and did not contribute to the evidence to be considered. Ms. Ybarra has presented no evidence to establish that she is partially unemployed or that she meets the work availability requirements of Iowa Code section 96.4(3). The weight of the evidence indicates that the significant change in Ms. Ybarra's work hours occurred *during* the base period and that since the beginning of 2010, Ms. Ybarra has worked a variable schedule of one to three shifts per week. Based on the evidence, the administrative law judge concludes that Ms. Ybarra cannot be considered partially unemployed for unemployment insurance purposes. The administrative law judge also concludes that Ms. Ybarra has not demonstrated compliance with the work availability requirements of Iowa Code section 96.4(3) since she established her claim for benefits.

This matter should be remanded so that the Claims Division or Tax Bureau can determine whether the dental practice operated by Dr. Jabbara is a successor employer for unemployment insurance tax purposes.

DECISION:

The Agency representative's June 1, 2010, reference 01, is affirmed. The claimant has not been partially unemployed since she established her claim for benefits. The claimant has not demonstrated compliance with the work availability requirements of Iowa Code section 96.4(3) since she established her claim for benefits. The claimant is not eligible for benefits. Benefits are denied effective April 25, 2010. The disqualification continued as of the July 22, 2010 hearing date.

This matter is remanded so that the Claims Division or Tax Bureau can determine whether the dental practice operated by Dr. Jabbara is a successor employer for unemployment insurance tax purposes.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw