

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARILYN J BROWN
Claimant

APPEAL NO. 12A-UI-13309-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

RM ENTERPRISES INC
Employer

OC: 01/29/12
Claimant: Respondent (2-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 October 30, 2012, reference 04, decision that allowed benefits, effective October 7, 2012 under a theory of partial unemployment and that held the employer's account could be charged. After due notice was issued, a hearing was held on December 7, 2012. Claimant Marilyn Brown submitted a letter in lieu of participating in the hearing and indicated that she was not available to participate in a hearing. The letter was received into evidence as Exhibit A. Rhonda Coborn, President and owner, represented the employer. Department Exhibits D-1 and D-2 and Exhibits One, Two and Three were received into evidence.

ISSUES:

Whether Ms. Brown has been able to work and available for work since she established the additional claim for benefits that was effective October 7, 2012.

Whether Ms. Brown has been partially unemployed since she established the additional claim for benefits that was effective October 7, 2012.

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: The employer is a staffing agency. Marilyn Brown has performed work for the employer during multiple, separate, and distinct periods. Ms. Brown most recently returned to the employer on September 25, 2012 after separating from the employer in March 2012 to accept other employment at Uni-Select USA, Inc., employer account number 357521. When Ms. Brown started back with RM Enterprises/Personnel Solutions, the employer placed her in a part-time assignment at Crescent Park Carnival. On October 24, 2012, Ms. Brown left before the end of the shift, after indicating that she could not physically perform the work, which required that she stand for 10 hours at a time. Thereafter, Ms. Brown reduced her availability for work with the

employer and indicated she was only available for "re-work." The re-work was a much less physically taxing work that was only available on a sporadic basis. The employer continued to make the re-work available to Ms. Brown as it became available to the employer. The employer continued to have the original work at Crescent Park Carnival available to Ms. Brown. The employer did not reduce Ms. Brown's hours or pay.

Ms. Brown established an additional claim for benefits that was effective October 7, 2012. The additional claim appears to have been in response to her separation from Uni-Select USA, Inc. Ms. Brown's separation from Uni-Select USA, Inc. does not appear to have been adjudicated by Workforce Development. Since Ms. Brown established the additional claim for benefits, she received benefits for the week ending October 13, 2012 through November 17, 2012. Ms. Brown continued her claim through the week that ended November 24, 2012, reported \$240.00 in wages for that week and received no benefits. Ms. Brown thereafter discontinued her claim. Ms. Brown began new, full-time employment on November 19, 2012.

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".

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).

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 50 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 weight of the evidence in the record establishes that RM Enterprises, Inc./Personnel Solutions in no way reduced the hours of work it had available for Ms. Brown or the wages paid to Ms. Brown. The evidence indicates instead that Ms. Brown reduced her availability. The evidence fails to establish that Ms. Brown has been partially unemployed since she established the claim for benefits that was effective October 7, 2012. The employer will not be charged.

Ms. Brown has presented insufficient evidence to establish that she met the work ability and availability requirements during the period when her additional claim for benefits was active. That period was October 7, 2012 through November 24, 2012. Ms. Brown is not eligible for benefits for that period.

This matter will be remanded for entry of an appropriate overpayment decision.

DECISION:

The Agency representative's October 30, 2012, reference 04 is reversed. The claimant has not demonstrated that she was able and available for work during the period of October 7, 2012 through November 24, 2012. The claimant was not partially unemployed during that period. Benefits are denied for that period. The employer's account will not be charged.

This matter is remanded to the Claims Division for adjudication of the claimant's separation from Uni-Select USA, Inc. and for entry of an appropriate overpayment decision.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/bjc