

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NICHOLAS R MENNEN**

Claimant

**APPEAL NO. 09A-UI-00669-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BOB BROWN CHEVROLET-GEO-ISUZU INC**

Employer

**OC: 10/26/08 R: 02  
Claimant: Respondent (3/R)**

Section 96.4-3 – Able and Available/Employed at Same Hours and Wages  
Section 96.3-7 – Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed an appeal from a decision of a representative dated January 7, 2009, reference 01, which held the claimant able and available for work beginning October 26, 2008 finding the claimant was working part-time or on-call but not performing services in the same pattern of employment as in the base period. After due notice, a telephone conference hearing was scheduled for and held on February 2, 2009. The claimant participated personally. The employer participated by Sandy Fitch, Hearing Representative and witness, Mr. William Walton, Department Manager.

**ISSUE:**

At issue in this matter is whether the claimant is able and available working part-time or on-call in the same pattern as in his base period and whether the claimant is overpaid unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge having heard the testimony and considered all of the evidence in the record, finds: The claimant began work for this employer in April 2008 as a full-time automobile detail worker paid by the vehicle. In October 2008 due to a business slowdown, the claimant at times was required to work only part-time as sufficient work was not available to keep him employed on a full-time status as contemplated in the agreement of hire and the claimant's base period.

Mr. Mennen opened a claim for unemployment insurance benefits effective October 26, 2008 and was issued the customary informational brochure that explains the system and its requirements. Mr. Mennen claimed partial unemployment insurance benefits during weeks when less than full-time work was available to him. The claimant, however, did not correctly report gross or net earnings due to some confusion on the claimant's part. At times Mr. Mennen did not report for available work due to illness. It appears that the claimant also claimed benefits for days that he was not available due to illness. Mr. Mennen made himself unavailable

for employment during the period October 10 through October 14 for personal reasons but claimed unemployment insurance benefits nevertheless.

#### **REASONING AND CONCLUSIONS OF LAW:**

The question is whether the evidence in the record establishes that Mr. Mennen was working part-time or on-call at the same hours and wages as contemplated in the original contract of hire. It does. The further question is whether the claimant has properly reported his earnings and periods of time when he was not able and available for work due to illness or personal obligations which prevented him from reporting for available employment. It does not.

The evidence in the record establishes that Mr. Mennen at the time that he opened his claim for unemployment insurance benefits was working part-time or on-call at a reduced workweek basis different from the original contract of hire. The claimant was hired to work full-time but due to a downturn in business conditions full-time work was not always available to the claimant after October 26, 2008.

Although the evidence establishes that the claimant was generally able and available for work based upon a reduced workweek different from the contract of hire, the evidence does not establish that Mr. Mennen was properly reporting his gross earnings each week or reporting days that he chose not to report for available employment due to illness or other personal obligations which prevented him from accepting available work. It is noted, however, that the employer has a right to protest any week that Mr. Mennen claimed benefits and the employer felt that he did not meet the availability requirements of law due to illness or other factors that prevented him from reporting for available work.

The employer in this case specifically notes that Mr. Mennen was not able and available for available employment during the period October 10 through October 14, 2008 as the claimant had personally chosen to take those days off work. Mr. Mennen testified that he did claim benefits for that period, however. As sufficient records were not available at the time of hearing to be offered as exhibits or to be used in determining whether the claimant was able and available for work for the majority of the weeks, the issue of whether the claimant properly reported his earnings and availability and whether the claimant is eligible to receive unemployment insurance benefits is remanded to the Claims Division for determination as to whether there has been an overpayment, the amount of the overpayment and whether Mr. Mennen will have to return those benefits.

871 IAC 24.23(26) provides:

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

(26) 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.

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 states pursuant to section 602.10101.

**DECISION:**

The representative's decision dated January 7, 2009, reference 01, is affirmed as modified. The portion of the determination finding that the claimant was employed part-time or working on-call because he was not performing the services in the same pattern of employment as in the base period is affirmed. The portion of the determination finding the claimant able and available for work beginning October 26, 2008 is remanded to the Claims Division for determination as to

whether the claimant has been overpaid unemployment insurance benefits during the weeks ending November 8 and November 15, 2008, the amount of the overpayment and whether the claimant will have to repay those benefits.

---

Terence P. Nice  
Administrative Law Judge

---

Decision Dated and Mailed

css/css