

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**GARY E MILLER**  
Claimant

**APPEAL NO. 21A-UI-06154-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DEWITT FOOD BANK INC**  
Employer

**OC: 12/27/20**  
**Claimant: Respondent (4)**

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Iowa Code Section 96.4(3) – Able & Available  
Iowa Code Section 96.1A(37) – Temporary & Partial Unemployment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 16, 2021, reference 01, decision that allowed benefits to the claimant beginning December 27, 2020, provided the claimant was otherwise eligible, and that held the employer's account could be charged. The deputy concluded that the claimant was able to work and available for work, but that the employer was not providing the same employment as in the base period. After due notice was issued, a hearing was held on May 5, 2021. Claimant, Gary Miller, participated. Thomas Baumgartner represented the employer. Exhibit 1 was received into evidence. The administrative law judge took official notice of the following Agency administrative records: KCCO, DBRO and WAGE-A.

**ISSUES:**

Whether the claimant was able to work and available for work during the three-week period of December 27, 2020 through January 16, 2021.

Whether this employer's account may be charged for benefits for the period of December 27, 2020 through January 16, 2021.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant is employed by Dewitt Food Bank, Inc. as a part-time home delivery clerk. The claimant usually works for the employer on Fridays. The claimant starts at 8:00 a.m. and works from six to eight hours. The claimant does not work for the employer on any other days of the week. The claimant's hourly wage has at all relevant times been \$9.70 an hour.

The claimant established an original claim or benefits that was effective December 27, 2020. Iowa Workforce Development set the weekly benefit amount for regular benefits at \$253.00. The claimant made weekly claims for the weeks that ended January 2, January 9, and January 16, 2021. When the claimant made his weekly claim for the week that ended January 2, he reported he had earned \$81.00 that week. When the claimant made his weekly claim for the week that ended January 9, he reported earning \$388.00 in wages that week. When the claimant made his weekly claim for the week that ended January 16, he reported

earning \$376.00 in wages that week. The claimant discontinued his claim for benefits after the week that ended January 16, 2021. The claimant received no benefits in connection with the claim.

The base period for purposes of the December 27, 2020 claim consists of the third and fourth quarters of 2019 and the first and second quarters of 2020. The claimant's base period wages were as follows:

<u>EMPLOYER</u>	<u>ACCT-LOC</u>	<u>2019/3</u>	<u>2019/4</u>	<u>2020/1</u>	<u>2020/2</u>
HY-VEE INC	006858-000	2178	1918	2966	2601
DEWITT FOOD BANK INC	560498-000	710	665	1106	1279
J.C. LANDSCAPE MAINTENANC	316847-000				1702

The claimant's more recent wages were as follows:

<u>EMPLOYER</u>	<u>ACCT-LOC</u>	<u>2020/3</u>	<u>2020/4</u>	<u>2021/1</u>
HY-VEE INC	006858-000	1623	3535	3402
J.C. LANDSCAPE MAINTENANC	316847-000	4094	1046	
DEWITT FOOD BANK INC	560498-000	817	841	733

The claimant filed his claim for benefits in response to an annual seasonal layoff from employer J.C. Landscape Maintenance. The claimant concedes there has be no change in the employment with Dewitt Food Bank, except that employer did not have work for the claimant on January 1, 2021, New Year's Day. The employer concedes there was no work for the claimant on New Year's Day. The employer is never open for business on New Year's Day. The employer had work available for the claimant during other days during the week that ended January 2, 2021, but the claimant elects to limit his work for Dewitt Food Bank to the Friday shift.

#### **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 Admin. Code r. 871-24.22(2) provides:

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.

Iowa Admin. Code r. 871-24.23(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 96.1A(37) 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.

If a claimant 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. Iowa Code section 96.7(2)(a)(2)(a).

The claimant was not partially or temporarily unemployed from this employer at any time during the period of December 27, 2020 through January 16, 2021. Though the employer did not have work for claimant on New Year's Day, a legal holiday, the employer had work for the claimant on other days during the week that ended January 2, 2021 and had the claimant's usual Friday shift for the claimant during the weeks that ended January 9 and January 16, 2021. This employer's account will not be charged for benefits for the three weeks between December 27, 2020 and January 16, 2021. The determination that the claimant was not temporarily or partially unemployed from this employer during those three weeks would not prevent the claimant being available for work and eligible for benefits for those weeks, provided the claimant met all other eligibility requirements. However, because the claimant's combined wages for the weeks that ended January 9 and January 16, 2021 exceeded his \$253.00 weekly benefit amount by more than \$15.00, the claimant cannot be deemed unemployed or partially unemployed during those two weeks and is not eligible for benefits for those two weeks.

**DECISION:**

The February 16, 2021, reference 01, is modified in favor of the employer/appellant as follows. The claimant was not temporarily or partially unemployed from this employer during the three weeks between December 27, 2020 and January 16, 2021. This employer's account will not be charged for benefits for those three weeks. The determination that the claimant was not temporarily or partially unemployed from this employer during those three weeks would not prevent the claimant being available for work and eligible for benefits for those weeks, provided the claimant met all other eligibility requirements. However, because the claimant's combined wages for the weeks that ended January 9 and January 16, 2021 exceeded his \$253.00 weekly benefit amount by more than \$15.00, the claimant cannot be deemed unemployed or partially unemployed during those two weeks and is not eligible for benefits for those two weeks.



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James E. Timberland  
Administrative Law Judge

September 13, 2021  
Decision Dated and Mailed

jet/scn