

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JERRY L NORTON

Claimant

APPEAL NO. 15A-UI-12668-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FLAGGER PROS USA LLC

Employer

OC: 10/18/15

Claimant: Respondent (4/R)

Iowa Code Section 96.4(3) – Able & Available

Iowa Code Section 96.19(38)(b) & (c) – Partial and Temporary Unemployment

Iowa Code Section 96.7(2) – Employer Liability

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 10, 2015, reference 02, decision that allowed benefits to the claimant effective October 18, 2015, provided he was otherwise and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant was able and available for work, but partially unemployed. After due notice was issued, a hearing was held on December 4, 2015. Claimant Jerry Norton participated and presented additional testimony through Sharon Bejarano. Victoria Benson, Human Resources Manager, represented the employer. Exhibits One through Five and A were received into evidence. The administrative law judge took official notice of the follow Agency administrative records: DBRO AND KCCO. The parties waived formal notice on the question of whether Mr. Norton had refused suitable work without good cause.

The administrative law judge notes the entry of another decision on November 10, 2015, the reference 03, decision that denied benefits for the week ending October 31, 2015, based on an Agency conclusion that Mr. Norton was ill and, therefore, not able and available for work that week. The administrative law judge notes that Mr. Norton did not appeal that reference 03 decision and that the reference 03 decision, therefore, became a final agency decision binding upon the parties.

ISSUES:

Whether the claimant has been able to work and available for work since he established the claim that was effective October 18, 2015.

Whether the claimant has been partially unemployed and/or temporarily unemployed since he established his claim.

Whether the employer's account may be assessed for benefits paid to the claimant for any or all of the weeks for which Mr. Norton has claimed benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jerry Norton commenced his employment with Flagger Pros U.S.A., L.L.C., in June 2014 and continues in the employment. Mr. Norton works as a road construction flagman. Though the employer calls the employment full-time, the employment does not consistently provide full-time work hours. Instead, the employer sends Mr. Norton on temporary flagging assignments throughout Iowa. When there is work, the work hours usually run from dawn to dusk. The work pays \$10.00 per hour unless a higher wage for the particular assignment is mandated by law.

Mr. Norton established a claim for unemployment insurance benefits that was effective October 18, 2015. Workforce Development set Mr. Norton's weekly benefit amount at \$260.00. Flagger Pros is Mr. Norton's primary base period employer. Mr. Norton's quarterly wages from the employment have been as follows:

<u>Quarter</u>	<u>Quarterly Wages</u>	<u>Weekly Average</u>
2014/2	955.00	partial quarter
2014/3	5,989.86	461.76
2014/4	2,365.55	181.97
2015/2	5,083.37	391.03
2015/3	8,499.98	653.84

For the week that ended October 24, 2015, Mr. Norton reported working zero wages and received \$260.00 in weekly unemployment insurance benefits. During that week, Mr. Norton had actually worked 15.75 hours on a project in Marshalltown for which he was paid \$154.75. That was all the work the employer had for Mr. Norton that week.

During the week that ended October 31, 2015, Mr. Norton was not able to work due to illness, as indicated in the November 10, 2015, the reference 03, decision. The employer made unsuccessful attempts to reach Mr. Norton by telephone that week. When Mr. Norton made his weekly claim for that week, he reported zero wages and received \$260.00 in benefits.

During the week that ended November 7, 2015, Mr. Norton was again unable to work due to illness. The employer made an unsuccessful attempt early in the week to contact Mr. Norton regarding an assignment. On November 6, 2015, Mr. Norton contacted the employer to indicate that he was unable to work, that he had been undergoing medical tests, and that he would provide the employer with documentation. Mr. Norton attributed his symptoms and illness to bug bites he has received at an Ottumwa motel in connection with a work assignment. For some reason, Mr. Norton had reported \$300.00 in wages for that week and had not received any unemployment insurance benefits for the week.

During the week that ended November 14, 2015, Mr. Norton reported zero wages and received \$260.00 in unemployment insurance benefits. However, Mr. Norton was still undergoing medical evaluation that week and was unable to perform work. On November 10, 2015, Mr. Norton had faxed the employer a medical excuse indicating that he would be available to return to work on Tuesday, November 17, 2015.

During the week that ended November 21, 2015, Mr. Norton was available for work pursuant to his release to return to work on Tuesday, November 17. On November 16, the employer notified Mr. Norton of a one-day assignment in Marshalltown on November 17. Mr. Norton worked the assignment, 9.75 hours, for which he was paid \$147.71. When Mr. Norton made his weekly unemployment insurance claim for that week, he reported only \$90.00 in wages and

received \$235.00 in benefits. On the morning of Thursday, November 19, 2015, the employer attempted to contact Mr. Norton about an assignment to start in Ottumwa on November 20, 2015. The employer left a voice mail message, but Mr. Norton did not immediately receive the message because his cell phone was malfunctioning due to a battery that would not keep a charge. Mr. Norton contacted the employer on November 20 in response to the voicemail message, but the employer said it was too late and the Ottumwa assignment was no longer available. Mr. Norton asked the employer to let him know if any additional assignments became available.

Mr. Norton was available for work during the week that ended November 28, 2015, but the employer had no work for him that week. The assignment that the employer had wanted Mr. Norton to start on November 20, was also expected to provide hours during the period of November 23-28, 2015. When Mr. Norton made contact with the employer on November 20, the employer told Mr. Norton that the proposed hours for the next week were also no longer available. When Mr. Norton made his weekly claim, he reported zero wages and received \$260.00 in benefits.

As of the appeal hearing on November 4, 2015, the employer had had no work for Mr. Norton for the week that ended December 5, 2015. However, Mr. Norton had been available for work that week.

REASONING AND CONCLUSIONS OF LAW:

A claimant who fails to accept an offer of suitable employment without good cause is disqualified for benefits until the claimant earns 10 times his weekly benefit amount from insured work. See Iowa Code section 96.5(3)(a).

Iowa Administrative Code rule 871 IAC 24.24(1)a provides:

(1) Bona fide offer of work.

a. In deciding whether or not a claimant failed to accept suitable work, it must first be established that a bona fide offer of work was made to the individual by personal contact and a definite refusal was made by the individual. For purposes of a recall to work, a registered letter shall be deemed to be sufficient as a personal contact.

At no time during the period of October 18, 2015 through the benefit week that ended December 5, 2015, did Mr. Norton refuse an offer of suitable work.

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".

Iowa Admin. Code r. 871-24.22(1)a, and (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.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

(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(1) provides:

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

(1) An individual who is ill and presently not able to perform work due to illness.

Iowa Admin. Code r. 871-24.23(29) and (35) 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.

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

An individual shall be deemed *partially* unemployed in any week in which, 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. Iowa Code Section 96.19(38)(b).

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 Code section 96.19(38)(c).

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.

2. Contribution rates based on benefit experience.

a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.

(2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

(a) However, if the individual 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. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

[Emphasis added.]

Each week of the claim must be examined separately to determine whether Mr. Norton was able and available, partially unemployed or temporarily unemployed during the week. The administrative law judge addressed each relevant week separately in the findings of facts.

For the week ending October 24, 2015, Mr. Norton was able to work, available for work, but partially unemployed. The employer only had 15.75 hours of work for him that week. Mr. Norton is eligible for benefits for that week, provided he meets all other eligibility requirements. Because Mr. Norton underreported his wages for that week when he made his weekly claim, this matter will be remanded to the Benefits Bureau for redetermination of the benefit amount based on the correct wages of \$154.75 and for entry of an appropriate overpayment decision.

During the weeks that ended October 31, November 7, and November 14, 2015, Mr. Norton was not able and available for work and, therefore, not eligible for unemployment insurance benefits. During those weeks, Mr. Norton was preoccupied with his health issues. Because Mr. Norton received benefits for the weeks that ended October 31, 2015 and November 14, 2015, this matter will be remanded for entry of an overpayment decision concerning benefits disbursed for those weeks.

During the week that ended November 21, 2015, Mr. Norton was able to work and available for work for the majority of the week pursuant to his release to return to work on Tuesday,

November 17. Mr. Norton performed work in a one-day assignment for which he was paid \$147.71. Mr. Norton did not refuse the assignment the employer wanted to place him in later in the week. Mr. Norton was out of touch with the employer on one day, November 19, 2015 due to a defective phone. Mr. Norton was in touch with the employer the very next day, at which time the assignment was no longer available. Because Mr. Norton was available for the majority of the week, he met the availability requirement. Mr. Norton was partially unemployed for the week and was eligible for benefits, provided he meets all other eligibility requirements. However, because Mr. Norton underreported his wages for the week, this matter will be remanded for redetermination of the weekly benefit amount, based on the correct wages of \$147.71, and for an overpayment decision.

During the weeks that ended November 28 and December 5, 2015, Mr. Norton was able to work, available for work and temporarily unemployed. The work the employer expected to have for Mr. Norton for the week that ended November 28 was no longer available as of November 20. Mr. Norton is eligible for benefits for both weeks, provided he meets all other eligibility requirements.

The employer is the sole base period employer. The employer's account may be charged for benefits for any of the weeks for which this decision indicates that the claimant is eligible for benefits.

DECISION:

The November 10, 2015, reference 02, decision is modified as follows:

For the week ending October 24, 2015, the claimant was able to work, available for work, but partially unemployed. The claimant is eligible for benefits for that week, provided he meets all other eligibility requirements. This matter is remanded to the Benefits Bureau for redetermination of the benefit amount based on the correct wages of \$154.75 and for entry of an appropriate overpayment decision.

During the weeks that ended October 31, November 7, and November 14, 2015, the claimant was not able and available for work and, therefore, not eligible for unemployment insurance benefits. This matter is remanded for entry of an overpayment decision concerning benefits disbursed for the weeks ending October 31 and November 14, 2015.

During the week that ended November 21, 2015, the claimant was able to work, available for work, and partially unemployed. The claimant is eligible for benefits for the week, provided he meets all other eligibility requirements. This matter is remanded for redetermination of the weekly benefit amount, based on the correct wages of \$147.71, and for an overpayment decision.

During the weeks that ended November 28 and December 5, 2015, the claimant was able to work, available for work, and temporarily unemployed. The claimant is eligible for benefits for both weeks, provided he meets all other eligibility requirements.

The employer's account may be charged for benefits for any of the weeks for which this decision indicates that the claimant is eligible for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs