

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GEORGE E SIMMONS
Claimant

APPEAL NO: 08A-UI-01068-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HAWKEYE WOOD SHAVINGS INC
Employer

OC: 06/24/07 R: 03
Claimant: Respondent (2)

Section 96.4-3 – Able and Available
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Hawkeye Wood Shavings, Inc. (employer) appealed a representative's January 23, 2008 decision (reference 05) that concluded George E. Simmons (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 14, 2008. The claimant participated in the hearing. Colleen Adkins appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Is the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The claimant started working for the employer on January 23, 1997. He worked full time, Monday through Friday, as a truck driver for the employer's recycling business, through June 25, 2007. He was laid off on that date due to the employer's loss of a contract with a business cycle. As a result, The claimant established an unemployment insurance benefit year effective June 24, 2007 and began drawing benefits based on his full time base period wages.

On or about September 15, 2007, the employer recalled the claimant for available work. The claimant agreed, but only wished to work three days per week. In October 2007, the parties verbally agreed that the claimant's regular schedule would be Monday, Tuesday, and Wednesday. The claimant further agreed he might be available on an on-call basis on Thursday and Friday when he was not otherwise busy.

The week ending December 8 the claimant filed a weekly claim for unemployment insurance benefits and reported no wages. That week the employer did not have work for the claimant on Monday; on Tuesday and Wednesday the claimant indicated he could not work for health reasons, and on Thursday and Friday the claimant was not available under his current

arrangement with the employer. He was paid benefits of \$265.00 for that week. For the week ending December 15 the claimant filed a weekly claim for benefits and reported wages of \$158.00. He worked on Monday and Tuesday, however, in addition to his general non-availability on Thursday and Friday, the claimant informed the employer he was not available for work on that Wednesday. He received benefits for that week in the amount of \$173.00.

For the week ending December 22 the claimant filed a weekly claim and reported \$376.00 in wages as he worked most of the week; he received no benefits for that week. For the week ending December 29 he reported wages of \$90.00; he worked one day that week but was not available on Thursday and Friday, although the employer specifically wished the claimant to work that Thursday; he received benefits for that week in the amount of \$241.00.

For the week ending January 5, 2008, the claimant was not available on Monday, December 31, or Wednesday, January 2, as well as not being available on Thursday or Friday. He reported no wages on his weekly claim for the week and received benefits for the week in the amount of \$265.00. For the week ending January 12, 2008 the claimant made a weekly claim reporting wages of \$190.00. However, while he was available and worked on Monday and Tuesday, in addition to not being available on Thursday and Friday he informed the employer he was not available on that Wednesday. He received benefits for that week in the amount of \$141.00. For the week ending January 19, the claimant reported wages of \$220.00; he worked the Monday, Tuesday, and Wednesday, but even though the employer had work for him on Thursday and Friday, he declined as he did not wish to work those days. He received benefits for that week in the amount of \$111.00.

For the week of January 26 the claimant reported no wages and received the full weekly benefit amount of \$265.00. However, on Monday and Tuesday the claimant called in that he could not get to work due to his personal transportation; he did not call the remainder of the week but was also unavailable for work Wednesday, Thursday, and Friday. For the week ending February 2 the claimant worked on January 28, Monday, as well as Friday, February 1, which was on an on-call basis. He did not make himself available on Thursday. For the week ending February 9, the claimant reported no wages for his weekly claim; he called in non-availability to the employer for Monday, did not make himself available on Tuesday, declined available work on Thursday, and did not make himself available on Friday.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant is eligible for unemployment insurance benefits by being able and available for employment.

Iowa Code § 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 24.23(29) provides:

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

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

871 IAC 24.22(2)a and f 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.

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.

f. Part-time worker, student--other. Part-time worker shall mean any individual who has been in the employ of an employing unit and has established a pattern of part-time regular employment which is subject to the employment security tax, and has accrued wage credits while working in a part-time job. If such part-time worker becomes separated from this employment for no disqualifiable reason, and providing such worker has reasonable expectation of securing other employment during the same hours and for the same number of hours worked, no disqualification shall be imposed under Iowa Code § 96.4(3). In other words, if an individual is available to the same degree and to the same extent as when the wage credits were accrued, the individual meets the eligibility requirements of the law.

Emphasis added.

By indicating to the employer that he only wishes to work three days per week, regardless of which three days it is, the claimant is automatically preventing himself from being available for work on the same full time basis as when his wage credits were accrued. Therefore, as long as the claimant maintains that restriction on his availability, he is not able and available for work as needed to be eligible for unemployment insurance benefits.

In order for the claimant to regain his eligibility for at least partial unemployment insurance benefits for weeks in which he earns less than \$280.00 (\$265.00 plus \$15.00), while the employer might not have work for the claimant all days of the week, the claimant needs to make himself available Monday through Friday. Whether the claimant calls in each day or whether the claimant and the employer structure a method by which the employer informs the claimant which days it will have work for him is a detail which the parties should resolve for themselves.

Iowa Code § 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant was not able and available for work for the weeks since December 2, 2007 due to the restrictions on his days of work, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's January 23, 2008 decision (reference 05) is reversed. The claimant is not able to work and available for work on the same basis upon which his wages credits were accrued effective December 2, 2007. The claimant is overpaid benefits in the amount of \$1,622.00.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs