

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK A CURTIS

Claimant

APPEAL NO. 08A-UI-00832-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIRACLE CAR WASH CORP

MIRACLE CAR WASH

Employer

**OC: 12/02/07 R: 04
Claimant: Respondent (4)**

Iowa Code Section 96.7(2)(a)(2) – Employer Liability
Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Miracle Car Wash Corporation filed a timely appeal from the January 16, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 5, 2008. Claimant Mark Curtis participated. Heidi Tonn, owner and Secretary/Treasurer, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUES:

Whether the employer's account may be charged for benefits paid to the claimant during the current benefit year.

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

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mark Curtis has worked for the employer during multiple periods over the course of several years. Mr. Curtis commenced his most recent period of employment on August 17, 2007, as a part-time, on-call line worker at the employer's Locust Street car wash. Mr. Curtis worked 5-10 hours per week in the part-time, on-call position.

During the week of October 28-November 3, 2007, Mr. Curtis went to full-time status. The employer deems full-time status 30 or more hours per week. The employer does not guarantee non-management employees a minimum number of hours per week. While Mr. Curtis was in full-time status, his weekly hours were as follows: 40 hours during October 28-November 3, 30.25 hours during November 4-10, 27 hours during November 11-17, 25.25 hours during

November 18-24, 23.5 hours during November 25-December 1, 17.75 hours during December 2-8, 19.5 hours during December 9-15, 34.75 hours during December 16-22.

Mr. Curtis then requested to return to part-time status because he did not want to work as much. The employer limits part-time employees to 20 hours per week, but does not guarantee a certain number of hours. During the return to part-time status, Mr. Curtis' weekly hours have been as follows: 14.75 hours during December 23-29, 18 hours during December 30-January 5, 3.25 hours during January 6-12, 5.5 hours during January 13-19, 4.5 hours during January 20-26, and 9.5 hours during January 27-February 2.

Mr. Curtis' employment at Miracle Car Wash is of a seasonal nature. Mr. Curtis begins his work at Miracle Car Wash when is laid off from his other seasonal employment at Dubuque Greyhound Racetrack and Casino. Mr. Curtis voluntarily separates from the Miracle Car Wash employment when he returns to Dubuque Greyhound Racetrack and Casino. Mr. Curtis most recently worked for Dubuque Greyhound Racetrack and Casino on October 31, 2007 and expects to return to that employment on March 28, 2008. The employment at Dubuque Greyhound Racetrack and Casino is full-time, 32 or more hours per week.

Mr. Curtis most recently established a claim for benefits that was effective December 2, 2007 and has received benefits. Mr. Curtis has reported his weekly wages and his weekly unemployment insurance benefits have been calculated accordingly. For purposes of determining Mr. Curtis' benefits and the employer's potential liability on the claim, Iowa Workforce Development has determined that Mr. Curtis' "base period" consists of the third and fourth quarter of 2006, as well as the second quarter of 2007. The Agency's record indicates no wage credits were earned during the first quarter of 2007. Miracle Car Wash was not a base period employer. Prior to the most recent period of employment, Mr. Curtis had most recently worked for Miracle Car Wash during the third quarter of 2005.

Mr. Curtis has received unemployment insurance benefits in connection with the claim that was effective December 2, 2007. During the benefit week that ended December 22, 2007, Mr. Curtis' reported wages exceeded his weekly benefit amount and he did not receive benefits. Since December 23, 2007, Mr. Curtis has received benefits totaling \$903.00.

REASONING AND CONCLUSIONS OF LAW:

There are two separate issues that must be addressed. The first issue is the employer's liability for unemployment insurance benefits paid to the claimant. The second issue is the claimant's eligibility for benefits. The administrative law judge will first address the employer's liability.

Iowa Code section 96.7-2-a(2) provides:

2. Contribution rates based on benefit experience.

a. (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.

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.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

871 IAC 23.43(4)a provides in part:

(4) Supplemental employment.

a. An individual, who has been separated with cause attributable to the regular employer and who remains in the employ of the individual's part-time, base period employer, continues to be eligible for benefits as long as the individual is receiving the same employment from the part-time employer that the individual received during the base period. The part-time employer's account, including the reimbursable employer's account, may be relieved of benefit charges....

The simple fact is that Miracle Car Wash is not a base period employer. Because Miracle Car Wash is not a base period employer, neither Iowa Code section 97.7(2)(a) nor Workforce Development Rule 871 IAC 23.43(4)(a) imposes any liability on this employer for benefits paid to Mr. Curtis during the current benefit year, which started on December 2, 2007 and will end on November 30, 2008. The employer's account will not be charged. In the event Mr. Curtis establishes a new claim in a future benefit year, the employer's liability on that claim will have to be determined at that time.

The administrative law judge will now address the claimant's availability.

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.

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. Iowa Code section 96.19(38)(b).

Workforce Development Rule 871 IAC 24.23(16) provides as follows:

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

24.23(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

The evidence indicates that Mr. Curtis' claim for unemployment insurance benefits is premised on an October 31, 2007 layoff from full-time employment at Dubuque Greyhound Racetrack & Casino and purported partial unemployment relating to the employment with Miracle Car Wash. From August 17 to October 27, 2007, Mr. Curtis worked 5-10 hours per week at Miracle Car Wash. Mr. Curtis then had one 40-hour work week, followed by weeks in which he worked 30.25, 27, 25.25, and 23.5 hours. Mr. Curtis' new benefit year then began, and Mr. Curtis established a claim for unemployment insurance benefits that was effective December 2, 2007. Mr. Curtis then 17.75 hours during December 2-8, 19.5 hours during December 9-15, and 34.75 hours during December 16-22. The hours Mr. Curtis received during December 2-15 represented a decrease in the hours Mr. Curtis had received during the previous five weeks and Mr. Curtis was indeed partially unemployed during these two weeks. During the benefit week that ended December 22, Mr. Curtis received the second highest number of hours in connection with the Miracle Car Wash employment and was not partially unemployed. Effective December 23, Mr. Curtis voluntarily reduced his employment hours and was no longer partially unemployed. The evidence indicates that effective December 23, Mr. Curtis was simply not willing to work more than minimal part-time hours. This restriction of Mr. Curtis' work availability rendered him ineligible for unemployment insurance benefits.

Based on the evidence in the record, the administrative law judge concludes the claimant was partial unemployed during the period of December 2-15, 2007 and was eligible for benefits under a theory of partial unemployment from his part-time employment. During the benefit week that ended December 22, 2007, the claimant was not partially unemployed and was not eligible for benefits. Effective December 23, 2007, the claimant restricted his work availability and was no longer eligible for unemployment insurance benefits. Benefits are denied effective December 16, 2007.

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 Agency's records indicate that since Mr. Curtis' voluntary and undue restriction of his availability on December 23, 2007 he has received benefits totaling \$903.00. These benefits constitute an overpayment of benefits that Mr. Curtis must repay to Iowa Workforce Development.

DECISION:

The Agency representative's January 16, 2008, reference 01 decision is modified as follows. The employer is not a base period employer and has no liability for benefits paid during the current benefit year that will expire on November 30, 2008. The employer's liability for benefits paid during any subsequent benefit year will need to be determined at that time. During the period of December 2-19, 2007, the claimant was partially unemployed and eligible for benefits, provided he was otherwise eligible. During the benefit week that ended December 22, 2007,

the claimant was not partially unemployed and was not eligible for benefits. Effective December 23, 2007, the claimant has unduly restricted his work availability and is not eligible for benefits. Benefits are denied effective December 16, 2007. The claimant is overpaid 903.00 for benefits he has received since December 23, 2007. Hereafter, the claimant's work availability should be more closely scrutinized by the claims division.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs