

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JESSICA KRUG
Claimant

NISSEN INC
Employer

APPEAL NO. 21A-UI-12813-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 02/28/21
Claimant: Respondent (2R)**

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 10, 2021, reference 01, decision that allowed benefits to the claimant for the period beginning February 28, 2021, provided the claimant was otherwise eligible, based on the deputy's conclusion that the claimant was available for work and medically able to work. After due notice was issued, a hearing was held on August 2, 2021. Claimant, Jessica Krug, participated. Melissa Hanson represented the employer. Exhibits 1 and A through F were received into evidence. The administrative law judge took official notice of the following Agency administrative records: KCCO, DBRO, and KPYX.

ISSUES:

Whether the claimant was able to work and available for work during the period of February 28, 2020 through April 17, 2021.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant, Jessica Krug, established an original claim for benefits that was effective February 28, 2021. The claimant made weekly claims for the seven weeks between February 28, 2021 and April 17, 2021. The claimant received regular and FPUC benefits for each of those seven weeks. The claimant then discontinued her claim for benefits. Nissen, Inc. is a base period employer.

The claimant has been employed by Nissen, Inc., doing business as Dairy Queen, during two distinct periods. The most recent employment began in July 2020. The claimant most recently performed work for the employer on February 6, 2021. The claimant worked as a full-time, non-salaried assistant manager at the employer's Dairy Queen located in Emmetsburg. The claimant has at all relevant times resided in Pocahontas. The distance between the claimant's home and the workplace is approximately 25 miles. The claimant's assistant manager duties included all aspects of restaurant operations, including opening the store for business, serving customers, supervising employees, stocking and rotating liquid soft-serve, cleaning soft-serve ice cream machines, counting register drawers, and ancillary duties. The claimant's work hours

were 9:00 a.m. to 4:00 p.m., six days a week. Melissa Hanson, Store Manager, was the claimant's supervisor.

On February 6, 2021, the claimant slipped and fell on ice in the parking lot outside the Dairy Queen restaurant when she went outside to start and warm up her vehicle about 30 minutes before her shift was to end. The claimant injured her right foot, but was able to make it back into the store and complete the last 30 minutes of her shift.

On February 7, 2021, the claimant sought medical evaluation of her foot at an emergency room. The claimant advises that an x-ray showed that her right foot was broken. The emergency room doctor took the claimant off work for two weeks and referred the claimant to a podiatrist. The emergency room doctor restricted the claimant to minimal or no weight bearing on her right foot until after the claimant was evaluated by the specialist. The emergency room doctor advised the claimant to use crutches and to wear a controlled ankle motion (CAM) boot. The claimant was unable to drive due to the injury to her right foot. The claimant was unable to perform her regular duties due to her injury, given the restriction against putting weight on her foot, her need to use crutches, her need to wear the CAM boot, and the risk of further injury to her foot. On February 7, 2021, the claimant notified her supervisor of her injury and of her trip to emergency room. The claimant provided the employer with a copy of the medical note taking her off work. The employer told the claimant that she would not be allowed to work with crutches due to the safety risk.

The claimant had her first appointment with the podiatrist on February 11, 2021. At that time, the podiatrist released the claimant to return to work with the following restrictions. The claimant was restricted to no weight-bearing on her right lower extremity. The claimant was encouraged to use crutches or a scooter. The claimant was required to take a 10-minute sitting break every hour to elevate her foot. The podiatrist indicated the restrictions would likely continue for four weeks. The podiatrist advised the claimant she would have to wear the CAM boot for another six to eight weeks. In reality, the claimant continued to be unable to perform her regular duties due to her injury, due to the restriction against putting weight on her foot, due to her need to use crutches and wear the CAM boot, and due to the risk of further injury to her foot. Because the claimant was unable to drive, she had to wait until a friend was available to take her February 11, 2021 medical note to the employer. The friend delivered the note on February 15, 2021.

Because the claimant could not drive due to her injured foot and the need to wear the CAM boot, she planned to rely on her boyfriend and two friends to get to and from work if and when she returned to work. The claimant's boyfriend worked conflicting hours in Mallard and Havlock, Iowa. Those two communities are about half-way between Pocahontas and Emmetsburg. That meant the claimant's boyfriend would have to add 25 miles to his morning and afternoon commute in order to transport the claimant to and from work. One of the other friends the claimant intended to rely on for transportation also worked conflicting hours, also worked in Mallard, and would be in the same situation of having to add 25 miles to her commute morning and afternoon in order to transport the claimant to and from her workplace in Emmetsburg. The claimant's other friend started work at 5:00 p.m. in Gilmore City. That meant that friend would have to drive 50 miles morning and afternoon to transport the claimant to work and back, and then drive the additional 12 miles from Pocahontas to work in Gilmore City. Given the four-day delay in delivering the February 11, 2021 medical note to the employer, it is highly unlikely the claimant's friends would have provided reliable alternative transportation to and from the workplace.

The claimant returned to the podiatrist on February 25, 2021. At that time, the podiatrist released the claimant to return to work with the following restrictions. The doctor restricted the claimant to working four hours per day for two weeks and then six per day for the following two weeks. The doctor indicated that the claimant was required to take a 15-minute seated break every two hours during which she was to elevate her foot. The doctor indicated that the claimant was to use crutches as needed. Finally, the doctor indicated the claimant was to have a follow-up appointment in four weeks. The claimant provided the note to the employer via a February 28, 2021 text message. The employer asked whether the claimant was still using crutches and the claimant confirmed she was. The employer replied, "Ok if you get to the point of not using them before the 4 weeks is up let me know and I can get you back on the schedule." In other words, the employer reinforced the prior statement that the claimant would not be allowed to return to work while she was using crutches, but would be allowed to return to work as soon as she no longer needed the crutches. Given the nature of the work, the claimant could not perform her work duties with crutches.

On March 3, 2021, the claimant sent a text message to the employer in which she advised, "Hospital called me and said they need a work comp number to put in for my medical bills." The employer replied, "This was not reported on the day it happened therefore there is not work comp claim." After the March 3, 2021 exchange, there was no further contact between the parties until May 14, 2021, when the employer contacted the claimant. The claimant continued to need crutches. The claimant did not contact the employer to indicate she no longer needed crutches or that she was ready to return to work without crutches.

On April 1, 2021, the claimant had returned to the podiatrist for her follow up appointment. At that time, the podiatrist released the claimant to return to work with the following restrictions. The doctor indicated the claimant should elevate her foot every two hours and that the claimant may need to continue to use the boot. The claimant did not provide the April 1 medical note to the employer. The claimant advises that on April 3, 2021, her situation with her foot took a turn for the worse. The claimant advises that by that time she had lost feeling in her toes. The claimant advises that a different podiatrist affiliated with the same clinic advised her to wrap her foot with an ace bandage, use the CAM boot, use the crutches, and schedule the next available appointment.

The claimant advises that she returned to the podiatrist on April 16, 2020 and that her condition remained the same until the end of May 2021. The claimant has provided no medical note later in time than the April 1, 2021. The claimant advises that she continues to be under a doctor's care regarding her injured foot.

REASONING AND CONCLUSIONS OF LAW:

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".

Iowa Admin. Code r. 871-24.22(1)(a) 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.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. ...

...
(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. 871-24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

The weight of the evidence in the record establishes that the claimant was not able to work or available for work within the meaning of the law during the period of February 28, 2021 and April 17, 2021. The claimant had suffered significant injury to her foot on February 6, 2021. The claimant testified that she needed to use crutches throughout the period in question. A reasonable person would conclude, as the employer did, that the claimant could not safely perform her duties at the restaurant/ice cream parlor while using crutches. In addition, the claimant would not be able to perform her duties while required to be non-weight bearing on one of her feet. A reasonable person would conclude that wearing a CAM/immobilizing boot while working in a restaurant/ice cream parlor would be present a safety risk. The evidence further establishes that the claimant's plans to get back and forth to work were unlikely to pan out. One does not know what the claimant told the doctor about the nature of her work duties. Despite any suggestion in the medical releases that the claimant was able to perform her work duties during the period of February 28, 2021 through April 17, 2021, the weight of the evidence

indicates otherwise. The claimant continued under the care of a physician and continued to experience ongoing issues with her foot that prevented her from being able and available for work within the meaning of the law during period when she was filing weekly claims. The claimant is not eligible for benefits for the period of February 28, 2021 through April 17, 2021.

This matter will be remanded to the Benefits Bureau for a fact-finding interview and initial decision regarding the claimant's separation from the employment.

This matter will also be remanded to the Benefits Bureau for entry of overpayment decisions regarding the regular and FPUC benefits the claimant received for the seven weeks between February 28, 2021 and April 17, 2021.

DECISION:

The May 10, 2021, reference 01, is reversed. The claimant was not able or available for work within the meaning of the law during the period of February 28 2021 through April 17, 2021 and is not eligible for benefits for that period.

This matter is **remanded** to the Benefits Bureau for a fact-finding interview and decision regarding the claimant's separation from the employment and for entry of overpayment decisions regarding the regular and FPUC benefits the claimant received for the seven weeks between February 28, 2021 and April 17, 2021.



James E. Timberland
Administrative Law Judge

August 6, 2021
Decision Dated and Mailed

jet/mh