

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL BOOTS

Claimant

APPEAL NO. 10A-UI-09325-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STREAM INTERNATIONAL INC

Employer

OC: 05/16/10

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 June 21, 2010, reference 01, decision that allowed benefits effective May 16, 2010, based on an Agency conclusion that the claimant was partially unemployed. After due notice was issued, a hearing was held on August 16, 2010. Claimant Michael Boots participate. Hanna Cook, Human Resources Generalist, represented the employer and presented additional testimony through Andrew Goodell, Acting Team Manager. The administrative law judge took official notice of the Agency's record of wages reported by Mr. Boots and the Agency's record of benefits disbursed to Mr. Boots.

ISSUES:

Whether Mr. Boots has been able to work and available for work since establishing his claim for benefits.

Whether Mr. Boots has been partially unemployed from his employment since he established his claim for benefits.

Whether the employer's account may be assessed for benefits paid to Mr. Boots.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michael Boots commenced his full-time employment with Stream International, Inc., on February 22, 2010 and continues in the employment as an account specialist at this time. Mr. Boots participated in a two-week training period, during which he worked full-time hours. On March 11, 2010, Mr. Boots transitioned out of training and into a full-time work schedule, 8:00 a.m. to 5:00 p.m., Monday through Friday. On March 30, 2010, Mr. Boots' work hours changed to 9:30 a.m. to 6:30 p.m., Tuesday through Saturday, but Mr. Boots continued to work full-time hours.

On April 24, 2010, Mr. Boots submitted a written request to the employer to change his work availability and reduce his hours to 32 per week so that he could umpire youth athletics. Mr. Boots notified the employer that his new work availability was Tuesday-Wednesday, 9:30 a.m. to 6:30 p.m.; Thursday, 8:00 a.m. to 6:00 p.m.; and Friday, 8:30 a.m. to 5:30 p.m. Though the employer continued to have full-time work available for Mr. Boots, the employer granted Mr. Boots' request to change and reduce his work availability.

The employer has a voluntary time off program (VTO) under which employees may request to go home for all or part of the day if the employer had sufficient remaining staff to handle the workload. The employee decides whether to stay or go. The employer continues to make full-time work available. Mr. Boots elected to work fewer than his scheduled hours on May 4 and 21, June 9, 16, 18, 22, 29 and 30, July 6, 22, 27, 28, 29 and 30, and August 6 and 11, 2010. On July 28-30, Mr. Boots requested his entire shift off so that he could travel to Indiana to assist his sick mother.

Mr. Boots established a claim for unemployment insurance benefits that was effective May 16, 2010 and has received benefits for the period of May 16 through July 24, 2010 and for the week ending August 7, 2010. Mr. Boots did not receive any benefits for the week that ended July 31, 2010. This was the week that Mr. Boots traveled to be with his mother. When Mr. Boots called in his claim for that week, he indicated that he was not able and available for work. Mr. Boots received additional federal stimulus benefits at a rate of \$25.00 per week.

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".

Iowa Administrative Code 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(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(17) Work is unduly limited because the claimant is not willing to work the number of hours required to work in the claimant's occupation.

24.23(25) If the claimant is out of town for personal reasons for the major portion of the workweek and is not in the labor market.

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). However, the reduction in work hours must not be voluntary.

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.]

The weight of the evidence in the record establishes that the reduction in Mr. Boots work hours was voluntary and was due to his desire to work fewer hours and few days so that he could use his time for other matters. The employer had not decreased the number of hours available to Mr. Boots and has continued to make full-time work available to Mr. Boots. Mr. Boots has not met the work availability requirements of the law since he established his claim for benefits. Mr. Boots has not been partially unemployed since he established his claim for benefits. The employer's account will not be charged for benefits that have been paid to Mr. Boots.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because overpayment of benefits was not included in the issues set for hearing, this matter will be remanded to the Claims Division for entry of an overpayment decision for the benefits Mr. Boots has received since May 16, 2010. The overpayment decision should include regular benefits and federal stimulus benefits disbursed to Mr. Boots.

DECISION:

The Agency representative's June 21, 2010, reference 01, is reversed. The claimant has not been able and available for work since establishing his claim for benefits. The claimant has not been partially unemployed since establishing his claim for benefits. The claimant is not eligible for benefits and benefits are denied effective May 16, 2010. The disqualification continues. The employer's account will not be charged for benefits that have been paid to the claimant.

This matter is remanded to the Claims Division for entry of an overpayment decision for the benefits the claimant has received since May 16, 2010. The overpayment decision should include regular benefits and federal stimulus benefits disbursed to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css