

BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319

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LASHA BATEMAN

Claimant,

and

MEDICAL STAFFING NETWORK INC

Employer.

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HEARING NUMBER: 09B-UI-14482

EMPLOYMENT APPEAL BOARD  
DECISION

N O T I C E

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION: 96.4-3**

D E C I S I O N

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

Lasha Bateman (Claimant) first began working for Medical Staffing Network (Employer) on October 23, 2005 as a CNA. (Tran at p. 3). She left for a couple years hiatus and came back to work for the Employer on October 23, 2008. (Cert. Rec. at p. 12). At that time the Claimant understood that she was to be working full-time work on assignment. (Tran at p. 12-13). The Employer is a temporary staffing firm that supplies workers to client businesses. (Tran at p. 3; Ex. 1 [reference to clients]).

From her hire through early June, 2009 the Claimant established a pattern of working full-time work. (Tran at p. 21; p. 29-30; Ex. 1). The week of June 7, 2009, she worked 38.5 hours. (Ex. 1). The week of June 14, 2009, the Claimant worked 29.75 hours. (Ex. 1). The week of June 21, 2009, she worked 41.5 hours. (Ex. 1). The week of June 28, 2009, she worked 20.25 hours because after the

schedule was posted she said she could not work June 23, 24, and 25, 2009, because she did not have childcare. (Ex. 1). The week of July 5, 2009, she was scheduled for five shifts but two were cancelled by the client, so

the Claimant worked 17.5 hours. (Tran at p. 5; Ex. 1). The week of July 12, 2009, the Claimant was scheduled to work six shifts but three were cancelled by the client and the Claimant said she could not work one of the remaining three shifts. (Tran at p. 5-6; Ex. 1). The week of July 19, 2009, the Claimant was scheduled one shift. (Tran at p. 6; Ex. 1). The week of July 26, 2009, she was scheduled to work six shifts but two were cancelled by the client. (Tran at p. 6; Ex. 1). The week of August 2, 2009, she was scheduled to work eight shifts but three were cancelled by the client and two were cancelled by the Claimant. (Tran at p. 6; Ex. 1). The week of August 9, 2009, the Claimant was scheduled five shifts and worked four but cancelled one. (Tran at p. 6; Ex. 1). The week of August 16, 2009, the Claimant was scheduled to work four shifts but two were cancelled by the client. (Tran at p. 7; Ex. 1). The week of August 23 the Claimant was scheduled for 5 day shifts, and the client cancelled one. (Tran at p. 7).

The Claimant at no time notified the Employer that she would only be available Monday through Friday daytime hours. (Tran at p. 17; p. 28). The Employer had fewer hours in 2009 because of the economy. (Tran at p. 8-9; p. 18; p. 22). Starting in September the main client to whom the Claimant had been assigned since starting in 2008 decided to stop using the Employer as much. (Tran at p. 19; p. 31).

## REASONING AND CONCLUSIONS OF LAW:

*Timeliness of Appeal Issue:* The issue of timeliness was raised when the Claimant filed her appeal on November 13, 2009, one day beyond the statutory deadline. The reason for the late filing was that the Claimant did not receive the Administrative Law Judge's decision before the deadline to appeal. For this reason, we shall consider her appeal timely for further review.

*Merits.* The issue in this case is whether the Claimant is able and available for work. The Claimant has the burden of proof on this issue. Iowa Code §96.6(2). The able and available, and actively seeking work determinations are week-to-week. Iowa Code §96.4 (first unnumbered paragraph refers to "any week"); 871 IAC 24.22(3)(d) ("Active search for work disqualifications are to be made on a week-to-week basis and are not open-end disqualifications."). Thus availability for any week prior to the time the Claimant filed for benefits has no bearing on her availability for benefits.

Although the Administrative Law Judge did not cite the rule, we do recognize that "[w]here 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). We do not think this is that situation. The Claimant understood she was to get full-time work and she did in fact receive months of full-time work. Perhaps the Employer intended something different, but we do find credible the Claimant's assertion that she did not "contemplate" she would be working part-time. Rule 24.23(26) does not apply.

We also recognize that an on-call worker is not available for work if the worker accepts only on-call work and holds themselves available only for one employer. 871 IAC 24.22(2)(i). But an on-call

worker is different than a worker for a temporary employment firm. An employee for a temporary employer works on an on-going basis for the temporary employer and is sent on assignments as the work becomes available at those clients. The employee is not on-call for the clients, and is not waiting for calls from any

single client employer. The employee is a regular employee of the temporary employer. When the employee of a temporary employment firm is not given assignments sufficient to fill 40 hours the employee is on partial layoff. It is no different than someone working at a restaurant who has their schedule reduced for a period. The employment relationship is continuing, but the work has slowed. In such cases the normal rules for partial employment apply.

The general rule is if the individual is available for the major portion of the workweek, the individual is considered to be available for work. 871 IAC 24.22(2)(h). Since claiming for benefits the Claimant was willing to work for her temporary employer for 40 hours a week, and was therefore available for work. The real issue is whether she was required to seek work from other employers, that is, has she failed to earnestly and actively seek work elsewhere. A worker who is partially unemployed need not be earnestly and actively seeking work for anyone but the regular employer (here Medical Staffing).

Iowa Code §96.19(38) states:

b. 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.

An individual shall be deemed partially unemployed in any week in which 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.

Workforce rules provide:

*Week of unemployment.* A week during which an individual performs no work and earns no wages, except as indicated and has earnings which do not exceed the earnings limit.

a. *Week of partial unemployment.* A week in which an individual worked less than the regular full-time hours for such individual's regular employer, because of lack of work, and earned less than the weekly benefit amount (plus the partial earnings allowance, if any, in the state's definition of unemployment) but more than the partial earnings allowance, so that, if eligible for benefits, the claimant received less than such claimant's full weekly benefit amount plus \$15.

871 IAC 24.1(139). Here the Claimant is working at her regular job but less than the regular full-time week. She agreed to start at 40 hours, she was routinely assigned this level of hours for months, and then the hours dropped off. We find, on these facts, that the Claimant is partially unemployed (assuming she meets the wage test set out in the Code) for the weeks following her application for benefits.

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".

...

Assuming the Claimant meets the wage test, she was partially unemployed and therefore the question of able and available, and earnestly and actively seeking work are not relevant – she is exempt from the requirement. The unresolved question then is whether the Claimant “earned less than the weekly benefit amount (plus the partial earnings allowance, if any, in the state’s definition of unemployment) but more than the partial earnings allowance, so that, if eligible for benefits, the claimant received less than such claimant’s full weekly benefit amount plus \$15.” We send the matter to Claims for a determination of this issue.

#### DECISION:

The administrative law judge’s decision dated October 27, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant is partially unemployed. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. The Board sends this matter to the Iowa Workforce Development Center, Claims Section, for a determination of the issue of whether or not the Claimant, during the relevant time period, earned less than her weekly benefit amount (plus the partial earnings allowance, if any, in the state’s definition of unemployment) but more than the partial earnings allowance, so that the claimant received less than such claimant’s full weekly benefit amount plus \$15.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

