IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GARRY L SCHWAB
Claimant

AMANA NORDSTROM INC
Employer

APPEAL NO. 13A-UI-04934-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/31/13
Claimant: Respondent (4-R)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.4(3) – Still Employed Same Hours and Wages
Iowa Code Section 96.7(2) – Employer Liability

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 22, 2013, reference 01, decision that allowed benefits to the claimant effective March 31, 2013 based on an agency conclusion that the claimant was partially unemployed from Amana Nordstrom, Inc. The decision also held that the employer's account could be charged for benefits. After due notice was issued, a hearing was held on June 3, 2013. Claimant participated. Potique Johnson represented the employer and presented additional testimony through Doug Hargrave. Exhibits One through Eight were received into evidence. The administrative law judge took official notice of the agency's administrative record of wages reported by or for the claimant and benefits disbursed to the claimant.

ISSUES:

Whether the claimant has been able to work and available for work since establishing his claim for benefits.

Whether the claimant was partially unemployed from his employment since he filed his claim for benefits.

Whether the employer's account may be assessed for benefits paid to the claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Garry Schwab has been employed by Amana Nordstrom, Inc., as a part-time maintenance employee since August 2010 and continues in the employment at this time. Mr. Schwab established a claim for unemployment insurance benefits that was effective March 31, 2013 in response to a reduction in his work hours. Workforce Development set Mr. Schwab's weekly benefit at $148.00. Mr. Schwab's hourly wage has been $8.93 going back at least to the beginning of September 2012.

Mr. Schwab's base period for purposes of the claim that was effective March 31, 2013 consists of the fourth quarter of 2011 and the first, second, and third quarters of 2012. During those quarters, Mr. Schwab's quarterly wages, as reported by the employer to Iowa Workforce Development, were as follows:

Quarter/Year	Quarterly Wages	Average Weekly Wage (rounded to nearest dollar)
4/11	$1,990.95	$153.15
1/12	$1,406.58	$108.00
2/12	$2,702.63	$208.00
3/12	$3,275.97	$252.00

The employer has reported one additional quarter's wages, the fourth quarter of 2012, as follows:

Quarter/Year	Quarterly Wages	Average Weekly Wage (rounded to nearest dollar)
4/12	$3,909.00	$301.00

From August 2011 to the end of May 2012, Mr. Schwab worked as little as 24.5 hours per two-week pay period and as much as 42.5 hours per two-week pay period. The average number of weekly hours during that period was 15.78.

From the end of May 2012 until December 22, 2012, the employer had an enhanced need for Mr. Schwab's services. This was because the employer discharged one full-time maintenance tech supervisor, had multiple subsequent full-time maintenance techs leave employment shortly after starting employment, abandoned the idea of having a maintenance supervisor, and then reconsidered that decision. Between May 27, 2012 and December 22, 2012, Mr. Schwab worked from 52 to 74.75 hours per two-week pay period. The average number of weekly hours during that period was 30.88.

Mr. Schwab's work hours during subsequent two-week pay periods were as follows:

12/23/12 to 1/5/13	37 hours
1/6/13 to 1/19/13	40.25 hours
1/20/13 to 2/2/13	33 hours
2/3/13 to 2/16/13	26.75 hours
2/17/13 to 3/2/13	57.25 hours
3/3/13 to 3/16/13	31.5 hours
3/17/13 to 3/30/13	39.25 hours

In January 2013, the employer decided to enlist a third-party staffing agency to help locate a new full-time maintenance tech. That person started in February and left at the end of April 2013.

During the week that Mr. Schwab established his claim for benefits, the week that ended April 6, 2013, the employer scheduled Mr. Schwab to work only 12 hours. Mr. Schwab worked the hours as scheduled.

During the week that ended April 13, 2013, the employer again scheduled Mr. Schwab to work 12 hours and Mr. Schwab worked 12.5. On April 8, the employer contacted Mr. Schwab to have him come in and fix the swimming pool. Mr. Schwab was not on the schedule to work that day and was traveling with his daughter. Mr. Schwab did not return the employer's call that day and did not report to the workplace that day.

During the week that ended April 20, 2013, the employer scheduled Mr. Schwab to work 11 hours. Mr. Schwab worked only 10.75, but that was because the employer sent him home early. During the week that ended April 27, 2013, the employer scheduled Mr. Schwab to work 12 hours and Mr. Schwab worked the hours as scheduled. During the week that ended May 4, 2013, the employer scheduled Mr. Schwab to work 15 hours and Mr. Schwab worked the hours as scheduled.

During the week that ended May 11, 2013, the employer scheduled Mr. Schwab to work 20 hours and Mr. Schwab worked all hours as scheduled plus another quarter hour. On May 7, the employer telephoned Mr. Schwab to see whether he could come in and work a few hours. Mr. Schwab was not on the schedule to work that day. Mr. Schwab was traveling with his daughter and did not report to the workplace that day.

During the week that ended May 18, 2013, the employer scheduled Mr. Schwab to work 15 hours and Mr. Schwab worked all hours as scheduled plus another quarter hour. On May 14, Mr. Schwab and other employees were engaged in cleaning the swimming pool. Toward the end of Mr. Schwab's scheduled shift, Ms. Johnson asked Mr. Schwab to stay a couple hours longer to finish the pool cleaning project. Mr. Schwab said he could not because his son's girlfriend was about to give birth and he needed to be there.

During the week that ended May 25, 2013, the employer scheduled Mr. Schwab to work 21 hours and Mr. Schwab worked 20.5 hours. During one shift, Mr. Schwab had taken an hour for lunch instead of half an hour and this is had decreased his total work hours for the day and the week by one half hour.

During the week that ended June 1, 2013, the employer scheduled Mr. Schwab to work 18 hours and Mr. Schwab worked all hours as scheduled plus one half hour additional.

Mr. Schwab has reported the following wages and received the following unemployment insurance benefits since he established his claim. By comparison, Mr. Schwab's *actual* gross wages based on the number of hours worked per the payroll records multiplied by the $8.93 hourly wage are also set forth below:

Benefit week end date	Wages reported	Benefits paid	Actual Gross Wages
04/06/13	$175.00	0.00	$107.00
04/13/13	$80.00	$105.00	$112.00
04/20/13	$120.00	$65.00	$96.00
04/27/13	$110.00	$75.00	$107.00
05/04/13	$100.00	$85.00	$134.00
05/11/13	$105.00	$80.00	$181.00
05/18/13	$125.00	$60.00	$136.00
05/25/13	$135.00	$50.00	$183.00
6/1/13	n/a	n/a	$165.00

REASONING AND CONCLUSIONS OF LAW:

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". 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".

871 IAC 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.

The evidence establishes that Mr. Schwab has been able to work and available for work since he filed his claim for benefits. Mr. Schwab has continued to be available for the same number of *scheduled* hours for which he was available during his base period. Mr. Schwab is not obligated to be on-call for the employer 24/7 to prove availability for work. Indeed, Mr. Schwab is not an on-call employee. Mr. Schwab's decision not to come into work on April 8, May 7, or to stay late a couple hours on May 18, 2013 would not prevent him from meeting the work availability requirement. The weight of the evidence establishes that Mr. Schwab had good cause reason to forego or decline the last minute requests that he appear or stay longer. The weight of the evidence indicates that Mr. Schwab was available for work with the employer during the majority of the week during those weeks.

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 different from the contract for hire, such claimant cannot be considered partially unemployed. 871 IAC 24.23(26). *Contract for hire merely means the established conditions of the employment.* See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986).

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

> Employer contributions and reimbursements.
>
> 1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.

> 2. Contribution rates based on benefit experience.
>
> a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.
>
> (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.

[Emphasis added.] The employer changed the *established* conditions of the employment over the course of several months, beginning in May 2012, when the employer substantially increased Mr. Schwab's work hours. The work hours between May 27, 2012 and December 22, 2012, were 52 to 74.75 hours per two-week pay period. The average number of weekly hours during that period was 30.88. These increased hours had become the established conditions of the employment by the end of December 2012, at which time the subsequently substantially reduced the number of work hours it had available for Mr. Schwab. This was no temporary increase in work hours or a series of temporary increases in work hours. Instead, it was a seven-month period during which Mr. Schwab averaged more than 30 hours a week. While a slight decrease in hours in connection with the holidays and winter months might have been reasonable, the employer went well beyond that in cutting Mr. Schwab's hours.

The weight of the evidence establishes that Mr. Schwab was partially unemployed during the weeks that ended April 6, 13, 20 and 27, and May 4 and 18, 2013. During those weeks Mr. Schwab was scheduled for reduced hours and his gross wages did not exceed his weekly benefit amount, $148.00, plus $15.00. Mr. Schwab is eligible for benefits for those weeks, provided he is otherwise eligible. The employer's account may be charged for benefits paid for those weeks.

Mr. Schwab was *not* partially unemployed during the weeks that ended May 11, May 25, and June 1, 2013. During those weeks, Mr. Schwab was working fewer hours than during the period of May through December 2012, but his gross weekly earnings exceeded his weekly benefit amount plus $15.00. Mr. Schwab is not eligible for benefits for those weeks under the theory that he was partially unemployed.

For any week for which Mr. Schwab claims unemployment insurance benefits, Mr. Schwab must accurately report his gross weekly wages to Iowa Workforce Development.

This matter will be remanded to the Claims Division for entry of an overpayment decision pertaining to benefits Mr. Schwab received for the weeks ending May 11 and 25, 2013, when he made too much in wages to be deemed partially unemployed within the meaning of the law. An overpayment decision would also need to be entered with regard to the week ending June 1, 2013, if any benefits are paid out for that week.

DECISION:

The Agency representative's April 22, 2013, reference 01, decision is modified as follows. The claimant has been able and available for work since establishing his claim for benefits. The claimant was partially unemployed during the weeks that ended April 6, 13, 20 and 27, and May 4 and 18, 2013. The claimant is eligible for benefits for those weeks, provided he is otherwise eligible. The employer's account may be charged for those benefits and for benefits during any additional week when the claimant is deemed to be partially unemployed while continuing in the employment. The claimant was *not* partially unemployed during the weeks that ended May 11, May 25, and June 1, 2013 and is not eligible for benefits for those weeks under a theory of partial unemployment. This matter is remanded to the Claims Division for entry of an overpayment decision pertaining to benefits paid for the weeks ending May 11 and 25, 2013. An overpayment decision would also need to be entered with regard to the week ending June 1, 2013, if any benefits are paid out for that week.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/tll