

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JANICE I WOLFS

Claimant

APPEAL NO. 11A-UI-15537-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COMFORT CARE INC

Employer

OC: 07/10/11

Claimant: Appellant (4-R)

Section 96.4(3) – Able & Available

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

STATEMENT OF THE CASE:

Janice Wolfs filed a timely appeal from the December 2, 2011, reference 01, decision that denied benefits effective July 10, 2011 based on an Agency conclusion that she was not partially unemployed. After due notice was issued, a hearing was held on January 9, 2012. Ms. Wolfs participated. Rose Miller represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Numbers 11A-UI-15538-JTT, 11A-EUCU-00828-JTT, and 11A-EUCU-00874-JTT. Exhibit B, C, D, F and G were received into evidence. The administrative law judge took official notice of the Agency's administrative records (DBRO and DBIN) concerning wages reported by or for the claimant and benefits disbursed to the claimant in connection with the benefit claim years that were effective July 12, 2009; July 11, 2010; and July 10, 2011.

ISSUES:

Whether the claimant has been able to work and available for work since July 10, 2011.

Whether the claimant was partially unemployed from her employment since July 10, 2011.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Janice Wolfs has been employed with Comfort Care, Inc., as a part-time home care aid since 1997. Ms. Wolfs' wage, since December 2010, has been \$12.00 per hour. Ms. Wolfs has generally worked for the employer approximately 15 hours per week.

Ms. Wolfs' most recent benefit claim year was effective July 10, 2011. Workforce Development has calculated Ms. Wolfs' weekly unemployment insurance benefit amount applicable to that benefit year at \$155.00. The base period for purposes of the new claim year consists of the second, third, and fourth quarters of 2010 and the first quarter of 2011. Ms. Wolfs' base period wages derive exclusively from the *part-time* employment with Comfort Care. Ms. Wolfs has had no other employment since April 2009. Up until September 2, 2011, Ms. Wolfs' continued at the 15 hours or so per week at Comfort Care. Ms. Wolfs limited her work availability to the 15 hours

or so she spent with the two clients assigned to her. Up to that point, the employer had not decreased in any way the hours it had available for Ms. Wolfs. The employer has never decreased the hourly wage.

On or about September 3, 2011, Ms. Wolfs had non-work-related surgery. Ms. Wolfs was then on an approved medical leave of absence from September 4, 2011 until she was released to return to work and returned to work on October 23, 2011. Ms. Wolfs discontinued her claim for unemployment insurance benefits during the week that ended September 10, 2011. Ms. Wolfs reopened her claim effective October 23, 2011.

Ms. Wolfs returned to the same part-time work with Comfort Care on October 24, 2011 and cared for her assigned clients from October 24-29, 2011. Then, one of Ms. Wolfs' assigned clients required hospitalization. That client subsequently passed away on November 11, 2011. Effective October 30, 2011, Ms. Wolfs experienced a significant decrease in work hours as a result of the one client's hospitalization and subsequent passing. Ms. Wolfs continued at that time to be available to work her regular 15 hours or so and continued to provide services six hours per week to her other assigned client. That continued until December 8, 2011, when the second client discontinued services.

From December 8, 2011, Ms. Wolfs picked up the minimal hours the employer made available to her and did not decline any work offered by the employer.

Finally, on Thursday or Friday, January 5 or 6, 2012, Ms. Wolfs was assigned a new client and returned to her 15 hours or so per week with Comfort Care. Ms. Wolfs continues back at her previous level of part-time employment with Comfort Care.

Since the benefit week that ended July 16, 2011, Ms. Wolfs has reported the following wages:

Benefit week end date	Wages reported
07/16/11	110.00
07/23/11	101.00
07/30/11	122.00
08/06/11	169.00
08/13/11	136.00
08/20/11	131.00
08/27/11	122.00
09/03/11	74.00
(break in claim)	
10/29/11	252.00
11/05/11	71.00
11/12/11	79.00
11/19/11	179.00
11/26/11	67.00
12/03/11	48.00
12/10/11	59.00
12/17/11	10.00
12/24/11	30.00
12/31/11	20.00
01/07/12	99.00

A couple claim years ago, Ms. Wolfs had established a claim for benefits that was effective July 12, 2009, in response to a separation from full-time employment at Covenant Medical Center. Ms. Wolfs received both regular benefits and extended (EUC) benefits in connection with that claim. Ms. Wolfs then established a new original claim for benefits that was effective July 11, 2010. Ms. Wolfs received both regular benefits and extended (EUC) benefits in connection with that claim. When Ms. Wolfs' claim year expired on July 10, 2011, Ms. Wolfs became monetarily eligible, based exclusively on the part-time employment with Comfort Care, to be considered for regular unemployment insurance benefits in connection with a third claim year.

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 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".

871 IAC 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.

Since April 2009, Ms. Wolfs has consistently performed only part-time work. Ms. Wolfs' July 2011 original claim is based exclusively on wages earned from part-time employment. Given the well-established pattern of part-time employment, Ms. Wolfs is a part-time worker, not a full-time worker, for unemployment insurance purposes. See 871 IAC 24.22(2)(f). Now in her *third* claim year since separating from her last full-time employment, the employment with Comfort Care cannot be considered merely part-time supplemental. It is instead Ms. Wolfs' primary employment. Given the nature of the work Ms. Wolfs had traditionally performed, the relatively large Waterloo-Cedar Falls labor market, and the overall length of her multiple unemployment insurance claims, it is reasonable to conclude, and the evidence indicates, that Ms. Wolfs is not motivated to obtain, or genuinely available for, new *full-time* employment. Instead, the question of whether Ms. Wolfs has been able and available for work, or partially unemployed, can be based only on her status as a part-time worker.

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.]

The evidence in the record establishes that from July 10, 2011 through the benefit week that ended September 3, 2011, Ms. Wolfs was working her regular part-time schedule with Comfort

Care. Because she was enjoying the same, approximately, 15 hours per week she had enjoyed during the base period, she can neither be deemed "available" for work for purposes of receiving unemployment insurance purposes nor partially unemployed for that period. Benefits are denied for that period.

For the period of September 4, 2011 through the benefit week that ended October 22, 2011, Ms. Wolfs was off work due to medical issues and unable to work. Ms. Wolfs was not eligible for unemployment insurance benefits for that period.

During the week that ended October 29, 2011, Ms. Wolfs was again working her regular part-time schedule with Comfort Care. Because she was enjoying the same, approximately, 15 hours per week she had enjoyed during the base period, she can neither be deemed "available" for work for purposes of receiving unemployment insurance purposes nor partially unemployed for that week.

Effective October 30, 2011, Ms. Wolfs was able and available for her regular part-time work, but was partially unemployed from Comfort Care. The period of partial unemployment continued through the benefit week that ended January 7, 2012. Ms. Wolfs was eligible for *regular state* benefits for those weeks, provided she was otherwise eligible. The employer's account may be charged for regular state benefits paid to Ms. Wolfs for those weeks. During the week that ended November 19, Ms. Wolfs' reported wages exceeded her \$155.00 weekly benefit amount by more than \$15.00. Accordingly, Ms. Wolfs would not be eligible for benefits for that week.

Effective January 8, 2012, Ms. Wolfs was once again enjoying her regular part-time employment of approximately 15 hours per week and, therefore, was no longer eligible for unemployment insurance benefits under a theory of partial unemployment.

This matter will be remanded to the Claims Division for determination of the claimant's weekly benefit eligibility for *regular* benefits for the weeks she was partially unemployed. These would be the weeks ending November 5, 12, and 26, 2011; December 3, 10, 17, 24, and 31, 2011; and January 7, 2012.

DECISION:

The Agency representative's December 2, 2011, reference 01 is modified as follows. The claimant is a *part-time* worker. During the period of July 10, 2011 through the benefit week that ended October 29, 2011, the claimant neither met the availability requirement nor was partially unemployed. Benefits are denied for those weeks. For the period of October 30, 2011 through the benefit week that ended November 12, 2011, the claimant was able and available for part-time work, partially unemployed from the part-time work, and eligible for regular state benefits, provided she was otherwise eligible. During the week that ended November 19, 2011, the claimant's weekly wages exceeded her weekly benefit amount by more than \$15.00. Therefore, claimant did not meet the definition of being partially unemployed for the week that ended November 19, 2011 and was not eligible for benefits for that week. During the period of November 20, 2011 through the benefit week that ended January 7, 2012, the claimant was able and available for part-time work, partially unemployed from the part-time work, and eligible for regular state benefits, provided she was otherwise eligible. Effective January 8, 2012, the claimant is no longer "available" for work for unemployment insurance purposes, not partially unemployed, and not eligible for benefits. The employer's account may be charged for regular benefits disbursed to the claimant for those weeks when she was eligible for benefits under a theory of partial unemployment.

This matter will be remanded to the Claims Division for determination of the claimant's weekly benefit eligibility for *regular* benefits for the weeks she was partially unemployed. These would be the weeks ending November 5, 12, and 26, 2011; December 3, 10, 17, 24, and 31, 2011; and January 7, 2012.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw