

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER A LE PERA
Claimant

APPEAL NO. 13A-UI-05401-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HOSPICE OF CENTRAL IOWA
Employer

OC: 03/31/13
Claimant: Respondent (2-R)

Section 96.4-3 – Still Employed Same Hours and Wages
Section 96.4-3 – Able and Available for Work

STATEMENT OF THE CASE:

Hospice of Central Iowa filed a timely appeal from a representative's decision dated April 29, 2013, reference 02, which held claimant eligible to receive unemployment insurance benefits beginning March 31, 2013 finding the claimant is still employed part time or working on call when work is available but finding that the claimant was not performing services in the same pattern of employment as in the base period and finding the employer chargeable for benefits paid to the claimant. After due notice, a telephone hearing was held on June 12, 2013. Ms. Le Pera participated personally. The employer participated by Mr. Kevin Spitzig, Vice President of Administration, and Ms. Michelle Heisler, Scheduling Coordinator.

ISSUE:

At issue in this matter is whether the claimant is still employed part-time in the same hours and wages agreed upon by the parties.

FINDINGS OF FACT:

Jennifer Le Pera began her employment with Hospice of Central Iowa on May 7, 2012. The claimant was hired at that time as an on-call home health aide and was paid by the hour. In her on-call employ Ms. Le Pera was not guaranteed any minimum number of working hours each week as her working hours were dependent on client needs.

Ms. Le Pera worked in her as-needed on-call capacity as a home health aide for approximately 14 weeks until August 19, 2012 when the claimant was offered and accepted full-time employment with Hospice of Central Iowa. When Ms. Le Pera was offered full-time work and accepted, it was agreed that the claimant would be required to travel between service locations and the job description of home health aide included the travel requirement. Employees are paid by the company during travel time between locations. The employer was willing to work with Ms. Le Pera's requirement that she be in Osceola between 6:00 and 8:00 a.m. and 2:00 and 3:00 p.m. to pick up or drop her children off at school. The claimant was informed that the company pays \$.45 per mile for the use of their personal vehicles for company travel. In the

alternative, Hospice of Central Iowa provides vehicles. The parties initially agreed that Ms. Le Pera would be qualified to use a company vehicle, if needed, however, a previous conviction for OWI made Ms. Le Pera ineligible to use a company vehicle until further time had elapsed.

Ms. Le Pera continued to work for the company as a full-time employee with benefits, however, the claimant declined to take assignments that were not in Osceola even when the working hours were compatible with the time limitations that she had set for dropping off and picking up her children in town. Although Ms. Le Pera was then aware that the use of a company vehicle would not be available to her because of her driving record, the claimant declined to use her own vehicle for travel or seek alternative sources of transportation even she knew that she would be reimbursed on a regular basis at the rate of \$.45 per mile by her employer.

When Ms. Le Pera continued to be unwilling to work the full-time hours that she had agreed to when she accepted full-time employment in August 2012, the claimant was issued a warning by the company on January 14, 2013 that she must begin to accept assignments being offered, including out-of-town assignments, to retain her full-time status. The employer continued to be willing to schedule Ms. Le Pera around her obligations of dropping off and picking up her children at school each day.

Based upon continuing issues with the claimant being unwilling to work the full-time hours that she had agreed to, Ms. Le Pera was given the option of employment with the organization coming to an end or reverting to prn, as-needed status with the organization.

Ms. Le Pera agreed to have her full-time employment reduced to on-call as-needed status with no guarantee of any minimum number of working hours each week. Ms. Le Pera continued to be employed at Hospice of Central Iowa in that capacity at the time of the hearing.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Le Pera is employed part time on call at the same hours and wages as contemplated in the working agreement in effect between the parties. It does.

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. Le Pera initially was employed part time on call with no guarantee of any minimum number of working hours each week. Later the claimant was offered and accepted full-time employment guaranteeing the claimant 40 hours of work per week and providing benefits. After remaining in the full-time capacity from August 19, 2012 to January 14, 2013, Ms. Le Pera relinquished her full-time position and once again accepted part-time on-call work with no guarantee of a minimum number of working hours each week.

The claimant had not fulfilled the requirements of full-time employment by making herself available to work the full-time hours that were being offered. Claimant had declined to travel although she had agreed to do so and a \$.45 per mile reimbursement stipend was available to defray Ms. Le Pera's transportation expenses.

The parties do not dispute that Ms. Le Pera has been employed by Hospice of Central Iowa since January 15, 2013 to the present under the terms and conditions of prn as-needed employment. Inasmuch as the claimant is not guaranteed any minimum number of hours, the fact that she is working fewer hours than she would like does not render her partially unemployed. When an individual is still working in a part-time job under the same terms and conditions as agreed, that person cannot be considered partially unemployed. 871 IAC 24.23(26). For the reasons stated herein, the administrative law judge concludes that the claimant has not been eligible to receive unemployment insurance benefits beginning March 31, 2013. The reason the claimant is not performing services in the same pattern of employment as in the base period is because the claimant chose to leave full-time employment and accept part-time, on-call employment with no guarantee of minimum hours each week.

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.

Because the claimant has been deemed ineligible to receive partial, unemployment insurance benefits, any partial unemployment insurance benefits the claimant has received since March 31, 2013 could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination as to whether there has been an overpayment, the amount of the overpayment and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated April 29, 2013, reference 02, is reversed. The claimant is not partially unemployed within the meaning of the law as she is still employed by Hospice of Central Iowa in a part-time, on-call job under the same terms and conditions as agreed by the parties on January 15, 2013. The matter is remanded to the Claims Section for an investigation and determination of the overpayment issue.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs