

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PERRY J CRUSE
Claimant

APPEAL NO. 09A-UI-18601-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

O'REILLY AUTOMOTIVE INC
Employer

OC: 10/25/09
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 December 2, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 25, 2010. Claimant participated. Joe Davis, Manager, represented the employer. Exhibits One, Two and Three were received into evidence. The administrative law judge took official notice of the Agency's administrative record of wages reported by and 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.

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: Perry Cruse was employed by O'Reilly Automotive, Inc., as a part-time, "supplemental," delivery driver from October 8, 2009 until January 8, 2010, when he voluntarily quit. There was no change in the conditions of the employment while Mr. Cruse continued with the employer.

This included no change in the established number of work hours. Mr. Cruse worked all the hours the employer made available to him until the last week of the employment.

Since Mr. Cruse left the employment, he had been under the care of a physician. The physician has not taken Mr. Cruse completely off work. Mr. Cruse's doctor has recommended that he not drive for long periods. This was because Mr. Cruse was prone to passing out due to either his

diabetes or a new medication to treat the diabetes. At the time of the appeal hearing, Mr. Cruse was waiting for his doctor's approval before he commenced new employment.

Mr. Cruse's base period wage credits are based on a history of full-time employment. At the time of the hearing, Mr. Cruse had last worked full time on October 31, 2008. Mr. Cruse has no expectation of returning to that full-time employment.

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(1)a and (2) provide:

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.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

(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.

Where a person is under the care of a doctor and has not been released to work, the person is deemed unavailable for work and not eligible for unemployment insurance benefits. 871 IAC 24.23(35).

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 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.]

First, there was not employer-initiated change in the work hours or other conditions of the employment so long as Mr. Cruse continued in the employment. Accordingly, this employer would not be liable for benefits under a theory of partial unemployment. Nor would Mr. Cruse be eligible for benefits under a theory of partial unemployment.

The remaining issues are whether Mr. Cruse has met the work ability and availability requirements of Iowa Code section 96.4(3) since he established the new claim for benefits that was effective October 25, 2009. Though Mr. Cruse was not partially unemployed from the work with O'Reilly Automotive, while he continued in that employment, he was still not working full-

time, as he had been for at least part of the base period upon which his unemployment insurance benefits are based. Through the benefit week that ended January 9, 2010, Mr. Cruse continued to meet the work ability and availability requirements of Iowa Code section 96.4(3).

The weight of the evidence indicates that at the end of the employment Mr. Cruse went off work due to a medical issue. Mr. Cruse had not yet been released to return to work at the time of the hearing on January 25, 2010. Because of the medical issues, Mr. Cruse has failed to present sufficient evidence to establish that he is both able to work and available to work since January 10, 2010. Effective January 10, 2010 Mr. Cruse was ineligible for benefits until he presents proof that he had been released to work without restrictions and is again available for full-time work. Because Mr. Cruse was still not able and available for work as of the date of the appeal hearing on January 25, 2010, the disqualification would extend through the benefit week that ended January 30, 2010.

This matter will be remanded to the Claims Division for review of Mr. Cruse's ability to work and availability for work effective January 31, 2010.

Upon remand, the Claims Division should also enter an appropriate overpayment decision concerning the benefits received for the period of January 10, 2010 through January 30, 2010 and any affected period thereafter.

This matter is also remanded to address the effect of the separation on the claimant's eligibility for benefits and the employer's liability for benefits.

DECISION:

The Agency representative's December 2, 2009, reference 01, is modified as follows. The claimant was not partially unemployed. Employer O'Reilly Automotive, Inc., is not a base period employer and is not liable for benefits paid to the claimant during the benefit year that started October 25, 2009. The claimant was able and available for work, and eligible for benefits during the period of October 25, 2009 through the benefit week that ended January 9, 2010. Effective January 10, 2010, the claimant was no longer able and available for work and not eligible for benefits through the benefit week that ended January 30, 2010.

This matter will be remanded to the Claims Division for review of the claimant's ability to work and availability for work effective January 31, 2010. Upon remand, the Claims Division should also enter an appropriate overpayment decision concerning the benefits received for the period of January 10, 2010 through January 30, 2010 and any affected period thereafter. The Claims Division should also address the effect of the separation on the claimant's eligibility for benefits and the employer's liability for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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