

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LYNN W HAMANN
Claimant

APPEAL NO: 10A-EUCU-01109-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VOGEL TRAFFIC SERVICES INC
Employer

OC: 11/29/09

Claimant: Respondent (4/R)

Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits
Section 96.4-3 - Able and Available
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Vogel Traffic Services, Inc. (employer) appealed a representative's November 16, 2010 decision (reference 02) that concluded Lynn W. Hamann (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 10, 2011. The claimant received the hearing notice and responded by calling the Appeals Section on December 20, 2010. She indicated that she would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, she did not participate in the hearing. Doug Andresen appeared on the employer's behalf. 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 claimant started working for the employer in the third quarter 2009, probably sometime in about March 2009. She works full time as a seasonal general laborer in the employer's road painting business. The employer's season in 2010 went through about December 1, at which time the claimant was laid off for lack of work through the winter months. As of December 1 the employer was not providing the claimant with the same hours and wages in her employment as during the prior months of her employment.

The claimant had established an unemployment insurance benefit year effective November 29, 2009 when she was laid off for the winter months in 2009. She reopened that claim by filing an additional claim effective October 17. She filed a weekly claim for that week, ending

October 23, and reporting no wages for that week, and receiving unemployment insurance benefits for that week. There was no further activity on the claim for the remainder of the benefit year. After the seasonal layoff in December 2010, she established a new claim year effective December 5, 2010.

For the week of October 17 through October 23 there was no outside road work available due to inclement weather, but the employer had 40 hours of work available for the claimant in its shop. In fact, the claimant worked a few hours on October 18 for which she was paid but failed to report wages on her weekly claim that week. The reason the claimant did not work the full 40 hours available for her that week was that she requested to take off the remainder of that week for personal reasons, which was granted.

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). The reason the claimant's earnings for the week ending October 23, 2010 were low enough to qualify her for partial eligibility is because she was not able and available to work the number of hours the employer had available to her, and she is thus ineligible for unemployment insurance benefits for that week. 871 IAC 24.23(29). This disqualification does not apply to weeks after October 23, 2010.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The unemployment insurance decision dated November 16, 2010 (reference 02) is modified in favor of the employer. The claimant is not eligible for partial unemployment insurance benefits for the week ending October 23, 2010, as she was not able and available for the work the

employer had for her. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue. Benefits are allowed as of December 5, 2010, if the claimant is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css