

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**CODY J JOHNSON**  
Claimant

**EXPRESS SERVICES INC**  
Employer

**APPEAL 17A-UI-00041-JP-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 12/04/16**  
**Claimant: Respondent (2-R)**

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Iowa Code § 96.4(3) – Ability to and Availability for Work  
Iowa Code § 96.19(38)b – Partial Unemployment  
Iowa Code § 96.7(2)a(2) – Same Base Period Employment

**STATEMENT OF THE CASE:**

The employer filed an appeal from the December 20, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 23, 2017. Claimant did not participate. Employer participated through branch manager Brandy Whittenbaugh. Official notice was taken of the administrative record of claimant's wage history, with no objection.

**ISSUES:**

Is the claimant able to work and available for work effective December 4, 2016?

Is the claimant partially unemployed and available for work?

If so, is the employer's account liable for potential charges?

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: The employer is a staffing agency. Claimant was a temp employee with an evaluation for hire, full-time, last assigned at Dee Electronics from August 31, 2015, and was separated from the assignment, but not the employer, on November 29, 2016. The assignment notified the employer on November 29, 2016 that claimant's assignment had ended because of two consecutive no-call/no-shows (November 28 and 29, 2016). The employer had tried to contact claimant on November 28, 2016, but was unsuccessful. On November 29, 2016, the employer again tried to contact claimant, but had to leave a message informing him the assignment ended.

On December 1, 2016, claimant came to the employer and requested help finding employment. The employer had a discussion with claimant about being a no-call/no-show and that he has to contact the employer if he is going to be absent from the assignment. Claimant indicated to the employer that he was a no-call/no-show because he had been trying to find an electrician

apprenticeship. On December 1, 2016, the employer instructed claimant to contact the employer when he was available for an additional assignment. Claimant was supposed to contact the employer about whether he got the apprenticeship. Claimant did not contact the employer after December 1, 2016 about an additional assignment. The employer has a policy that requires employees to contact the employer once a week if they are available for assignment. Claimant was aware of the policy.

On December 19, 2016, there was a fact-finding interview for this matter and the employer told claimant during the fact-finding interview that it had an assignment available for him. On December 19, 2016, after the fact-finding interview, Ms. Whittenbaugh called claimant about a full-time assignment opportunity, but she was unsuccessful in reaching claimant and she left him a message. On December 20, 2016, the employer again attempted to contact claimant about a full-time assignment opportunity, but the employer was unsuccessful and left him a message. The employer had work available for claimant.

On December 2, 2016, the employer has placed claimant on the inactive list.

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

For the reasons that follow, the administrative law judge concludes claimant is not able to work and available for work.

Iowa Code § 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".

Iowa Admin. Code r. 871-24.22(2) provides:

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.

(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.

Iowa Code § 96.5(7) provides:

An individual shall be disqualified for benefits: ...

7. Vacation pay.

a. When an employer makes a payment or becomes obligated to make a payment to an individual for vacation pay, or for vacation pay allowance, or as pay in lieu of vacation, such payment or amount shall be deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" hereof.

b. When, in connection with a separation or layoff of an individual, the individual's employer makes a payment or payments to the individual, or becomes obligated to make a payment to the individual as, or in the nature of, vacation pay, or vacation pay allowance, or as pay in lieu of vacation, and within ten calendar days after notification of the filing of the individual's claim, designates by notice in writing to the department the period to which the payment shall be allocated; provided, that if such designated period is extended by the employer, the individual may again similarly designate an extended period, by giving notice in writing to the department not later than the beginning of the extension of the period, with the same effect as if the period of extension were included in the original designation. The amount of a payment or obligation to make payment, is deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" of this subsection 7.

c. Of the wages described in paragraph "a" (whether or not the employer has designated the period therein described), or of the wages described in paragraph "b", if the period therein described has been designated by the employer as therein provided, a sum equal to the wages of such individual for a normal workday shall be attributed to, or deemed to be payable to the individual with respect to, the first and each subsequent workday in such period until such amount so paid or owing is exhausted. Any individual receiving or entitled to receive wages as provided herein shall be ineligible for benefits for any week in which the sums, so designated or attributed to such normal workdays, equal or exceed the individual's weekly benefit amount. If the amount so designated or attributed as wages is less than the weekly benefit amount of such individual, the individual's benefits shall be reduced by such amount.

d. Notwithstanding contrary provisions in paragraphs "a", "b", and "c", if an individual is separated from employment and is scheduled to receive vacation payments during the period of unemployment attributable to the employer and if the employer does not designate the vacation period pursuant to paragraph "b", then payments made by the employer to the individual or an obligation to make a payment by the employer to the individual for vacation pay, vacation pay allowance or pay in lieu of vacation shall not be deemed wages as defined in section 96.19, subsection 41, for any period in excess of one week and such payments or the value of such obligations shall not be deducted for any period in excess of one week from the unemployment benefits the individual is otherwise entitled to receive under this chapter. However, if the employer designates more than one week as the vacation period pursuant to paragraph "b", the vacation pay, vacation pay allowance, or pay in lieu of vacation shall be considered wages and shall be deducted from benefits.

e. If an employer pays or is obligated to pay a bonus to an individual at the same time the employer pays or is obligated to pay vacation pay, a vacation pay allowance, or pay in lieu of vacation, the bonus shall not be deemed wages for purposes of determining benefit eligibility and amount, and the bonus shall not be deducted from unemployment benefits the individual is otherwise entitled to receive under this chapter.

An individual claiming benefits must be able to work, available for work, and actively and earnestly seeking work. Because claimant indicated to the employer on December 1, 2016 he may not be available for additional assignment due to an electrician apprenticeship and he failed to contact the employer after December 1, 2016, as he was instructed to do, to indicate he was available for additional assignment, claimant has failed to establish he was able to work, available for work, or actively and earnestly seeking work as of December 4, 2016. Furthermore, the employer had work available for claimant. It is noted that the employer offered claimant additional assignment on December 19 and 20, 2016, but claimant did not respond to the employer about the additional assignments. Accordingly, benefits are denied.

**DECISION:**

The December 20, 2016, (reference 01) unemployment insurance decision is reversed. Claimant is not able to work and available for work effective December 4, 2016. Benefits are denied.

**REMAND:** The separation issue delineated in the findings of fact is remanded to the Benefits Bureau of Iowa Workforce Development for a fact-finding interview and unemployment insurance decision.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs