

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHAHNA WITTER

Claimant

APPEAL NO: 09A-UI-18929-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CHILDSERVE HABILITATION CTR INC

Employer

OC: 11-08-09

Claimant: Respondent (2)

Section 96.4-3 – Able and Available for Work

Section 96.4-3 – Same Hours and Wages

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 7, 2009, reference 02, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 21, 2010. The claimant provided a phone number prior to the hearing but was not available at that number at the time of the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Amanda Blackman, Staff Relations Coordinator and Missy McCann, AM Supervisor on the Continuing Care Unit, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the claimant is still employed with the employer for the same hours and wages as contemplated in the original contract of hire.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was hired by Childserve Habilitation Center April 30, 2007. There was no change in her wages or hours until she suffered a non-work-related automobile accident and was on FMLA until exhausting it April 17, 2009. She received a full release to return to work around April 17, 2009, and returned to work around that date. After trying to work full time she realized she was not physically able to do so and consequently she chose per diem status due to her back injury. The employer has full and part-time work available. A per diem employee can work as often or as little as she likes but must work at least one shift per quarter. In October 2009, the claimant chose to work 21 hours; in November 2009, the claimant chose to work 29.5 hours; in December 2009, the claimant chose to work 15.75 hours; and to date in January 2010 she chose to work 17.75 hours. The employer offered her hours “numerous” times but she was unable to take them.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is still employed at the same hours and wages.

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".

The claimant was hired as a full-time CNA. There has been no separation from her employment and the claimant is currently working for this employer on a per diem basis at her own request due to the fact she had a car accident and injured her back, which still bothers her and makes working difficult. When she chose to become a per diem employee that became her new contract of hire and the claimant is still working the same hours and wages as contemplated in that original contract of hire. Consequently, the claimant is not eligible to receive benefits.

DECISION:

The December 7, 2009, reference 02, decision is reversed. The claimant is still employed at the same hours and wages as in her per diem contract of hire and therefore is not qualified for benefits.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css