

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOSEPH E TORY**  
Claimant

**APPEAL NO. 14A-UI-03531-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FMC/MARC INC ARBIES**  
Employer

**OC: 02/23/14**  
**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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the March 24, 2014, reference 03, decision that allowed benefits effective February 23, 2014 based on an agency conclusion that Mr. Tory was able and available for work, but partially unemployed. After due notice was issued, a hearing was held on May 13, 2014. The hearing in this matter was consolidated with the hearing in Appeal Number 14A-UI-03308-JTT. Mr. Tory participated. Lisa Harroff of Equifax represented the employer and presented testimony through Jim Bast. Exhibits A and B were received into evidence. The administrative law judge took official notice of the agency's administrative record of wages reported by and for the claimant and of benefits disbursed to the claimant.

**ISSUES:**

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

Whether the claimant was partially unemployed from his employment.

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: Joseph Tory established a claim for benefits that was effective February 23, 2014. The weekly benefit amount is set at \$166.00. Mr. Tory has reported wages as follows and received benefits as follows:

<u>Benefit Week End</u>	<u>Wages Reported</u>	<u>Benefits Paid</u>	<u>Actual Wages (rounded)</u>
03/01/14	127.00	80.00	127.00
03/08/14	180.00	27.00	190.00
03/15/14	.00	.00	.00 (ill)
03/22/14	.00	.00	.00 (ill)
03/29/14	.00	.00	.00 (released to work)
04/05/14	195.00	.00	195.00
04/12/14	247.00	.00	247.00
04/19/14	257.00	.00	257.00
04/26/14	.00	.00	.00 (ill)
05/03/14	184.00	.00	184.00 (med. restriction)
05/10/14	168.00	.00	168.00 (med. restriction)

Mr. Tory is employed by FMC/Marc, Inc., Arbies, doing business as Arby's, as a shift manager. Mr. Tory's hourly wage is \$9.00. Prior to the middle of February 2014, the employer provided Mr. Tory with 25-32 hours per week. Mr. Tory established his claim for benefits in response to the employer's decision to reduce his work hours.

During the week that ended February 22, the employer had 21.88 for Mr. Tory and Mr. Tory performed all the work the employer had available. 21.88 times \$9.00 equals \$196.92.

During the week that ended March 1, the employer had 18.5 hours for Mr. Tory. Mr. Tory worked 14.15 hours and missed on shift, 5.5 hours, due to illness. 18.5 times \$9.00 equals \$166.50. 14.15 times \$9.00 equals \$127.35

During the week that ended March 8, the employer had 21.07 hours for Mr. Tory and Mr. Tory performed all of the work the employer had available. 21.07 times \$9.00 equals \$189.63.

During the week that ended March 15, Mr. Tory was not able to work or available for work because he needed to undergo a heart procedure.

During the week that ended March 22, Mr. Tory was recovering his heart procedure and was not released to return to work. Mr. Tory provided the employer with a medical release on March 22, 2014.

During the week that ended March 29, Mr. Tory was released to return to work, was available for work, but the employer did not have any hours for him because the schedule had already been set.

During the week that ended April 5, the employer had 21.68 hours for Mr. Tory and Mr. Tory performed all of the work the employer had available. 21.68 times \$9.00 equals \$195.12.

During the week that ended April 12, the employer had 27.42 hours available for Mr. Tory and Mr. Tory performed all of the work the employer had available for him. 27.42 times \$9.00 equals \$246.78.

During the week that ended April 19, the employer the employer had 28.57 hours available for Mr. Tory and Mr. Tory performed all of the work the employer had available for him. 28.57 times \$9.00 equals \$257.13.

During the week that ended April 26, the employer has 25 hours for Mr. Tory. Mr. Tory did not work that week due to illness.

During the week that ended May 3, Mr. Tory's doctor restricted him to working no more than 20 hours per week due to his non-work-related heart condition. Mr. Tory worked 20.47 hours that week. The 20 hours medical restriction will be in place an extended period until Mr. Tory's doctor determines the restriction is no longer necessary. 20.47 times \$9.00 equals \$184.23.

During the week that ended May 10, the employer scheduled Mr. Tory for 20 hours and Mr. Tory worked 18.67 hours. 18.67 times \$9.00 equals \$168.03.

### **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 § 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a and (2) provide:

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.

(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.

(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.

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).

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. Iowa Code section 96.19(38)(c).

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.]

According to the findings of fact above, Mr. Tory's ability to work, availability for work, and eligibility for benefits are as follows:

During the week that ended March 1, Mr. Tory was able and available for work, partially unemployed and eligible for benefits provided he was otherwise eligible. The one missed shift did not prevent Mr. Tory from being able and available for work.

During the week that ended March 8, Mr. Tory was able and available for work, but not partially unemployed. While Mr. Tory worked reduced hours that week, Mr. Tory's wages exceeded his weekly benefit amount by more than \$15.00. Mr. Tory is not eligible for benefits for that week.

During the weeks that ended March 15 and 22, Mr. Tory was not able to work or available for work due to his heart condition, and was not eligible for benefits.

During the week that ended March 29, Mr. Tory was temporarily unemployed, was able to work, available for work, and temporarily unemployed. Mr. Tory was eligible for benefits that week provided he met all other eligibility requirements.

During the week that ended April 5, Mr. Tory was able to work, available for work, but not partially unemployed. Though Mr. Tory was working reduced hours, Mr. Tory's weekly wages were greater than his weekly benefit amount plus \$15.00. Mr. Tory is not eligible for benefits for that week.

During the weeks that ended April 12, 19 and 26, Mr. Tory no longer met the availability requirement or the definition of partial unemployment because his hours had been restored to the level that existed before the February cut in hours. Mr. Tory is not eligible for benefits for those weeks.

Effective the week that ended May 3, 2014, Mr. Tory no longer meets the able and available requirements and is not eligible for benefits because his doctor has restricted him to working no more than 20 hours per week and the employer has made roughly 20 hours of work available to him.

The employer's account may be charged for benefits paid to Mr. Tory for any week for which the evidence indicated that Mr. Tory was able and available for work and partially or temporarily unemployed.

#### **DECISION:**

The claims deputy's March 24, 2014, reference 03, decision is modified as follows.

During the week that ended March 1, 2014, the claimant was able and available for work, partially unemployed and eligible for benefits provided he was otherwise eligible.

During the week that ended March 8, the claimant was able and available for work, but not partially unemployed. The claimant is not eligible for benefits for that week. This matter is **remanded** for entry of an overpayment decision concerning the \$27.00 in benefits disbursed for that week.

During the weeks that ended March 15 and 22, the claimant was not able to work or available for work due to his heart condition, and was not eligible for benefits.

During the week that ended March 29, Mr. Tory was temporarily unemployed, was able to work, available for work, and temporarily unemployed. The claimant was eligible for benefits that week provided he met all other eligibility requirements.

During the week that ended April 5, the claimant was able to work, available for work, but not partially unemployed. The claimant is not eligible for benefits for that week.

Effective April 6, 2014, the claimant no longer met the able and available requirements, was not partially unemployed, and was not eligible for benefits.

The employer's account may be charged for benefits paid to the claimant for weeks ending March 1 and 29, 2014.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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