

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MICHAEL T HANSEN
Claimant

AVEKA NUTRA PROCESSING
Employer

APPEAL 17A-UI-07828-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/06/16
Claimant: Appellant (5R)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions
Iowa Code § 96.19(38)a & b – Total and Partial Unemployment

STATEMENT OF THE CASE:

Michael T. Hansen (claimant) filed an appeal from the August 3, 2017, reference 02, unemployment insurance decision that denied benefits based upon the determination he does not have adequate child care which limits his availability for work. After due notice on the issue of ability to and availability for work was issued, a telephone conference hearing was held on August 24, 2017. The claimant participated and was represented by Attorney Todd Schmidt. Aveka Nutra Processing (employer) participated through Plant Manager Dennis Wohlfeil and Corporate Controller Kelli Best. Claimant's Exhibits A through C were received without objection. The parties agreed to waive notice on the issue of total and partial unemployment.

ISSUES:

Was the claimant able to work, available for work, and actively and earnestly seeking work effective July 9, 2017?

Was the claimant partially unemployed rendering the issues of ability to and availability for work moot?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant began working for the employer on March 30, 2015 full-time as a Packager and Big Dryer Operator. The employer rotates its schedule and all employees are required to work weekends. The claimant was hired for second shift. From the end of 2015 through the beginning of 2016, he worked third shift at his request. Due to child care for his mentally impaired daughter, he then worked the swing shift. He was scheduled to work mostly the second shift, but would occasionally work on first shift.

In May 2017, the claimant provided written notice to the employer that as of May 25, 2017, he would only be able to work first shift and would no longer be available to work any weekends as he was unable to find child care outside those hours for his daughter who has special needs.

He indicated in his letter that he understood he may be required to go part-time as a result of his change in availability.

The employer attempted to accommodate the claimant's request; however, scheduling became overly burdensome. As all shifts require working weekends, the claimant's inability to work the weekend was causing other employees to have to work additional weekends. The claimant was not included on the schedule for the two week period from July 9 through July 22, 2017. He was not given any hours. On July 25, 2017, the employer notified the claimant that he was being laid off as his availability for work was too limiting. The employer intends to recall the claimant back to work once it has a position that fits his availability or his availability changes. The claimant's daughter attends school full-time and he has after school care available Monday through Friday.

The claimant opened his claim for benefits effective August 6, 2016. His base period for that time frame encompasses April 1, 2015 through March 31, 2016, or the second quarter of 2015 through the first quarter of 2016. The claimant reactivated his claim for benefits the week of July 9, 2017. His benefit year expired on August 5, 2017. The claimant opened a second claim year for benefits the week of August 6, 2017. His current base period encompasses April 1, 2016 through March 31, 2017, or the second quarter of 2016 through the first quarter of 2017.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not available for work effective July 9, 2017.

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 Code section 96.19(38) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) 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.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

Iowa Admin. Code r. 871-24.22(2) provides, in relevant part:

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.

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.

Iowa Admin. Code r. 871-24.23(7) provides, in relevant part:

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

...

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

...

(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.

...

(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.

An individual claiming benefits must be able to work, available for work, and actively and earnestly seeking work. These requirements are waived during any week the claimant is temporarily laid off of work due to a lack of work or when the employer has temporarily suspended operations. In this case, the claimant was not laid off due to the employer's lack of work, but because of his restricted schedule. The employer has work available for the claimant, if he works weekends and second or third shift. The claimant is not partially unemployed as defined in Iowa Code section 96.19(38)c.

The next issue is whether the claimant is able to work, available for work, and actively and earnestly seeking work. The claimant is physically able to work and appears to be conducting an adequate job search. He has adequate child care for the hours he has made himself available for work.

This issue is whether the claimant is considered available for work based on his altered availability. While the claimant is not required to work a certain shift, he does need to be available for work on the same basis as when he earned his wage credits in order to be eligible for unemployment insurance benefits. It is only after he meets this requirement that the analysis continues to whether he can reasonably expect to find employment with his current availability.

Until May 2017, the claimant worked primarily second and third shift and weekends. In May 2017, the claimant limited his availability due to child care for his daughter. He limited his availability to Monday through Friday first shift only. During his base period, the claimant was available for work on all three shifts and weekends. The claimant has now limited his availability to one shift and is unable to work weekends. The claimant is not available for work on the same basis on which his wage credits were earned for the claim year.

The claimant argues that the five weeks the employer accommodated his shift restriction, which is in his lag quarter, should be considered when determining if he is available for work. The claimant relies on *Tuthill v. Iowa Dept. of Empl. Services, Job Serv. Div.*, 408 N.W.2d 391, 391 (Iowa App. 1987) as the basis for his argument. This case is distinguishable from *Tuthill* for multiple reasons. *Tuthill* was a full-time student and there are separate rules applicable solely to students with regard to their availability for work. *Id.* at 392. The court found that "all of a full-time student's work history must be considered in determining available for work" and goes on to cite the rule specific to full-time students. *Id.* The claimant is not a full-time student. Additionally, *Tuthill's* employer agreed to the restricted shift that left him available for afternoons, evenings, and weekends which he worked for four months before being laid off. *Id.* at 391. In this case, the claimant's schedule was far more restricted than *Tuthill's* schedule and, while the employer tried to work with the restricted schedule, it did not ultimately agree to the change in

schedule as it laid the claimant off due to the difficulty in scheduling. Finally, *Tuthill* supports the idea that each case must be evaluated on its own facts. *Id; see also Savage v. Iowa Dept. of Job Serv.*, 361 N.W.2d 329, 332 (Iowa App. 1984). The claimant is not available to work in the same capacity as when he earned his wage credits. Accordingly, benefits are denied.

DECISION:

The August 3, 2017, reference 02, unemployment insurance decision is modified with no change in effect. The claimant is not able to work and available for work effective July 9, 2017. Benefits are denied.

REMAND:

The issue of whether the claimant is available for work on the same basis which his wage credits were earned for the claim year effective August 6, 2017 is remanded to the Benefits Bureau for an initial investigation and determination.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/scn