

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

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**CAROL A ROBINSON**

Claimant

and

**GIT-N-GO CONVENIENCE STORES INC**

Employer

**HEARING NUMBER: 17BUI-02437**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**SECTION:** 10A.601 Employment Appeal Board Review

**D E C I S I O N**

**FINDINGS OF FACT:**

A hearing in the above matter was held March 28, 2017. The administrative law judge's decision was issued March 31, 2017. The administrative law judge's decision has been appealed to the Employment Appeal Board. The Board finds that the record developed at hearing raised issues which must be developed at hearing following notice.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 10A.601(4) (2017) provides:

5. Appeal board review. The appeal board may on its own motion affirm, modify, or set aside any decision of an administrative law judge on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The appeal board shall permit such further appeal by any of the parties interested in a decision of an administrative law judge and by the representative whose decision has been overruled or modified by the administrative law judge. The appeal board shall review the case pursuant to rules adopted by the appeal board. The appeal board shall promptly notify the interested parties of its findings and decision.

Pursuant to this authority we review this case and determine to remand it for further proceedings consistent with this decision.

The decision below focused on the question of availability. The Administrative Law Judge ruled the Claimant was not available and found that the question of partial unemployment was moot. Unfortunately, if one is partially unemployed while working for one's regular employer then one need not be able and available. Although "[a]n unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that...[t]he individual is able to work, is available for work, and is earnestly and actively seeking work" the next sentence in the Code states "[t]his subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job..." Iowa Code §96.4(3). Thus analytically the question of partial unemployment **must come first**.

The evidence indicates that the first question to be answered is whether the 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..." 871 IAC 24.23(26). If the Claimant *is* employed at the same hours and wages as contemplated in the original contract of hire then she is not partially unemployed. If she is not partially unemployed then she could only collect benefits if she is totally unemployed (i.e. for a week she is not working at all). Only if she is found totally unemployed would the Administrative Law Judge then need to resolve whether the Claimant was able and available. We note that we read "original contract of hire" to encompass any modifications made to the contract at the request of the Claimant. Thus if the Claimant is working reduced hours only because the Claimant requested reduced hours then she would not be partially unemployed under rule 24.23(26). Unfortunately this issue of same hours and wages was not noticed for hearing.

"Iowa Code section 17A.12 provides all parties to a contested case shall be afforded an opportunity for hearing after reasonable notice in writing. The notice shall include a reference to the particular sections of statutes and rules implicated and a short and plain statement of the matters asserted. Iowa Code §17A.12(2)(c) and (d)." *Silva v. Employment Appeal Board*, 547 N.W.2d 232, 235 (Iowa 1996). The plain language of §17A.12(2)(c) and (d) allows the hearing to proceed only on those issues, and concerning those Code sections, that are identified in the Notice of Hearing. Here there the notice did not include "same hours and wages" as is usually done by the Appeals Bureau when this is an issue. This prevents us from addressing the issue. Iowa Code §17A.12; *Silva v. Employment Appeal Board*, 547 N.W.2d 232, 235 (Iowa 1996). Thus we remand on this issue. Since availability is analytically subsequent, we also remand on the issue of being able and available. Since the Employment Appeal Board is unable to adequately make a decision based on the record now before it, this matter must be remanded for a new hearing in order that evidence may be obtained from the parties.

## **DECISION:**

The decision of the administrative law judge dated March 31, 2017 is not vacated at this time, and remains in force unless and until the Department makes a differing determination pursuant to this remand. This matter is **remanded** to an administrative law judge in the Workforce

Development Center, Appeals Section. The administrative law judge shall conduct a new hearing following due notice to address the

issues in a manner consistent with the Board's concerns set forth in this decision's Reasoning and Conclusions of Law. After the hearing, the administrative law judge shall issue a decision that provides the parties appeal rights.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv