

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**LUCILLE G KALVIG
1419 N FEDERAL AVE APT 2
MASON CITY IA 50401-1205**

**MYBAR LIMITED
D/B/A HANFORD INN
3041 - 4TH ST SW
MASON CITY IA 50401**

**Appeal Number: 06A-UI-05872-RT
OC: 05-07-06 R: 02
Claimant: Respondent (4)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.4- 3 – Required Findings (Able and Available for Work)
Section 96.7-2-a-2 – Employer Contributions and Reimbursements (Same Employment-
Benefits not Charged)
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Mybar Limited, doing business as Hanford Inn, filed a timely appeal from an unemployment insurance decision dated May 31, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Lucille G. Kalvig and determining that those benefits should be charged to the account of the employer and the account of the employer would not be relieved of charges for such benefits. After due notice was issued, a telephone hearing was held on June 19, 2006, with the claimant participating. Kathy Barlas, Manager, participated in the hearing for the employer. Myrna Barlas was available to testify for the employer but not

called because her testimony would have been repetitive and unnecessary. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was, is, and has been, employed by the employer as a part time night housekeeper since May of 1996. She averages between 30 and 35 hours per week. The claimant has not permanently separated from that position. The claimant's basic employment from the employer has not changed. She has always been part time working as a night housekeeper. She has always averaged approximately the same hours. Although the claimant's start times may vary she always averages approximately the same number of hours. The claimant's start times have always varied. The claimant's hours also vary slightly but they have always varied in such a fashion.

The claimant is earnestly and actively seeking work by making two in-person job contacts each week. The claimant has placed no physical restrictions or training restrictions on her ability to work. The claimant has placed no day or time or location restrictions on her availability for work except that she is looking for daytime work because she has her nighttime part time job. The claimant lost employment from another employer and has filed for unemployment insurance benefits. The claimant is not disqualified to receive unemployment insurance benefits as a result of that separation from employment. Pursuant to her claim for unemployment insurance benefits filed effective May 7, 2006, the claimant has received unemployment insurance benefits in the amount of \$843.00 for six weeks from benefit week ending May 13, 2006 to benefit week ending June 17, 2006. That entire amount has been offset against an overpayment from 2005 leaving a balance overpaid of \$635.00. The claimant reported earnings in each of the weeks claimed which earnings were from the employer herein. Workforce Development records also show consistent earnings from the employer herein in the amount of slightly more than \$3,000.00 per quarter for the second, third, and fourth quarters of 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, she is, and was, not able, available and earnestly and actively seeking work. The claimant is not ineligible to receive unemployment insurance benefits for those reasons.
2. Whether the claimant is receiving from the employer herein the same employment including the same hours and wages presently during the time that the claimant is receiving benefits as she did in her base period and therefore the account of the employer herein shall not be charged for any benefits to which the claimant is entitled and the employer's account shall be relieved of any such charges. The claimant is receiving the same employment now as she did during her base period and the employer herein shall not be charged for any unemployment insurance benefits to which the claimant is entitled and the account of the employer herein shall be relieved of any such charges.
3. Whether the claimant is overpaid unemployment insurance benefits. The claimant is not overpaid unemployment insurance benefits.

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".

The administrative law judge concludes that the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code section 96.4(3) or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W. 2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met her burden of proof to demonstrate by a preponderance of the evidence that, at relevant times, she is, and was, able, available, and earnestly and actively seeking work. The claimant credibly testified that she is seeking work by making two in-person job contacts each week. The claimant also credibly testified that she has placed no physical or training restrictions on her ability to work. Finally, the claimant credibly testified that she has placed no time or day or location restrictions on her availability for work except that she is seeking work during the daytime because her part time work is at night. The administrative law judge concludes that the claimant's restriction to daytime work does not unreasonably impede her opportunity for employment. Further, the individual does not have to be available for a particular shift and it is sufficient if an individual is available for work on the same basis as which the individual's wage credits were earned and if after considering the restrictions as to the hours of work there exists a reasonable expectation of securing employment. The administrative law judge notes that the claimant is available for work on the same basis as her wage credits were earned from the previous part time employer from which the claimant is now separated and further determines that there exists a reasonable expectation for the claimant to secure daytime employment. See 871 IAC 24.22 (2)(a). Accordingly, the administrative law judge concludes that the claimant is able, available, and earnestly and actively seeking work and, as a consequence, she is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she remains able, available, and earnestly and actively seeking work and is otherwise entitled to such benefits.

Iowa Code section 96.7-2-a(2) provides:

2. Contribution rates based on benefit experience.

a. (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.

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.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge concludes that the claimant is receiving from the employer herein, the same employment from the employer including hours and wages and terms and conditions as she did during her base period. The evidence is uncontested to that effect. Accordingly, the administrative law judge concludes that any unemployment insurance benefits to which the claimant is entitled shall not be charged to the account of the employer herein and the account of the employer herein shall be relieved of any charges for any unemployment insurance benefits to which the claimant is entitled.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$843.00 since filing for such benefits effective, May 7, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits. However, these benefits shall not be charged against the account of the employer herein and the account of the employer herein shall be relieved of those charges.

DECISION:

The representative's decision of May 31, 2006, reference 01, is modified. The claimant, Lucille G. Kalvig, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she is, and was, at relevant times, able, available, and earnestly and actively seeking work. Any unemployment insurance benefits to which the claimant is entitled shall not be charged to the account of the employer herein and the account of the employer herein shall be relieved of any such charges because the claimant is receiving from the employer herein the same employment including hours and wages and conditions now as she did during her base period. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of her claim for benefits filed effective May 7, 2006. However, those benefits shall not be charged against the account of the employer herein and the account of the employer herein shall be relieved of such charges.

kkf/pjs