

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VIRGIL J BIRDSELL
Claimant

APPEAL NO. 10A-UI-06663-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MONONA WIRE CORP
Employer

OC: 03-28-10
Claimant: Appellant (2)

Iowa Code § 96.4(3) – Able and Available
Iowa Code § 96.19(38)a & b – Total and Partial Unemployment
Iowa Code § 96.7(2)a – Same Base Period Employment

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 30, 2010, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on June 22, 2010. The claimant did participate along with his wife Audrey Birdsell. The employer did not participate.

ISSUE:

Is the claimant partially unemployed?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full time until April 1, 2009 when he was laid off. When he was called back to work on July 26, 2009 his hours were cut from 40 per week down to 24 per week. Additionally, his wages were reduced by \$2.00 per hour and he no longer receives any employee benefits such as insurance. The claimant is working fewer hours than he was originally hired to work and is partially unemployed. The claimant works all the hours the employer offers him.

The employer provided the name Teresa Eilers to participate in the hearing. When the administrative law judge called the number provided for Ms. Eilers she reached the voice mailbox of Jackie McEwan. A voice mail was left for Ms. McEwan. The administrative law judge called the employer back and using their name directory reached Ms. Eilers. The administrative law judge told Ms. Eilers that the voice mail was picking up for Ms. McEwan and Ms. Eilers said she would go to Ms. McEwan's office and answer the telephone. Again the administrative law judge called the telephone number provided for Ms. McEwan and her voice mail picked up again. The administrative law judge left a second voice mail message and began the hearing with the claimant at 9:09 a.m. The hearing was completed at 9:17 a.m. Ms. McEwan did not call back until 9:23 a.m. after the record had been closed. She did not have a good cause reason for why she was not responding to the administrative law judge's telephone calls and voice mail messages.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the employer's request to reopen the hearing should be granted or denied.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The employer's failure to participate was not related to an emergency, or other good cause reason for being unavailable to participate when the hearing was called as she did not answer the telephone. The employer did not establish a good cause to reopen the hearing record and the request to reopen the hearing is denied.

For the reasons that follow, the administrative law judge concludes the claimant is partially unemployed beginning on July 26, 2009.

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 Code § 96.19-38 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, 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.

An individual shall be deemed partially unemployed in any week in which 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.

Iowa Code § 96.7-2-a(2) provides:

2. Contribution rates based on benefit experience.

a. (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.

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.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of

calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

Because the claimant is currently employed less than his regular full-time hours, he is considered partially unemployed. Benefits may be allowed based upon reporting of weekly earnings. For whatever period the employer is not offering the same wages and hours as contemplated in the contract of hire, it may be liable for benefit charges to its account.

DECISION:

The April 30, 2010, reference 02, decision is reversed. The claimant is partially unemployed and benefits are allowed, provided he is otherwise eligible. The account of employer (account number 010889), may be liable for charges.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs