

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOHN M PENNISTON
Claimant

SUPREME STAFFING INC
Employer

APPEAL 18A-UI-02465-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/07/18
Claimant: Appellant (1)

Iowa Code § 96.19(38)a & b – Total and Partial Unemployment
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.23(26) – Availability Disqualifications Same Hours and Wages
Iowa Code § 96.7(2)a(2) – Same Base Period Employment

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 16, 2018, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant is still employed at the same hours and wages as contemplated in his original contract of hire. The parties were properly notified of the hearing. A telephone hearing was held on March 22, 2018. The claimant, John M. Penniston, participated. The employer, Supreme Staffing, Inc., participated through Mike Riehl, Office Manager. The administrative law judge took official notice of the administrative record.

ISSUES:

Is the claimant partially unemployed effective January 7, 2018?
Is the claimant available for work effective January 7, 2018?
Is the employer's account subject to charge?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed most recently as a laborer beginning August 30, 2004. From 2009 through 2016, claimant was assigned to work for American Bottling. In this assignment, claimant averaged full-time hours and worked Monday through Friday as well as occasional weekends.

Claimant's hours have varied throughout his employment. He has earned between \$7.25 and \$9.00 per hour since his assignment ended with American Bottling. Over the past year, claimant has worked approximately twenty-one hours per week and has routinely worked only three days per week. The administrative record shows during the first quarter of 2017, claimant averaged 34.3 hours per week for the 13-week quarter. During the second quarter of 2017, claimant averaged 21.5 hours per week for the 13-week quarter. During the third quarter of 2017, claimant averaged 15.8 hours per week for the 13-week quarter. These averages are all based on claimant's current wage of \$7.25 per hour. Since filing his claim for unemployment

benefits effective January 7, 2018, claimant has reported wages each week. It appears there has been no week during which claimant was completely unemployed since filing his claim in 2018.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant is not partially or totally unemployed. Therefore, the issues of availability for work and the chargeability of the employer's account are moot at this time. Benefits are denied.

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".

Iowa Code § 96.19(38) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) 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.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. 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 Admin. Code r. 871-24.23(26) provides:

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

(26) 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.

Under Iowa Employment Security Law, an individual must be totally or partially unemployed to be eligible for benefits. Iowa Code § 96.19(38). Total unemployment is when someone has received no wages and performed no services during any given week. *Id.* In this case, claimant has performed services and earned wages for each week he has claimed benefits. He is not totally unemployed.

The next question is whether he is partially unemployed. In order to be partially unemployed, an individual must be laid off from full-time employment or working less than his or her regular full-time work week. *Id.* If an individual is employed in a part-time position working the same hours and wages as contemplated at hire, he or she cannot be considered partially unemployed. Iowa Admin. Code r. 871-24.23(26). Claimant was hired by a temporary employment agency to perform work as it became available. He has worked part-time hours during the majority of his base period. His hours have fluctuated as was the expectation when he was hired. He continues to work for the employer. The parties agree that for the past year, claimant has worked three days per week and averaged approximately 21 hours per week. As the claimant is working in a part-time job in the same hours and wages contemplated at hire and reflected in his base period, the claimant is not partially unemployed and is not eligible for benefits.

As the claimant is not partially unemployed nor has he had any weeks of total unemployment, the issues of his availability for work and the chargeability of the employer's account are moot at this time.

DECISION:

The February 16, 2018 (reference 01) unemployment insurance decision is affirmed. The claimant is not partially unemployed and benefits are denied. The issues of availability for work and the chargeability of the employer's account are moot at this time.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn