

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORI A HOSIER

Claimant

APPEAL NO: 09A-UI-06989-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SCHENKER LOGISTICS INC

Employer

OC: 03/15/09

Claimant: Appellant (2/R)

Section 96.4-3 – Able and Available
871 IAC 24.22(2)j – Leave of Absence

STATEMENT OF THE CASE:

Lori A. Hosier (claimant) appealed a representative's April 29, 2009 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits in connection with Schenker Logistics (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 2, 2009. The claimant participated in the hearing and was represented by Paul McAndrew, Attorney at Law. Gregory Anello of TALX Employer Services appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant eligible for unemployment insurance benefits by being able and available for work? Was there period of voluntary unemployment through a leave of absence?

FINDINGS OF FACT:

The claimant started working for the employer on January 15, 2008. She worked full time as a janitor in the employer's West Branch, Iowa warehousing business. Her last day of work in her regular position was December 5, 2008.

The claimant discussed with the employer in November 2008 some issues she was having with her shoulder that she believed was work related. The employer's workers' compensation carrier initially denied the claimant's claim as non-work-related. The claimant was scheduled to have surgery on December 11. The claimant indicated she would be off work from three to six months. As the claimant was not yet eligible for FMLA (Family Medical Leave), in order to protect her job, the employer recommended to the claimant that she sign a leave of absence request.

On March 16 the claimant's doctor released the claimant for some light-duty work. The claimant contacted the employer's safety manager the same day, but was told the employer did not have

work for the claimant within her restrictions. As a result, the claimant established an unemployment insurance benefit year effective March 15, 2009.

On April 8 the claimant's doctor released her to return to light-duty work on April 9 with fewer restrictions. The claimant provided this to the employer. Also on April 9 a determination was made that the claimant's condition was substantially work related and therefore covered under workers' compensation. On April 16 the employer returned the claimant to light-duty work; however, the employer only has limited light-duty work available for the claimant, so she is only working about eight hours per week.

On April 13 the employer's workers' compensation carrier issued back pay of temporary disability benefits to the claimant in the amount of \$4,609.45 representing the period from December 11 through April 13. The employer's understanding was that the claimant would be receiving additional temporary disability benefits after April 13 to cover a percentage of the difference between the claimant's earnings working the part-time light-duty hours and her regular full-time wages. The claimant indicated that she as yet had not seen additional workers' compensation benefits since the April 13 check.

REASONING AND CONCLUSIONS OF LAW:

For each week for which a claimant seeks unemployment insurance benefits, she must be able and available for work. Iowa Code § 96.4-3. In general, an employee who is only temporarily separated from her employment due to being on a leave of absence is not "able and available" for work during the period of the leave, as it is treated as a period of voluntary unemployment. 871 IAC 24.22(2)j; 871 IAC 24.23(10)

The claimant's unemployment in this case was due to her being on a leave of absence due to a work-related medical issue. As the condition causing her temporary unemployment was related to the work environment, her "leave of absence" was not voluntary. Therefore, for her to be found able to work, "[a]n 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." Sierra v. Employment Appeal Board, 508 N.W.2d 719, 721 (Iowa 1993); Geiken v. Lutheran Home for the Aged, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). The claimant has demonstrated that she is able to work in some gainful employment as of March 15, 2009, even if the employer did not have work within those restrictions. She is therefore eligible to receive unemployment insurance benefits for that period, if she is otherwise eligible.

An issue as to whether the amount of the claimant's unemployment insurance benefit eligibility for some weeks is affected by the receipt of or entitlement to workers' compensation benefits attributable to those weeks arose as a consequence of the hearing. This issue, covered by Iowa Code § 96.5-5-b and 871 IAC 24.13(3)d, was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's April 29, 2009 decision (reference 02) is reversed. The claimant was able and available for work effective March 15, 2009, and the period of temporary separation was a period of involuntary unemployment attributable to the employer. The claimant is qualified to receive unemployment insurance benefits beginning March 15, 2009. The matter is remanded

to the Claims Section for investigation and determination of the temporary disability benefit issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css