

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

COLETTE C BURKLE
Claimant

APPEAL NO: 10A-UI-16273-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PRN STAFFING INC
Employer

OC: 10/24/10

Claimant: Appellant (4/R)

Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Colette C. Burkle (claimant) appealed a representative's November 22, 2010 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits in conjunction with her employment with PRN Staffing, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 14, 2011. The claimant participated in the hearing. Kathleen Reynolds appeared on the employer's behalf. One other witness, Liz Fay, was available on behalf of the employer but did not testify. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Is the claimant employed by the employer for less than her usual hours and wages even though she remains able and available for work, and is she therefore eligible for full or partial unemployment insurance benefits?

FINDINGS OF FACT:

The employer is a temporary employment firm providing medical personal staffing. After a prior period of employment with the employer, the claimant most recently resumed actively working for the employer as of August 27, 2010. She worked as needed on essentially an on-call basis as a certified nursing aide (CNA) at various of the employer's area nursing home business clients. Her last day of work was November 13, 2010. She called off sick from that assignment on November 14 due to a pulled back, and provided a doctor's note excusing her from work from November 14 through November 16, indicating she was released to return to work was of November 17. The claimant was otherwise not available for work on November 17 because of personal business. The employer would not allow the claimant to return to work after November 17 because it wanted some other doctor's note other than the one that had indicated she could return to work without restrictions as of November 17, 2010. The claimant spoke to her doctor, who indicated he could not provide any note in addition to the note indicating she was released for work as of November 17, as he could not guarantee that she would never

again pull a muscle in her back. Since the employer insisted that the claimant provide another note before she would be placed on another assignment, and the claimant could not obtain another note, the employment ended on or about November 20. No determination has been made regarding the legal impact of the ending of the employment.

The claimant had established an unemployment insurance benefit year effective October 24, 2010 after the end of a period of full-time employment with another employer. Her base period therefore was set as July 1, 2009 through June 30, 2010. The highest quarter of the claimant's base period was the third quarter 2009, in which she held full-time employment with another employer. Her weekly benefit amount was calculated to be \$182.00, based on wages in that quarter. She did have some part-time employment during that quarter and the fourth quarter 2009 and first quarter 2010; the highest quarterly wage from the employer during the claimant's base period was \$634.00 in the third quarter 2009. The claimant's lag quarter was the third quarter 2010 (ending September 30, 2010), in which there are wages from the employer in the amount of \$1,318.00.

After the claimant established her claim for unemployment insurance benefits effective October 24, 2010, she filed weekly claims for the weeks ending October 30, November 6, November 13, and November 20. Claims were filed for weeks after November 20 as well. For the week ending October 30, no wages were reported, and full benefits paid. The claimant had class on October 28 and October 29, and other obligations on October 27 and October 30, and so was not available for work the employer could have given her those days. The claimant did work some days during the week ending November 6 which she reported on her weekly claim; as the wages earned that week were in excess of \$197.00 (\$182.00 + \$15.00), no benefits were paid for that week. She also worked some days during the week ending November 13 which she reported on her weekly claim; as those wages were also in excess of \$197.00, no benefits were paid for that week.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law provides that a claimant is deemed partially unemployment insurance benefits if she is not employed at her usual hours and wages and earns less than her weekly benefit amount plus \$15.00 in other employment. Iowa Code § 96.19-38-b.

However, implicit with the concept of allowing benefits for a claimant who is working fewer hours is that the reduction bringing the earned wages low enough to qualify for partial benefits has been because of the choice of the employer, not that the claimant is not able or willing to work the hours available to her. Rather, she must remain available for work on the same basis as when she was previously working. Iowa Code § 96.4-3; 871 IAC 22(2)(a). For the weeks ending October 30 and November 20, the reason the claimant had no earnings for the week were because she was not able and available to work hours the employer had available to her either due to class or other personal business, or illness, and she is thus ineligible for unemployment insurance benefits for those weeks. 871 IAC 24.23(29). As the claimant had sufficient earnings to exceed her earning allowance for the weeks of November 6 and November 20, the question as to whether there might have been additional work available for her those weeks is moot.

For the period beginning November 21, 2010, the claimant had provided a doctor's note indicating that she was able to work after November 17. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. 871 IAC 24.22(2)(1)(a). The claimant's doctor's note of November 14

releasing her as of November 17 is sufficient to establish that the claimant was medically able and available for work. To be found able to work, "[a]n 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." Sierra v. Employment Appeal Board, 508 N.W.2d 719, 721 (Iowa 1993); Geiken v. Lutheran Home for the Aged, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). The claimant has demonstrated that she is able to work in some gainful employment on and after November 21, 2010. As of November 21, the employer was not providing the claimant with her prior hours and wages, and would be subject to charge for any benefits that might be payable. Benefits are allowed, if the claimant is otherwise eligible.

An issue as to whether the claimant's separation from the employer as of about November 20, 2010 could be disqualifying arose during the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The unemployment insurance decision dated November 22, 2010 (reference 02) is modified in favor of the claimant. The claimant is not eligible for partial unemployment insurance benefits for the period of October 24 through November 20, 2010 because for weeks in which she did not earn at least \$192.00 she was not sufficiently able and available for work the employer could have provided to her. As of November 21, 2010, the claimant was adequately able and available for work to be eligible to receive unemployment insurance benefits if she was otherwise eligible. As of November 21, 2010, the employer was not providing the claimant with her prior hours and wages, and could be subject to charge for any benefits that might be paid to the claimant. The matter is remanded to the Claims Section for investigation and determination of the issue of the separation which occurred on or about November 20, 2010.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css