

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS  
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

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**RICK A BURNS**  
Claimant

**BOMGAARS SUPPLY INC**  
Employer

**APPEAL 22A-UI-18546-SN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/04/22  
Claimant: Appellant (1)**

Iowa Code section 96.1A(37) – 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, Rick A Burns, filed an appeal from the October 31, 2022 (reference 02) unemployment insurance decision that denied benefits effective September 25, 2022 with the conclusion he was receiving the same hours and wages as in his original contract of hire. The parties were properly notified of the hearing. A telephone hearing was held on November 28, 2022, at 1:00 p.m. The claimant participated. Buena Vista County Veteran's Affairs Executive Director Louie DeRoos offered support to the claimant. The employer, Bomgaars Supply Inc., did not participate. Official notice was taken of the administrative record.

**ISSUES:**

Whether claimant is totally, partially or temporarily unemployed?  
Whether claimant is able to and available for work?  
Whether claimant is still employed at the same hours and wages?  
Whether employer's account is subject to charge?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant began employment with the employer as a part-time maintenance associate on November 4, 2020. The claimant has worked a variable schedule over the term of his employment. His hourly wage in this position was \$10.25 per hour. The employer is a retail store that sells farm equipment among other wares.

The claimant testified he agreed to work at least twenty-three hours per week at the time of his hire. The claimant testified the employer scheduled him at least of twenty-three hours per week or \$2829.00 per quarter throughout 2021. The administrative record shows the claimant's schedule varied to the upside considerably more than an average of twenty-three hours per

week. It also shows a seasonal downside variation in the third business quarter. The following table describes the claimant's base period wages.<sup>1</sup>

Employer	2021/2	2021/3	2021/4	2022/1	2022/2
Bomgaars Supply Inc	\$3,636.00	\$2,049.00	\$3,936.00	\$3,305.00	\$2,958.00

The claimant filed an initial claim for unemployment insurance benefits effective September 4, 2022. The claimant's weekly benefit amount is \$171.00.

The administrative record shows the claimant began filing continuing claims beginning with the week ending October 1, 2022. The claimant testified his ability to and availability for work have remained unchanged during the filing period.

For the week ending October 1, 2022, the claimant earned \$67.00.

For the week ending October 8, 2022, the claimant earned \$154.00.

For the week ending October 15, 2022, the claimant earned \$180.00.

For the week ending October 22, 2022, the claimant earned \$200.00.

For the week ending October 29, 2022, the claimant earned \$205.00.

For the week ending November 5, 2022, the claimant earned \$200.00.

For the week ending November 12, 2022, the claimant earned \$200.00.

The claim period here falls on the boundary line between the third and fourth business quarters of 2022. The administrative record shows the claimant received \$1,567.00 in the third quarter of 2022.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant is not partially unemployed. Benefits are denied.

Iowa Code section 96.4(3)a provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. a. 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 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, 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,

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<sup>1</sup> The base period consists of the wages a claimant received from all their employers to become monetarily eligible for the claim. Each column represents a business quarter.

subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Code section 96.1A(37) provides:

Totally unemployed", "partially unemployed", and "temporarily unemployed.

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. 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 difference from the contract for hire, such claimant cannot be considered partially unemployed.

Iowa Code section 96.7(2)a(2) provides:

2. Contribution rates based on benefit experience.

a. (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.

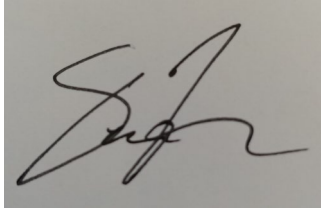
(b) An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

(c) The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge agrees with the representative that the claimant is receiving the same hours and wages as contemplated at the time of hire. The administrative record shows the claimant had a period of wages that was higher than the twenty-three hour average he testified he worked. It also slumped considerably in the same business quarter in 2021 as it did during this claims period, albeit it did not slump as much. Given that record, the administrative law judge finds to the extent that the claimant initially was hired with a twenty-three hour average expectation, he acquiesced to an arrangement of variation of hours and shifts. That arrangement remained when he filed for benefits. As a result, the claimant is ineligible for benefits under Iowa Admin. R. 871-24.23(26).

**DECISION:**

The October 31, 2022 (reference 02) unemployment insurance decision is AFFIRMED. Benefits are denied.

A handwritten signature in black ink, appearing to read 'S. Nelson', is shown within a rectangular frame.

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Sean M. Nelson  
Administrative Law Judge II  
Iowa Department of Inspections & Appeals  
Administrative Hearings Division – UI Appeals Bureau

December 6, 2022  
Decision Dated and Mailed

smn/scn

**APPEAL RIGHTS.** If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board  
4<sup>th</sup> Floor – Lucas Building  
Des Moines, Iowa 50319  
Fax: (515)281-7191  
Online: [eab.iowa.gov](http://eab.iowa.gov)**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

**AN APPEAL TO THE BOARD SHALL STATE CLEARLY:**

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

**Note to Parties:** YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

**Note to Claimant:** It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**SERVICE INFORMATION:**

A true and correct copy of this decision was mailed to each of the parties listed.

**DERECHOS DE APELACIÓN.** Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board  
4th Floor – Lucas Building  
Des Moines, Iowa 50319  
Fax: (515)281-7191  
En línea: [eab.iowa.gov](http://eab.iowa.gov)**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

**UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:**

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

**Nota para las partes:** USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

**Nota para el reclamante:** es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

**SERVICIO DE INFORMACIÓN:**

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.