

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

BRYAN GAWLIK
Claimant

APPEAL NO: 20A-UI-14603-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CITY OF DUBUQUE
Employer

OC: 04/05/20
Claimant: Appellant (4)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 26, 2020, (reference 01) unemployment insurance decision that concluded he was not able and available for work effective April 5, 2020. After proper notice, a telephone hearing was conducted on January 13, 2021. The hearing was held jointly with Appeal 20A-UI-14606-SN-T. The claimant participated. The employer participated through Human Resources Assistant Gina Noel and Transportation Field Supervisor Stecklein. The administrative law judge took official notice of the administrative records.

ISSUES:

Was the claimant able and available? Was he on an approved leave of absence?

FINDINGS OF FACT:

The claimant, Bryan Gawlik, started working as a part time parking enforcement officer for the employer, the City of Dubuque, on November 7, 2019. The claimant worked an average of 28 hours per week and made \$18.16 per hour prior to his leave of absence. His hours varied significantly from 10 to weeks when he might receive overtime. He is still working for the employer. He does not receive sick or vacation time.

After the onset of the Covid19 pandemic, the employer had a policy that it would allow employees to request leave if they were not comfortable working during the pandemic. The claimant has asthma and has a higher mortality risk due to a Covid19 infection.

From March 23, 2020 to March 27, 2020, the claimant worked 39 hours. Shortly thereafter, the claimant requested to be paid the average he had worked for the previous year under the employer's Covid19 pay program.

From March 29, 2020 to April 18, 2020, the employer paid the claimant Covid19 pay for \$29.09 hours per week for each of those weeks.

The employer shut down meter enforcement but the employer continued to assign varied assignments to enforcement officers that were willing to work at their average of 28 hours per week. These new tasks included wiping down infrastructure around parking ramps such as elevators and handrails.

On April 18, 2020, the claimant requested not to return to work due to his asthma and mortality risks among members of his immediate family. The employer would have scheduled the claimant an average of 28 hours per week, if he had not been on leave.

The claimant returned to work from his leave of absence to work for nine hours on July 11, 2020. The claimant had a release to return to work from his doctor with his inhaler. The claimant worked nine hour shifts on the following Saturdays of July 18 and July 25, 2020.

For the week ending August 1, 2020, the claimant worked 22 hours. The claimant has been working his regularly scheduled hours since then.

The employer provided testimony at fact finding and provided information regarding the claimant's hours worked and earnings.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant was either employed or not able and available for all for the claim period except from July 11, 2020 to July 25, 2020.

Iowa Code section 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 either of the following apply:

(1) 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.

(2) 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 § 96.4(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 Admin. Code r. 871-24.22(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 Admin. Code r. 871-24.22(2)(1) and (2) provides:

Benefit 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

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...

j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

Iowa Admin. Code r. 871-24.23(10) provides:

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

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

In order to be eligible for benefits, an individual claiming benefits must be able to work, available for work, and actively and earnestly seeking work.

The claimant is not eligible for benefits after his effective date for two different reasons over four different periods in time.

For the two week period of time from the week ending April 5, 2020 to the week ending April 18, 2020, the claimant's ability to and availability for work is moot because he was not unemployed. The claimant is not partially unemployed for this period because he received more (\$522.54) than his weekly benefit amount of \$257.00 plus \$15.00. Benefits are denied for this period in the amount of \$514.00.

The claimant requested and was granted a leave of absence from April 18, 2020 to the week ending July 5, 2020. This period is deemed a period of voluntary unemployment. Accordingly, benefits are denied. Benefits are denied for this period in the amount of \$2,827.00

For the period of from the week ending July 11, 2020 to the week ending July 25, 2020, the claimant worked nine hours each of these weeks and was partially unemployed. The employer did not have more than nine hours to schedule him. The claimant was able and available for work these weeks. Benefits are granted for this period in the amount of \$483.00.

On August 1, 2020, the claimant worked for 22.03 hours. His ability to and availability for work is moot for this week because he was not partially unemployed. The claimant's pay (\$396.45) exceeds his weekly benefit amount plus fifteen dollars for this period, so he was not partially unemployed. Benefits are denied for this period in the amount of \$257.00.

In total, the claimant was overpaid \$3,598.00 for the fourteen weeks he was not eligible from April 5, 2020 to July 11, 2020 and the week ending August 1, 2020.

The next issue is whether claimant has been overpaid benefits. Iowa Code § 96.3(7)a-b, 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) (a) 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. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) 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.

(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.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) “Participate,” as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer’s representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer’s representative contends meet the definition of unexcused absences as set forth in [871—subrule 24.32\(7\)](#). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) “A continuous pattern of nonparticipation in the initial determination to award benefits,” pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer’s representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) “Fraud or willful misrepresentation by the individual,” as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

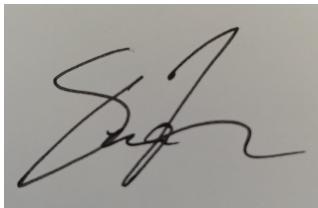
This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault.

The law also states that an employer is to be charged if “the employer failed to respond timely or adequately to the department’s request for information relating to the payment of benefits. . .” Iowa Code § 96.3(7)(b)(1)(a). Here, the employer provided testimony and scheduling information for fact finding. Benefits were paid, but not because the employer failed to respond timely or adequately to the agency’s request for information relating to the payment of benefits. Instead, benefits were paid in error despite its participation. Employer thus cannot be charged.

DECISION:

The October 26, 2020, (reference 01) unemployment insurance decision is affirmed. The claimant was either employed or not able and available for all for the claim period except from July 11, 2020 to July 25, 2020. The claimant was eligible for the weeks ending July 11 and July 25, 2020. The claimant was overpaid \$3,598.00 for the fourteen weeks he was not eligible from April 5, 2020 to July 11, 2020 and the week ending August 1, 2020. The employer’s account (# 101884) will not be charged. Benefits are denied.



Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

February 11, 2021
Decision Dated and Mailed

smn/kmj