

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARY J PATTEN
Claimant

APPEAL NO. 12A-UI-09308-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CAPROCK INC
HOME INSTEAD SENIOR CARE
Employer

OC: 06/17/12
Claimant: Respondent (2-R)

Section 96.4-3 – Able and Available for Work
871 IAC 24.23(26) – Availability Disqualification/Still Employed Part-Time at Same Hours and Wages as Agreement of Hire
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Caprock, Inc. filed a timely appeal from a representative's decision dated July 26, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits beginning June 17, 2012 finding the claimant was available for work and the claimant's unemployment was due to a short-term layoff. Due notice was provided and the hearing was initially scheduled to be held on August 27, 2012. The hearing was postponed on two occasions at the request of the parties. Due notice was again provided and a telephone hearing was held on December 5, 2012. Prior to the hearing the claimant stated in writing that she would not be participating at the hearing. The employer participated by Ms. Janet Mau and Ms. Jenni Crow.

ISSUE:

The issue is whether the claimant is still employed in a part-time job at the same hours and wages as contemplated in the original agreement of hire.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Mary Patten began employment with the captioned employer d/b/a Home Instead Senior Care on December 21, 2010. At the time of hire Ms. Patten was specifically informed by the employer that she was being hired on a part-time basis with no guarantee of any minimum number of working hours each week. It was explained to the claimant that her working hours were dependent upon client requests for services. Ms. Patten was paid by the hour and continues to be employed by Home Instead Senior Care at the time of hearing. During the course of her employment, Ms. Patten's work hours varied depending on the client's needs. In mid June of 2012, few working hours were available to Ms. Patten because of fewer requests for service and because some clients had specifically requested that Ms. Patten not be assigned to provide care to them. Ms. Patten opened a claim for partial unemployment insurance benefits with an

effective date of June 17, 2012. Subsequently, the claimant's part-time working hours increased again based upon client needs. Claimant continues to be employed by the company at the same or greater rate of pay per hour.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether Ms. Patten continues to be employed in a part-time job at the same hours and wages that were contemplated in the original agreement of hire between the parties. She does.

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".

871 IAC 24.23(26) provides:

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

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

The evidence in the record establishes that Ms. Patten was not guaranteed any minimum number of working hours each week as a part-time worker for Caprock, Inc. The claimant was aware that the number of working hours were dependent upon client needs and that on occasion the employer would not have any working hours available to her in her part-time job.

At the time that Ms. Patten opened her claim for benefits she continued to be employed part time under the same agreement of hire with no guarantee as to a minimum number of part-time working hours each week and the claimant continued to be paid at the same or greater rate per hour as when hired.

For the above-stated reasons the administrative law judge concludes that the claimant cannot be considered to have been partially unemployed with this employer and is disqualified from receiving unemployment insurance benefits because she is unavailable for work within the meaning of the Employment Security Law as she continued to be employed part time at the same hours and wages contemplated in the agreement of hire with her employer. The claimant is not working on a reduced work week basis different from what was agreed upon. Unemployment insurance benefits are withheld effective June 17, 2012.

Iowa Code section 96.3-7, 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.

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 section 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 section 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 state pursuant to section 602.10101.

DECISION:

The representative's decision dated July 26, 2012, reference 01, is reversed. Claimant is still employed in her part-time job working the same hours and wages as contemplated in the original agreement of hire and has not been working on a reduced work week basis different from the agreement of hire and is not eligible to receive unemployment insurance benefits. Partial unemployment insurance benefits are denied effective June 17, 2012 and until the claimant establishes eligibility for benefits. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs