IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

EDWARDS, YOLANDA, Y
Claimant

CBS STAFFING LLC
Employer

APPEAL NO. 10A-UI-17141-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/21/10
Claimant: Respondent (2-R)

Iowa Code Section 96.7(2)(a)(6) – Appeal from Statement of Charges
Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.7(2)(a)(2)(a) – Employer Liability
Iowa Code Section 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed an appeal from the August 3, 2010, reference 07, decision that allowed benefits to the claimant effective March 28, 2010, based on an Agency conclusion that the claimant was able and available for employment. After due notice was issued, a hearing was held by telephone conference call on January 26, 2011. The claimant participated. Brad Ortmeier represented the employer. Department Exhibits D-1 and D-2 were received into evidence. The administrative law judge took official notice of the Agency's administrative record of wages reported by or for the claimant and benefits disbursed to the claimant. The administrative law judge took official notice of the April 6, 2010, reference 03 decision, the April 15, 2010, reference 01 decision, the administrative law judge decision in Appeal Number 10A-UI-05991-ET, the April 21, 2010, reference 05 decision, the April 21, 2010, reference 02 decision, the April 26, 2010, reference 04 decision, the August 3, 2010, reference 07 decision, the August 5, 2010, reference 99 decision, the September 8, 2010, reference 99 decision and the January 11, 2011, reference 99 decision. The administrative law judge took official notice of the Agency's administrative records concerning the April 23, 2010 fact-finding interview that led to the April 26, 2010, reference 04 decision. The administrative law judge took official notice of the November 10-22, 2010 correspondence between the employer and the Workforce Development Tax Bureau. The administrative law judge took official notice of the official clerk of court records concerning the Polk County traffic violations that resulted in loss of the claimant driving privileges, specifically case numbers STA0218023, WHNTA0298131 and WHNTA0298132, which records are available to the public at www.iowacourts.state.ia.us.

ISSUES:

Whether the employer's appeal was timely.

Whether the claimant has been able to work and available for work since March 28, 2010.

Whether the employer's account may be charged for benefits paid to the claimant for the period beginning March 28, 2010.

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Yolanda Edwards established a claim for unemployment insurance benefits that was effective March 21, 2010, in response to her March 18, 2010 separation from full-time employment with Pinnacle Health Facilities (employer account number 354822). Workforce Development initially denied benefits in connection with the separation from Pinnacle. See the April 15, 2010, reference 01 decision.

Ms. Edwards had additional part-time employment at the same time she worked for Pinnacle. In January 2008, Ms. Edwards started part-time, on-call (p.r.n.) employment with CBS Staffing, L.L.C. (employer account number 361323). CBS Staffing provides temporary workers to healthcare facilities. CBS Staffing is located in Urbandale, but provided Ms. Edwards with work assignments that included assignments outside the Des Moines metropolitan area. Ms. Edwards has at all relevant times resided in Des Moines. Ms. Edwards initially worked for CBS Staffing as a Certified Nursing Assistant, but later performed work for that company as a Licensed Practical Nurse. Ms. Edwards continued as a part-time, on-call employee with CBS Staffing under the same wages and conditions at the time she established her claim for unemployment insurance benefits. CBS Staffing continued to have the same part-time on-call employment available to Ms. Edwards.

On March 26, 2010, Iowa Workforce Development mailed a notice to CBS Staffing, L.L.C., that Ms. Edwards had filed a claim for unemployment insurance benefits and that the employer's maximum *potential* liability on the claim was $3,996.31. The employer protested liability on the claim. The agency treated the protests timely. The matter was set for a fact-finding interview on April 23, 2010. CBS Staffing participated in the fact-finding interview. Ms. Edwards did not participate in the fact-finding interview. The employer provided truthful information concerning the lack of contact from Ms. Edwards *for months* prior to March 31, 2010. Ms. Edwards' cell phone number had changed and she had not provided CBS Staffing with the new cell phone number prior to March 31, 2010. CBS Staffing provided truthful information to the fact finder concerning Ms. Edwards' agreement to work shifts on April 4, 9, 13, 22, and Ms. Edwards' subsequent notice to the employer that she could not work the shifts because she lacked transportation. Ms. Edwards had in fact lost her driving privileges in early 2009 in connection with a motor vehicle accident and her failure to have auto insurance. Ms. Edwards has never regained her driving privileges, but continued to operate the vehicle illegally. See Polk County case numbers STA0218023, WHNTA0298131 and WHNTA0298132. Based solely on Ms. Edwards' notice to the employer that she lacked transportation to get to work, CBS Staffing ceased its efforts to place her in assignments. But CBS Staffing continued to have the same work available to Ms. Edwards. Ms. Edwards made no further effort to obtain work from CBS Staffing.

On April 26, 2010, a Workforce Development representative entered a reference 04 decision that *denied* benefits effective March 21, 2010, based on an Agency conclusion that the claimant was *not* available for work due to lack of transportation to the area where work was existed. A copy of the decision was mailed to both parties. The claimant did not appeal the April 26, 2010, reference 04 decision and the decision became a final Agency decision.

On July 21, 2010, Administrative Law Judge Julie Elder entered a decision that allowed benefits to Ms. Edwards, *provided she was otherwise eligible*, based on the March 18, 2010 separation from the full-time employment with Pinnacle Health Facilities. See Appeal Number 10A-UI-05991-ET.

On August 2, 2010, Ms. Edwards contacted Workforce Development to ask why she was not receiving unemployment insurance benefits despite the July 21, 2010, Administrative Law Judge decision that allowed benefits, provided she was otherwise eligible. A Workforce Development representative advised Ms. Edwards that the reason she was still not receiving unemployment insurance benefits was the April 26, 2010, reference 04 decision that denied benefits effective March 21, 2010, based on the availability/transportation disqualification. Ms. Edwards was only available for work "close" to her home. Ms. Edwards continued to lack other transportation. In other words, Ms. Edwards' transportation situation had not changed since the April 26, 2010, reference 04 decision that denied benefits based on the availability/transportation disqualification. Ms. Edwards placed further restrictions on her availability that will be addressed below.

Based solely on Ms. Edwards' August 2, 2010 assertions to the Workforce Development representative that she was indeed available for work, the Workforce Development representative entered the August 3, 2010, reference 07 decision that *allowed* benefits to Ms. Edwards effective March 28, 2010, provided she was otherwise eligible. The reference 07 decision stated that Ms. Edwards was "now" able and available for work. It is unclear why the decision was made retroactive to March 28, 2010 if Ms. Edwards was only "now" able and available for work. The decision was entered without a fact-finding interview and without input from any affected employer. The decision indicated on its face that Ms. Edwards was the only party in interest. The decision did *not* indicate an employer in interest to which a copy of the decision should be mailed or which might be impacted by the decision.

Workforce Development did in fact mail a copy of the August 3, 2010, reference 07 decision to CBS Staffing and CBS Staffing received the decision prior to the August 13, 2010 appeal deadline that appeared on the decision. There was nothing in the decision to place CBS Staffing on notice that the employer's account would be assessed for benefits or to otherwise alert the employer that it needed to file an appeal to avoid having its account assessed for benefits. There was no other decision or other correspondence from a Workforce Development between the April 26, 2010, reference 04 decision that denied benefits and the August 3, 2010, reference 07 decision that would have placed the employer on notice that it would be assessed for benefits disbursed to the claimant. Because there was nothing in the August 3, 2010, reference 07 decision to indicate that CBS Staffing would be assessed for benefits or that an appeal was necessary, CBS Staffing did not file an appeal from the August 3, 2010, reference 07 decision until much later.

CBS Staffing did not hear anything more about Ms. Edwards' claim for benefits until the employer received the quarterly statement of charges that was mailed to the employer on November 9, 2010. The quarterly statement of charges assessed $3,996.31 to the employer's account for benefits disbursed to the claimant during the third quarter of 2010. CBS Staffing received the statement of charges on November 9 or 10, 2010 and immediately contacted the Workforce Development Tax Bureau in writing on November 10, 2010 to protest the charge to its account.

On November 22, the Tax Bureau faxed a two-page response to the employer. The two pages consisted of the April 26, 2010, reference 04 decision denying benefits and the August 3, 2010, reference 07 decision allowing benefits. The Tax Bureau had added some written comments,

but nothing to indicate the employer needed to make further protest or further appeal from the assessment. The Tax Bureau provided no information whatsoever to the employer regarding any further rights or remedy that might be available to the employer. The response from the Tax Bureau was inconsistent with their responses in other similar situations.

On December 15, 2010, the employer filed an appeal ostensibly from the August 3, 2010, reference 07 decision. The employer was in fact also appealing from the quarterly statement of charges mailed on November 9, 2010. The employer submitted the appeal by mail in an envelope bearing a legible December 16, 2010 postmark.

From the time Ms. Edwards established her claim for benefits on March 21, 2010, she had been making a weekly report to Workforce Development through the automated telephonic reporting system and had been reporting her gross weekly wages along with her weekly job search information. After Ms. Edwards established her claim for unemployment insurance benefits in connection with her separation from Pinnacle Health Facilities, she did not commence her search for new employment until April 6, 2010, when she received a warning that she needed to make at least two employer contacts per week.

Prior to August 4, 2010, Ms. Edwards had received no unemployment insurance benefits in connection with the claim she had established on March 21, 2010. Ms. Edwards has since been paid $8,283.38 in regular benefits for the period of March 21, 2010 through September 4, 2010 and $7,665.00 in emergency unemployment compensation benefits (EUC) for the period of September 5, 2010 through January 22, 2011. Ms. Edwards was paid an additional $25.00 per week in federal stimulus benefits tied to her eligibility for the regular or EUC benefits.

At the time Ms. Edwards established her claim for benefits, she had additional part-time employment over and above the part-time on-call employment with CBS Staffing. During the fall of 2008, Ms. Edwards had commenced part-time employment with the Des Moines Independent Community School District (employer account number 103234) as a food service worker. Ms. Edwards continued in that employment under the same terms and conditions at the time she filed her claim for benefits. On April 21, 2010, Workforce Development acknowledged this ongoing part-time employment by entering a reference 02 decision that relieved that employer of liability for benefits, and that told Ms. Edwards the continued part-time employment would not prevent her from being eligible for unemployment insurance benefits. Ms. Edwards continues in the employment at this time under the same terms and conditions. During the academic year, Ms. Edwards works 3.5 hours in the morning, Monday through Friday, beginning at 8:00 a.m. During the summer months, Ms. Edwards works 2.5 hours per day, Monday through Friday. Ms. Edwards has not looked for new full-time work since she filed her claim for benefits because she does not want to interfere with the part-time employment with the School District and she lacks transportation to make a meaningful search or commitment to full-time work. Ms. Edwards' base period wage credits are based on a history of full-time employment.

Ms. Edwards has placed restrictions on her work availability. Ms. Edwards is the parent of an 11-year-old son and lacks childcare for her son that would allow her to work any hours when the son is not in school. Ms. Edwards is not interested in full-time employment, but instead desires additional part-time employment that would mesh with her part-time employment with the School District and with her parenting needs. The employment would also have to be close to Ms. Edwards' home because Ms. Edwards cannot legally operate a car and does not have anyone to assist her with transportation to and from employment. Within a month or two prior to the appeal hearing, CBS Staffing attempted to recruit Ms. Edwards to work in full-time work assignment, which Ms. Edwards declined for the reasons stated above.

REASONING AND CONCLUSIONS OF LAW:

The appeal rights and procedures set forth at Iowa Code section 96.6 presupposes and requires the existence of an aggrieved party. The employer *was* indeed an aggrieved party in connection with the Claims representative's August 3, 2010, reference 07, decision that allowed benefits, as indicated by the assessment made to the employer's account for benefits paid to the claimant. The employer should have been given an opportunity to participate in the process leading to the decision. The employer should have received meaningful notice that it could be assessed for benefits in connection with the decision. The employer should have received notice that it needed to file an appeal if it disagreed with the decision, along with meaningful appeal deadline information.

871 IAC 24.35(1) provides:

> (1) Except as otherwise provided by statute or by department rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the department shall be considered received by and filed with the department:
>
> a. If transmitted via the United States postal service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
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> b. If transmitted by any means other than the United States postal service or its successor, on the date it is received by the department.

871 IAC 24.35(2) provides:

> (2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.
>
> a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
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> b. The department shall designate personnel who are to decide whether an extension of time shall be granted.
>
> c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.
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> d. If submission is not considered timely, although the interested party contends that the delay was due to department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

Iowa Code section 96.6-2 provides in pertinent part:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant.

Iowa Code section 96.7-2-a(6) provides:

> 2. Contribution rates based on benefit experience.
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> a. (6) Within forty days after the close of each calendar quarter, the department shall notify each employer of the amount of benefits charged to the employer's account during that quarter. The notification shall show the name of each individual to whom benefits were paid, the individual's social security number, and the amount of benefits paid to the individual. An employer which has not been notified as provided in section 96.6, subsection 2, of the allowance of benefits to an individual, may within thirty days after the date of mailing of the notification appeal to the department for a hearing to determine the eligibility of the individual to receive benefits. The appeal shall be referred to an administrative law judge for hearing and the employer and the individual shall receive notice of the time and place of the hearing.

The weight of the evidence in the record establishes that the employer's failure to file an appeal from the August 3, 2010, reference 07 decision prior to December 15, 2010 was wholly attributable to error on the part of Workforce Development. The employer had received no meaningful notice that it could or should file an appeal, or even that it was a party in interest in connection with the decision. The weight of the evidence establishes that the employer's failure to file an appeal to the Appeals Section within 30 days of the mailing of the quarterly statement of charges was also attributable to Workforce Development. The evidence indicates that employer made immediate protest to the Tax Bureau, but that the Tax Bureau delayed its response and then provided a response that neither put the employer on notice of the 30-day deadline to appeal from the statement of charges nor even alerted the employer that it needed to take further any steps at all to assert a right to relief from liability. The administrative law judge notes that the Tax Bureau's response to the employer's protest in this instance stands in contrast to Tax Bureau response the administrative law judge had consistently seen in other similar matters. There is good cause to treat the employer's appeal from the August 3, 2010, reference 07 decision and appeal from the November 9, 2010 statement of charges as a timely appeal. To rule otherwise would be to perpetrate an injustice and denial of due process rights upon the employer. The administrative law judge has jurisdiction to entertain the employer's appeal and rule on the merits of the appeal.

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:
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> 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 24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Administrative Code rule 871 IAC 24.23 provides in relevant part as follows:

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

24.23(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.

24.23(8) Where availability for work is unduly limited because of not having made adequate arrangements for child care.

24.23(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

24.23(18) Where the claimant's availability for work is unduly limited because such claimant is willing to work only in a specific area although suitable work is available in other areas where the claimant is expected to be available for work.

24.23(19) Availability for work is unduly limited because the claimant is not willing to accept work in such claimant's usual occupation and has failed to establish what other types of work that can and will be performed at the wages most commonly paid in the claimant's locality.

24.23(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.

> 24.23(28) A claimant will be ineligible for benefits because of failure to make an adequate work search after having been previously warned and instructed to expand the search for work effort.

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. Iowa Code section 96.7(2)(a)(2)(a).

The weight of the evidence establishes that CBS Staffing has at all relevant times had the same part-time, on-call work available for Ms. Edwards and that the only reason Ms. Edwards has discontinued performing work for the employer is because she is not available for work with the employer. The employer's account will be relieved of charges for the benefits paid to Ms. Edwards.

The findings of facts outlined above and the evidence presented at the hearing establish that Ms. Edwards has unduly restricted her work availability for multiple reasons and in multiple ways. Ms. Edwards has not been available for full-time employment since she established her claim for benefits. In addition to the multiple restrictions Ms. Edwards had made to her work availability, Ms. Edwards is still without driving privileges and lacks other means of transportation to look for or perform full-time work. Ms. Edwards has not met the work availability requirements since she established her claim for benefits and is not eligible for benefits. Because the April 26, 2010, reference 04 decision disqualified Ms. Edwards for benefits for the week ending March 27, 2010, this decision need only address Ms. Edwards' eligibility for benefits since March 28, 2010. Benefits are denied effective March 28, 2010. The disqualification based on lack of availability for full-time employment continues as of the entry of this decision on January 28, 2011. Ms. Edwards will continue to be disqualified for *future* benefits until she provides meaningful proof that she is indeed available for full-time employment and has removed the restrictions she has placed on her work availability.

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.
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> 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.

Ms. Edwards is overpaid $8,283.38 in regular benefits for the period of March 21, 2010 through September 4, 2010. Ms. Edwards is overpaid, $7,665.00 for the emergency unemployment compensation benefits (EUC) that she received for the period of September 5, 2010 through January 22, 2011. Ms. Edwards is overpaid an additional amount of federal stimulus benefits for the period of March 21, 2010 through January 22, 2011. This matter will be remanded to the Claims Division for the limited purpose of computing the federal stimulus benefit overpayment.

The administrative law judge has entered the present decision based on facts in evidence and the applicable law. The administrative law judge acknowledges, and does not take lightly, the heavy impact this decision will have on the claimant unless it is challenged by the claimant and modified or reversed on appeal. The administrative law judge reminds the claimant that she does have a further right of appeal to review the correctness of the decision.

DECISION:

The employer's appeal from the August 3, 2010, reference 07, decision and the statement of charges mailed on November 9, 2010 is timely. The Agency representative's August 3, 2010, reference 07 decision is reversed. The employer has continued to make the same work available to the claimant, but the claimant has not been available to accept work from the employer. The employer's account shall be relieved of charges for benefits paid to the claimant.

The claimant has not been available for full-time employment since March 28, 2010. Benefits are denied effective March 28, 2010. The disqualification based on lack of availability for full-time employment continues as of the entry of this decision on January 28, 2011. The claimant will continue to be disqualified for *future* benefits until she provides meaningful proof that she is indeed available for full-time employment and has removed the restrictions she has placed on her work availability.

The claimant is overpaid $8,283.38 in regular benefits for the period of March 21, 2010 through September 4, 2010. The claimant is overpaid, $7,665.00 for the emergency unemployment compensation benefits (EUC) that she received for the period of September 5, 2010 through January 22, 2011. The claimant is overpaid an additional amount of federal stimulus benefits for the period of March 21, 2010 through January 22, 2011.

This matter is remanded to the Claims Division for the limited purpose of computing the $25.00 per week federal stimulus benefit overpayment.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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