IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TAMMY M PRIMMER
Claimant

C R IV SERVICE INC
OPTION CARE OF EAST CENTRAL IOWA
Employer

APPEAL NO. 06A-UI-10075-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/03/06 R: 03
Claimant: Appellant (5-R)

Section 96.4(3) – Able and Available
Section 96.5(3)(A) – Refusal of Suitable Work

STATEMENT OF THE CASE:

Tammy Primmer filed a timely appeal from the October 5, 2006, reference 02, decision that she was disqualified for benefits based on a refusal to accept suitable work on September 15, 2006. After due notice was issued, a hearing was held on October 31, 2006. Ms. Primmer participated. Clinical Director Sandy Boddicker represented the employer. Human Resources Director Lori Siebenmann was available on behalf of the employer, but did not provide testimony. Employer's Exhibits One through Four were received into evidence. The administrative law judge took official notice of the Agency's calculation of Ms. Primmer's average weekly wage during the highest earnings quarter of her base period.

ISSUE:

Whether the claimant has been available for work, as required by Iowa Code section 96.4(3), since she established her claim for benefits.

Whether the claimant refused to accept a suitable offer of employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tammy Primmer commenced her most recent period of employment with Option Care of East Central Iowa on March 18, 2005 and became a full-time employee effective April 1, 2005. Ms. Primmer is a Licensed Practical Nurse (L.P.N.) and performed services for the employer in that capacity.

Until September 1, 2006, Ms. Primmer was primarily assigned to work overnight hours and was assigned to home health care cases in the Cedar Rapids area. The nature of the employer's business requires travel to clients' homes in Cedar Rapids and outside Cedar Rapids. On or about September 1, Ms. Primmer's primary home health care case no longer required skilled nursing services. As a result, Ms. Primmer's duties in connection with the case and the hours she worked on the case were greatly reduced. Ms. Primmer established a claim for benefits

that was effective September 3, 2006 and received benefits for the one-week period that ended September 9.

The end of the above referenced case assignment corresponded with changes in Ms. Primmer's parental responsibilities that prompted Ms. Primmer to change and restrict her availability for work. Ms. Primmer has two children who have each been in out-of-home placements through the Department of Human Services. In August, Ms. Primmer was preparing for her 17-year-old son's return to the household. Pursuant to an agreement with D.H.S., Ms. Primmer had to be home with her son during the evenings. Ms. Primmer's younger child was placed out of the home at a facility in Waverly and came home for weekend visits.

On or about September 1, Ms. Primmer advised the employer that she was restricting her work availability to day-shift hours, Monday through Friday. The nature of the employer's home health care business was such that most of the hours the employer had available involved overnight and weekend shifts outside Cedar Rapids. In addition, daytime hours would ordinarily be assigned to nurses with more seniority than Ms. Primmer. Because of the restrictions Ms. Primmer placed on her availability, the employer was no longer able to provide Ms. Primmer with full-time hours. Despite the restrictions Ms. Primmer placed on her availability, the employer attempted to accommodate Ms. Primmer's request for day-shift hours by offering her day-time shifts as they became available.

The employer had two cases to which it had wanted to assign Ms. Primmer. Both assignments were outside Cedar Rapids and would require Ms. Primmer to drive 35-40 minutes each way. One available assignment was in Williamsburg and would have involved overnight shifts. The overnight shifts would have ended at 7:30 or 8:00 a.m. Ms. Primmer did not wish to work on this case because she would be unable to return home in time to transport her 17-year-old to school, even though the school bus was available to the 17-year-old. A second available assignment was in Vinton and would have involved day and evening hours. The Vinton case involved a pediatric client. Ms. Primmer was more comfortable with adult clients and was less comfortable caring for a pediatric client.

The employer offered Ms. Primmer a day-time shift for September 15 that complied with the restrictions Ms. Primmer had made on her availability. Ms. Primmer refused the offered shift. Ms. Primmer refused the shift so that she could watch her 17-year-old perform with his high school marching band. In addition, it was homecoming weekend for her son's school, and Ms. Primmer decided to pick up her younger child in Waverly at 2:00 p.m. so that he could watch the older son perform.

Thereafter, the employer offered Ms. Primmer day shifts on Friday, September 29 and Saturday, September 30. Ms. Primmer declined both shifts.

On October 3, Ms. Primmer contacted the employer to indicate she was "frustrated" that the employer was scheduling her for shifts without first confirming her availability for the particular shift. The employer advised Ms. Primmer that it had been operating under the belief that Ms. Primmer wanted as many hours as possible.

On October 6, the employer discussed with Ms. Primmer the fact that it had scheduled her to work on the Vinton pediatric case on October 16 and 30. The employer asked Ms. Primmer to confirm that she could appear for the shifts, but Ms. Primmer did not confirm. The client's parents and teacher had expressed concerns to the employer regarding Ms. Primmer's ability to provide appropriate care to the child. The employer offered Ms. Primmer additional training on the case that might have allowed her, the client's parents, and the client's teacher to become

more comfortable with the care arrangement. Ms. Primmer did not pursue the offer of additional training.

On October 9, Ms. Primmer contacted the employer to advise that she had fallen on October 6 and would not be appearing for her scheduled shift on Saturday, October 14. The fall took place eight days before the scheduled shift and appears to have involved no injury or only minor injury.

On October 11, Ms. Primmer met with the employer to discuss her October work schedule. The employer expressed concern about whether Ms. Primmer planned to appear for her October shifts. Ms. Primmer indicated that she had not been aware that the employer planned to schedule her for shifts during October. The employer reiterated that it had been operating under the belief that Ms. Primmer wanted as many hours as the employer could make available to her. The employer advised Ms. Primmer that if she did not wish to be scheduled for available shifts, Ms. Primmer could go to "p.r.n." status. Ms. Primmer advised the employer that she had located potential temporary employment that would provide her with five weeks of full-time day shift hours. Ms. Primmer went to p.r.n. status as of October 11. The potential new employment did not materialize.

Ms. Primmer has recently commenced employment through a temporary agency. Due to the restrictions Ms. Primmer has placed on her availability, she only works one to three day shifts per week. As of the date of the hearing, CR IV Service continued to consider Ms. Primmer an employee, but continued to experience difficulty in making appropriate contact with Ms. Primmer regarding available shifts that meet her restricted availability. All of the shifts the employer has offered Ms. Primmer would have paid her the same wage she had been earning.

REASONING AND CONCLUSIONS OF LAW:

Where an individual refuses to accept suitable work without good cause for the refusal, the individual is thereafter disqualified for unemployment insurance benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. 871 IAC 24.24. In deciding whether an individual failed to accept suitable work, it must first be established that a bona fide offer of work was made to the individual. 871 IAC 24.24(1)(a). In determining whether a claimant refused to accept suitable work and/or whether there was good cause to refuse suitable work, the administrative law judge considers the specific facts surrounding the alleged refusal. 871 IAC 24.24(3).

An individual shall be disqualified for benefits for a refusal of work with a former employer if the work offered is reasonably suitable and comparable and is within the purview of the usual occupation of the claimant. 871 IAC 24.24(14). Where the offer comes from a "former" employer, the provisions of Iowa Code section 96.5(3)(b) are controlling in the determination of suitability of the work. 871 IAC 24.24(14)(a). Under Iowa Code section 96.5(3)(b), the offered employment will be deemed suitable unless the offered position was vacant due to a labor dispute, would have required the individual to join or refrain from joining a labor organization, or if the wages, hours, or other conditions of the offered work would have been substantially less favorable to the individual than conditions prevailing for similar work in the locality.

Even though an individual may have had good cause for refusing suitable employment, the individual may be disqualified for benefits for not being available for work. 871 IAC 24.24(3). Before a disqualification for failure to accept work may be imposed, an individual must first satisfy the benefit eligibility conditions of being able to work and available for work.

871 IAC 24.24(4). If the facts indicate that the claimant was or is not available for work, and this resulted in the failure to accept work or apply for work, such claimant shall not be disqualified for refusal since the claimant is not available for work. 871 IAC 24.24(4). In such a case it is the availability of the claimant that is to be tested. 871 IAC 24.24(4). Lack of transportation, illness or health conditions, illness in family, and child care problems are generally considered to be good cause for refusing work or refusing to apply for work. 871 IAC 24.24(4). However, the claimant's availability would be the issue to be determined in these types of cases. 871 IAC 24.24(4).

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:
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> 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".

Workforce Development rule 871 IAC 24.22(2) provides, in relevant part, as follows:

> Benefit 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.
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> 24.22(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.
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> a. Shift restriction. The individual does not have to be available for a particular shift. If an individual is available for work on the same basis on which the individual's wage credits were earned and if after considering the restrictions as to hours of work, etc., imposed by the individual there exists a reasonable expectation of securing employment, then the individual meets the requirement of being available for work.
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> h. Available for part of week. Each case must be decided on its own merits. Generally, if the individual is available for the major portion of the workweek, the individual is considered to be available for work.

i. On–call workers.
(1) Substitute workers (i.e., post office clerks, railroad extra board workers), who hold themselves available for one employer and who do not accept other work, are not available for work within the meaning of the law and are not eligible for benefits.

l. Available for work. To be considered available for work, an individual must at all times be in a position to accept suitable employment during periods when the work is normally performed. As an individual's length of unemployment increases and the individual has been unable to find work in the individual's customary occupation, the individual may be required to seek work in some other occupation in which job openings exist, or if that does not seem likely to result in employment, the individual may be required to accept counseling for possible retraining or a change in occupation.

m. Restrictions and reasonable expectation of securing employment. An individual may not be eligible for benefits if the individual has imposed restrictions which leave the individual no reasonable expectation of securing employment. Restrictions may relate to type of work, hours, wages, location of work, etc., or may be physical restrictions.

Workforce Development rule 871 IAC 24.23 provides, in relevant part, as follows:

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

24.23(4) If the means of transportation by an individual was lost from the individual's residence to the area of the individual's usual employment, the individual will be deemed not to have met the availability requirements of the law. However, an individual shall not be disqualified for restricting employability to the area of usual employment.

24.23(8) Where availability for work is unduly limited because of not having made adequate arrangements for child care.

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.

24.23(18) Where the claimant's availability for work is unduly limited because such claimant is willing to work only in a specific area although suitable work is available in other areas where the claimant is expected to be available for work.

24.23(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

24.23(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

24.23(41) The claimant became temporarily unemployed, but was not available for work with the employer that temporarily laid the claimant off. The evidence must establish that the claimant had a choice to work, and that the willingness to work would have led to actual employment in suitable work during the weeks the employer temporarily suspended operations.

The evidence in the record establishes that effective September 1, Ms. Primmer made herself unavailable for work by restricting her availability. After having consistently worked overnight and weekend shifts during the first year and a half of her employment, Ms. Primmer told the

employer she was no longer available for such work. Ms. Primmer restricted the types of cases she was willing to work to adult cases. Ms. Primmer unreasonably restricted the geographical area in which she was willing to work, though she understood the nature of the work required her to travel to clients' homes to provide care. Finally, Ms. Primmer refused to work shifts offered by the employer that complied with the restrictions she had placed on her availability. The evidence in the record indicates that Ms. Primmer rejected a bona fide offer of suitable work in connection with the September 15 shift and did not have good cause for refusing. Ms. Primmer's refusal of the shift was based on her desire to attend a school function with her children. The refusal was not based on a lack of childcare. Thus, even if the evidence indicated that Ms. Primmer met the availability requirements set forth in Iowa Code section 96.4(3), the evidence indicates a disqualification decision based on a refusal to accept suitable work would be appropriate. The greater weight of the evidence indicates that Ms. Primmer continues to unreasonably restrict her availability for work. This is confirmed by the employer's inability to reach Ms. Primmer to offer available shifts and by the fact that Ms. Primmer is only able to obtain part-time hours through her recent temporary employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Primmer has not been available for work, as required by Iowa Code section 96.4(3), since establishing her claim for benefits. Accordingly, Ms. Primmer is not eligible for benefits. This matter will be remanded for a determination of whether Ms. Primmer has been overpaid benefits for the benefit week that ended September 9, 2006. In the event there has since been a separation from the employment, the employer should bring the separation to the attention of their local Workforce Development office so that the question of whether Ms. Primmer is disqualified for benefits based on that separation can be addressed.

DECISION:

The Agency representative's decision dated October 5, 2006, reference 02, is modified as follows: The claimant has not been available for work, as required by Iowa Code section 96.4(3), since establishing her claim for benefits. Accordingly, the claimant has been ineligible for benefits since establishing her claim and continues to be ineligible for benefits. This matter is remanded for a determination of whether the claimant has been overpaid benefits for the benefit week that ended September 9, 2006. In the event there has since been a separation from the employment, the employer should bring the separation to the attention of the local Workforce Development office so that the question of whether Ms. Primmer is further disqualified for benefits based on that separation can be addressed.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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