

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PO HSER HSER
Claimant

APPEAL NO: 11A-UI-05919-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 03/20/11

Claimant: Appellant (4)

Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits
Section 96.4-3 - Able and Available

STATEMENT OF THE CASE:

Po Hser Hser (claimant) appealed a representative's April 26, 2011 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits in connection with his employment with Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 2, 2011. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Susan Pfeifer appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Is the claimant employed by the employer for less than his usual hours and wages even though he remains able and available for work, and is he therefore eligible for full or partial unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer on July 18, 2007. He works full time as a production worker on the "B" shift at the employer's Council Bluffs, Iowa case ready facility. His full-time status is based on normally working 40 hours per week. Due to demand, there are occasions where the claimant's department works less than 40 hours per week, as there are also times where he may be required to work more than 40 hours per week. His hourly wage is \$10.85, plus a \$.30 per hour attendance incentive for weeks in which he does not have any absences.

The claimant established an unemployment insurance benefit year effective March 20, 2011. Based upon his base period wages, which are exclusively with the employer, his weekly benefit amount was calculated to be \$332.00. The claimant filed weekly claims for the weeks ending March 26 through May 21. Those claims and the hour and wage information provided by the employer show:

Week ending	Hours worked as reported by the employer	Gross wages earned as reported by the employer	Gross wages earned as reported by the claimant
03/26/11	3.62	\$ 39.44	\$ 39.00
04/02/11	25.62	\$ 287.22	\$ 282.00
04/09/11	28.67	\$ 321.54	\$ 314.00
04/16/11	29.53	\$ 331.41	\$ 314.00
04/23/11	38.32	\$ 429.90	\$ 303.00
04/30/11	31.68	\$ 355.61	\$ 336.00
05/07/11	29.50	\$ 291.25	\$ 314.00
05/14/11	26.82	\$ 266.88	\$ 292.00
05/21/11	32.78	\$ 320.20	\$ 358.00

The administrative law judge accepts the employer's wage information as being more accurate.

For each of the weeks reported except for the week ending March 26, the claimant's hours were reduced solely due to a lack of work due to lack of demand. For the week ending March 26, additional work was available to the claimant, but he did not work the available hours, because he had gone home early for a health-related reason on March 21, and had then called in sick on March 22, March 23, March 24, and March 25.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law provides that a claimant is deemed partially unemployment insurance benefits if he is not employed at his usual hours and wages and earns less than his weekly benefit amount plus \$15.00, which in this case is \$347.00 (\$332.00 + \$15.00). Iowa Code § 96.19-38-b.

However, implicit with the concept of allowing benefits for a claimant who is working fewer hours is that the reduction bringing the earned wages low enough to qualify for partial benefits has been because of the choice of the employer, not that the claimant is not able or available to work the hours accessible to him. Rather, he must remain available for work on the same basis as when he was previously working. Iowa Code § 96.4-3; 871 IAC 22(2)(a). The primary reason the claimant's earnings for the week ending March 26, 2011 were substantially below the \$347.00 partial eligibility level is because he was not able and available to work the number of hours the employer had for him that week due to illness, and he is thus ineligible for unemployment insurance benefits for that week. 871 IAC 24.23(29).

Beginning on or about the week ending April 2, 2011, the employer was not providing the claimant with substantially the same employment as it provided during his base period. Consequently, the claimant is qualified to receive partial unemployment insurance benefits for which his earnings were less than \$347.00, provided he was otherwise eligible. To be eligible for benefits for any particular week, the claimant must file a weekly claim for that week reporting his gross wages earned (not paid) for that week, rounded to the nearest dollar; the amount of his eligibility will then be determined pursuant to the formula set out by the statute. 871 IAC 24.52(8); Iowa Code § 96.3-3.

Based upon the employer's wage information, it appears that the claimant has partial benefit eligibility for the weeks ending April 2, April 9, April 16, May 7, May 14, and May 21. The matter

is remanded to the Claims Section for computation of the claimant's partial benefit eligibility for those weeks using the gross wages earned for those weeks as provided by the employer.

DECISION:

The unemployment insurance decision dated April 26, 2011 (reference 01) is modified in favor of the claimant. The claimant is not eligible for partial unemployment insurance benefits for the week ending March 26, 2011. The claimant is eligible for partial unemployment insurance benefits for the six weeks identified above. The matter is remanded to the Claims Section for computation of the amount of his eligibility for those weeks.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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