

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JASON W CAPPS**  
Claimant

**APPEAL NO. 07A-UI-10001-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SARDUCCIS**  
Employer

**OC: 01/28/07 R: 04  
Claimant: Respondent (2)**

Section 96.4-3 – Able and Available  
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Sarduccis (employer) appealed a representative's October 22, 2007 decision (reference 05) that concluded Jason Capps (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 14, 2007. The claimant participated personally. The employer participated by Terry Moffit, Director of Operations, and Deborah Stratton, General Manager.

**ISSUE:**

The issue is whether the claimant is able and available for work.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 21, 2007, as a part-time crew member. He averaged 20.45 hours of work per week in July 2007. In August 2007, the claimant told the employer that he was unavailable to work Tuesdays and during the daytime hours on Monday, Wednesday and Friday because he would be attending school and personal issues. The employer complied with the claimant's request and the claimant averaged 30.73 hours per week in August 2007.

In September 2007, the claimant called in sick a number of days. He was tardy in reporting to work because he overslept on September 23, 2007. The employer issued the claimant a three-day suspension and the claimant did not work on September 28, 29 and 30, 2007. The claimant averaged 12.18 hours of work per week in September 2007. The claimant reopened his claim for benefits in mid-September 2007.

The claimant increased his work availability with the employer and averaged 21.18 hours of work per week in October 2007. The claimant continues to work for the employer.

The claimant's and the employer's testimony was not in agreement. The administrative law judge finds the employer's testimony to be more credible because the claimant's testimony was inconsistent.

**REASONING AND CONCLUSIONS OF LAW:**

The issue is whether the claimant was able and available for work. For the following reasons the administrative law judge concludes he was not.

871 IAC 24.23(16), (26) provides:

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

(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.

(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.

When an employee is not willing to perform work during the hours that work is available he is considered to be unavailable for work. The claimant was not willing to make himself available for the regular hours of his work. In addition, the claimant was hired as a part-time worker and is still working part-time for the employer. He is still employed in a part-time position as was agreed to at the time he was hired. The claimant is disqualified from receiving unemployment insurance benefits because he was not available for work.

Iowa Code section 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.

The claimant has received benefits since filing his claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

**DECISION:**

The representative's October 22, 2007 decision (reference 05) is reversed. The claimant is disqualified from receiving unemployment insurance benefits because he is not available for work with the employer. The claimant is overpaid benefits in the amount of \$722.00.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs