

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENNETH W SMITH
Claimant

APPEAL NO. 06A-UI-09826-NT

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

ADRIAN CARRIERS INC
Employer

**OC: 09/04/05 R: 04
Claimant: Respondent (1)**

Section 96.4-3 – Able and Available for Work
Section 96.5-3-a – Refusal to Accept Suitable Work
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's September 4, 2005, reference 06, decision which held the claimant was able and available for work. After due notice was issued, a hearing was held by telephone consolidated with docket number 06A-UI-10216-NT from Des Moines, Iowa, on November 1, 2006. Susan Smith, the claimant's wife, participated as the claimant's representative. Appearing as witnesses for the employer were D. J. Maher and Mark McGovern.

ISSUE:

At issue in this matter is whether Mr. Smith is able and available for work.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Smith was employed as an intermobile driver for Adrian Carriers, Inc., and is paid by the mile and by the hour. Claimant's immediate supervisors are D. J. Maher and Mark McGovern. At the claimant's personal request, Mr. Smith was allowed to change his full-time status with the company to part-time status. Mr. Smith specifically indicated that he did not wish to work Fridays and wanted to work only Monday through Thursday for the company. It appears that full-time work is generally available to individuals in Mr. Smith's capacity with the company. However, the employer allowed the claimant to change to part-time status because the claimant was considered to be a good driver and the company believed that he would quit his job if not allowed to work only four days per week.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.23(26) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(26) 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.

The administrative law judge finds based upon the testimony in the hearing record that the claimant, Mr. Smith, at his own request, altered the original contract of hire from full-time employment to part-time employment. Under the new contract of hire, whose terms and conditions were dictated by the claimant, Mr. Smith is not working on a reduced workweek but is employed in a part-time job at the same hours and wages contemplated by the parties and as such the claimant cannot be considered partially unemployed. Mr. Smith is, therefore, disqualified from receiving unemployment insurance benefits as through his own actions he has made himself unavailable for work.

The claimant is ineligible to receive unemployment insurance benefits on the basis of being partially unemployed until he has removed the limitations that have removed him from full-time employment.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has been paid benefits to which he is not entitled. These benefits must be repaid according to Iowa law.

DECISION:

The representative's September 4, 2005, reference 06, decision is reversed. The claimant is not able and available for work within the meaning of the Iowa Employment Security Law and is ineligible to receive unemployment insurance benefits until he has removed the limitations which prevent him from accepting full-time employment. The claimant is overpaid \$1,124.00.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

cs/pjs/kjw