

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CHRISTOPHER C PARHAM
Claimant

FLAGGER PROS USA LLC
Employer

APPEAL NO. 15A-UI-12735-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/11/15
Claimant: Respondent (4)**

Iowa Code § 96.4-3 – Able and Available
Iowa Code § 96.3-7 – Recovery of Overpayment of Benefits
871 IA Admin. Code 24(10) – Employer Participation in Fact Finding

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated November 16, 2015, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on December 7, 2015. Claimant participated personally. Employer participated by Victoria Benson.

ISSUES:

Whether claimant is able and available for work?

Whether claimant is partially unemployed?

Whether claimant was overpaid benefits?

If claimant was overpaid benefits, should claimant repay benefits or should employer be charged due to employer's participation or lack thereof in fact finding?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on November 28, 2015. Claimant works as a certified flagger for employer. Claimant is a full-time employee, but at times claimant does not receive full-time hours. Claimant's and employer's difficulty lies in the fact that claimant has a very tight budget. When claimant is not getting full-time hours, he is not able to meet his financial obligations. When claimant does not meet his financial obligations, his phone might get turned off, or his car might not have gas to get to a job, or claimant may not be able to make his car payment. Claimant's car was recently impounded.

Employer called claimant on multiple occasions to have claimant do work. Claimant either did not have a car, or had no gas money, or the phone had been turned off, so claimant was not able to work when it was available. Work has not been available on a steady or ongoing basis,

but has been available at times. Claimant initially filed for unemployment benefits when he was not getting full-time work. As a result of claimant not receiving full time hours, he was not able to make payments, and as a result, could not work any hours when his car, phone, and gas money were removed.

Work continues to be available for claimant. When claimant initially got the job, it was understood that claimant would be responsible for getting to the jobs. Claimant was allowed to use a work vehicle to transport himself and others to jobs for a period of time, but that vehicle is no longer available for his use.

Claimant has been receiving benefits in this matter. Employer did not participate in fact finding as employer did not receive notice of claimant having filed a claim.

REASONING AND CONCLUSIONS OF LAW:

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 § 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

Iowa Code § 96.3(7)a-b, 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.

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 § 96.8, subsection 5.

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 § 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 § 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 § 602.10101.

Iowa Code § 96.3(3) provides:

3. Partial unemployment. An individual who is partially unemployed in any week as defined in § 96.19, subsection 38, paragraph "b", and who meets the conditions of eligibility for benefits shall be paid with respect to that week an amount equal to the individual's weekly benefit amount less that part of wages payable to the individual with respect to that week in excess of one-fourth of the individual's weekly benefit amount. The benefits shall be rounded to the lower multiple of one dollar.

Iowa Admin. Code r. 871-24.23(4) provides:

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

(4) If the means of transportation by an individual was lost from the individual's residence to the area of the individual's usual employment, the individual will be deemed not to have met the availability requirements of the law. However, an individual shall not be disqualified for restricting employability to the area of usual employment. (See subrule 24.24(7).

871 IAC 24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code § 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was

discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code § 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code § 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code § 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code § 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code § 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

In examining this claim, the court must first examine whether claimant was able and available for work. The next question facing the administrative law judge is whether there was work available for claimant, and if work was available on a limited basis, when that work was available. In this matter claimant has not shown that he has remained able and available for work on those dates when work was available. As he knew that he had to have transportation to his place of employment - wherever that may be - claimant's lack of a car or lack of gas money to get to work creates a situation where claimant is not able to get to work, and therefore not eligible for benefits.

But this analysis alone is not determinative. Claimant argues that the reason his car was repossessed and the reason he has no gas money is because he was not getting hours when he had his car. Claimant filed his original claim on October 11, 2015 as he had not been getting hours for his full-time employment. As of October 19, 2015 employer offered hours to claimant which claimant declined due to transportation problems. Claimant is eligible to receive unemployment benefits in this matter for the week ending on October 17, 2015 as there was no showing that claimant was unable to get to work that week. Subsequent to that week,

claimant's lack of work was as a result of a lack of transportation and claimant is not eligible for benefits.

The overpayment issue was addressed. Claimant has received unemployment benefits in this matter.

The issue of employer participation was addressed. As employer did not receive notice of the fact-finding hearing, employer's lack of participation in fact finding will not result in employer's account being charged in this matter.

DECISION:

The decision of the representative dated November 16, 2015, reference 01, is modified. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements for the week ending October 18, 2015. Subsequent to that week, claimant has not been able and available for work, and is not eligible for benefits. Any payments received by claimant subsequent to that week will be deemed overpayments. Employer will not be responsible for overpayments received by claimant.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/css