

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JON M OZMON

Claimant

APPEAL NO. 15A-UI-05786-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIDAMERICA BASEMENT SYSTEMS

MIDWEST RECONSTRUCTION CO

Employer

OC: 01/04/15

Claimant: Appellant (4/R)

Iowa Code Section 96.4(3) – Able & Available

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

Iowa Admin. Code r. 871-24.13(3)(d) – Temporary Workers Compensation Benefits

Iowa Code Section 96.7(2) – Employer Liability

STATEMENT OF THE CASE:

Jon Ozmon filed a timely appeal from the May 12, 2015, reference 01, decision that denied benefits effective April 26, 2015, based on an Agency conclusion that he was not available for work within the meaning of the law because he was working too much. After due notice was issued, a hearing was held on June 26, 2015. Claimant Jon Ozmon participated. Kim Benthin, Office Manager, represented the employer. Exhibits One through Four were received into evidence. The administrative law judge took official notice of the agency's administrative record of wages reported by or for the claimant and benefits disbursed to the claimant (DBRO).

ISSUES:

Whether the claimant was able to work and available for work during the two-week period of April 26, 2015 through May 9, 2015.

Whether the claimant was partially unemployed during the two-week period of April 26, 2015 through May 9, 2015.

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: Jon Ozmon is employed by MidAmerica Basement Systems as a full-time laborer. Mr. Ozmon began the employment in 2013. Mr. Ozmon's usual work duties involve use of a jackhammer, remove rock and debris from worksites, and various digging assignments. On April 7, 2015, Mr. Ozmon suffered a tear in his right shoulder rotator cuff while digging a hole for the employer. Mr. Ozmon immediately reported for the injury to a supervisor. Mr. Ozmon returned to work for his next shift and continued to perform work for the employer.

After a few days of trying to deal with the injury without medical care, the employer arranged for Mr. Ozmon to be evaluated by a doctor. Mr. Ozmon subsequently underwent an MRI that revealed the tear in his rotator cuff. The doctor released Mr. Ozmon to continue working, but restricted him from operating a jackhammer, from lifting more than 20 pounds, from digging for long periods, and from performing overhead work.

In light of the medical restrictions, the employer substantially reduced the amount of work the employer had for Mr. Ozmon. This reduction in available work prompted the additional claim for benefits that was effective April 26, 2015. Workforce Development had previously set Mr. Ozmon's weekly benefit amount at \$471.00. Mr. Ozmon's hourly wage was \$14.00. During the week that ended May 2, 2015, the employer only had 19 hours of work for Mr. Ozmon. During the week that ended May 9, 2015, the employer only had 12 hours of work for Mr. Ozmon. When Mr. Ozmon reported his wages for those two weeks, he underreported the wages by attempting to report net wages, rather than gross wages. Using the number of hours provided by Mr. Ozmon and the \$14.00 hourly wage, Mr. Ozmon's reportable wages for the week that ended May 2, 2015 were \$266.00 and his reportable wages for the week ending May 9, 2015 were \$168.00. Mr. Ozmon did not refuse any work that the employer had for him during either week. In response to the reduced hours, Mr. Ozmon also spoke with the employer and pointed out how he could continue to work as part of a crew full-time while remaining within his medical restrictions. The employer then returned Mr. Ozmon to full-time, or near full-time work. Mr. Ozmon discontinued his claim for benefits after the benefit week that ended May 9, 2015.

Mr. Ozmon received some worker's compensation benefits for temporary disability in connection with his injury. It is necessary to consider those amounts as wages when determining whether Mr. Ozmon met the definition of being partially unemployed. Benefits for temporary *total* disability ceased before Mr. Ozmon filed his claim for unemployment insurance benefits. Thereafter, Mr. Ozmon received \$312.67 in worker's compensation benefits for temporary *partial* disability for the week that ended May 2, 2015. That would bring his total wages for the week to \$578.00. The employer's worker's compensation carrier paid \$534.33 in temporary partial disability benefits to the Mr. Ozmon for the *two-week* period of May 3-16, 2015. Without further information from the employer to apportion the worker's compensation benefits for those two weeks, an equal amount, \$267.17 would be apportioned to each week. Thus, Mr. Ozmon's total wages for the week that ended May 9, 2015 were \$435.17, which was less than his \$471.00 weekly benefit amount.

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).

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.]

The weight of the evidence establishes that Mr. Ozmon was able and available to work during the two-week period of April 26, 2015 through May 9, 2015. Mr. Ozmon's hours had been reduced by the employer. Mr. Ozmon's medical restrictions did not prevent him from performing full-time work for the employer as part of a regular crew. The employer had the ability to provide reasonable accommodations that would allow Mr. Ozmon to continue to perform full-time work. Because the employer has less than half of Mr. Ozmon's usual hours available during the two weeks in question, Mr. Ozmon was not working to such an extent that he would not meet the work availability requirement. However, his worker's compensation benefits for temporary disability have to be taken into consideration when determining whether he met the second prong of the partial unemployment analysis, regarding the amount of his weekly wages.

Iowa Admin. Code r. 871-24.13(3)d provides:

(3) Fully deductible payments from benefits. The following payments are considered as wages; however, such payments are fully deductible from benefits on a dollar-for-dollar basis:

d. Workers' compensation, temporary disability only. The payment shall be fully deductible with respect to the week in which the individual is entitled to the workers' compensation for temporary disability, and not to the week in which the payment is paid.

Mr. Ozmon's worker's compensation benefits for temporary *total* disability benefits were for a period that preceded Mr. Ozmon's unemployment insurance claim and, accordingly, have no impact on the claim. However, the worker's compensation benefits for temporary *partial* disability do factor in that analysis. Because Mr. Ozmon's total wages for the week that ended May 2, 2015 exceeded his weekly unemployment insurance benefit by more than \$15.00, Mr. Ozmon did not meet the definition of being partially unemployed that week and is not eligible for benefits for that week. On the other hand, Mr. Ozmon's combined wages and temporary disability benefits for the week that ended May 9, 2015, did not exceed his weekly unemployment insurance benefit amount by more than \$15.00. Mr. Ozmon was eligible for benefits for the week that ended May 9, 2015 under a theory of partial unemployment, provided he met all other eligibility requirements. The employer's account may be charged for benefits for that week. This matter will be remanded to the Benefits Bureau for determination of the appropriate benefit amount for that week.

DECISION:

The May 12, 2015, reference 01, decision is modified as follows. The claimant was able and available for work during the two-week period of April 26, 2015 through May 9, 2015. The claimant was not partially unemployed during the week that ended May 2, 2015 and is not eligible for benefits for that week. The claimant was partially unemployed during the week that

ended May 9, 2015 and is eligible for benefits for that week under a theory of partial unemployment, provided he meets all other eligibility requirements. The employer's account may be charged for any reduced benefits paid to Mr. Ozmon for that week.

This matter is remanded to the Benefits Bureau for determination of the claimant's reduced benefit amount for the week ending May 9, 2015 in light of the corrected \$168.00 regular wages and the \$267.17 apportioned temporary worker's compensation benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css