

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHRISTINE A MELLENCAMP
Claimant

VP INSTITUTE INC
Employer

APPEAL 15A-UI-14374-DL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/06/15
Claimant: Respondent (1)**

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(1) – Able to Work - illness, injury or pregnancy
Iowa Admin. Code r. 871-24.23(35) – Availability Disqualifications

STATEMENT OF THE CASE:

The employer filed an appeal from the December 24, 2015, (reference 03) unemployment insurance decision that allowed benefits based upon being able to and available for work. The parties were properly notified about the hearing. A telephone hearing was held on January 22, 2016. Claimant participated and was represented by Tyler Johnston, Attorney at Law. Employer participated through company director, April King, and business manager, Sheila Townsend. Employer's Exhibit 1 was received.

ISSUES:

Is the claimant able to and available for work effective December 6, 2015?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a massage therapist from December 3, 2012, and was separated from employment on December 9, 2015, when she quit. Her last day of work was August 7, 2015, when she was injured at work and alerted manager, Carie Moore. The employer did not file a first report of injury or designate a physician so she saw her personal medical provider Brett Stewart, physician's assistant (PA), who referred her to a female medical provider (unknown name) with Des Moines Orthopedic Surgeons, whom she saw on October 1 and 14, 2015. Claimant texted Moore on October 7 to tell her she was told not to use her arm until her next visit on October 14. (Employer's Exhibit 1, p. 8) On October 9 claimant and Moore spoke and Moore confronted claimant about a "bad attitude." She had not been warned about this issue in the past. Moore said claimant should not "gamble" on whether or not she would be able to work from week-to-week and that working at her regular job was not an option at that point. Moore told her to contact the employer when she felt like she was able to work again but to do some "soul searching" about whether she sees herself continuing with the company or sending resumes for other types of jobs. Moore then blocked her from being booked for massage appointments. (Employer's Exhibit 1, p. 9) Claimant sought a second opinion from orthopedic

surgeon (first name unknown) Tryin, M.D. on October 20, 2015. He told her she needed carpal tunnel surgery and put her on restrictions limiting repetitive movement. Claimant notified the employer verbally. The employer did not request documentation. Claimant has not yet had surgery and has not seen Dr. Tryin again.

Manager Jamie Evans told claimant the employer had medical information that she had been released to work-hardening effective November 3, 2015. Claimant declined because of continuing pain and wanted to get a second opinion. (Employer's Exhibit 1, p. 4) On November 23 Evans called claimant who said she had not heard back about a referral appointment. (Employer's Exhibit 1, p. 6) On November 30 claimant called Evans about her workers' compensation status and said that Doctors Now had released her without restriction. Claimant said she still had pain in her arm. (Employer's Exhibit 1, p. 7) Claimant did not present anything in writing to the employer. David Stilley, M.D., workers' compensation carrier-designated physician found claimant had reached maximum medical improvement (MMI) on November 25, 2015, and released her without restrictions.

On December 5 claimant called Evans to update her on the evaluation by occupational medicine physician's assistant (PA) Andrea (or Amanda, last name unknown) at Doctors Now. PA Andrea kept the restrictions and wanted further testing because she saw her well after the injury occurred. (Employer's Exhibit 1, p. 6) On Tuesday, December 8 Evans noted claimant had acknowledged she would return to work the following day. (Employer's Exhibit 1, p. 10) Claimant was a no-show for the shift. (Employer's Exhibit 1, p. 11) She contacted Evans to notify her she could not return to work on December 9 because she had church activities planned and no arrangement for child care. On December 9 via e-mail Cowling told claimant if she did not return to work she would not have job. (No documentation provided.)

Neither party submitted any medical documents and both were vague about dates and details of the chronology. Claimant started work as a certified pharmacy technician on December 30, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work effective December 6, 2015.

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(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. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

To be 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); Iowa Admin. Code r. 871-24.22(1).

Inasmuch as the physician had released the claimant to return to work as of November 25, 2015, and she found another job that began December 30, 2015, she has established her ability to work.

DECISION:

The December 24, 2015, (reference 03) unemployment insurance decision is affirmed. The claimant is able to work and available for work effective December 6, 2015. Benefits are allowed, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs

NOTE TO EMPLOYER:

If you wish to change the name and suite number of record, please access your account at: <https://www.myiowaui.org/UITIPTaxWeb/>.

Helpful information about using this site may be found at:

<http://www.iowaworkforce.org/ui/uiemployers.htm> and
http://www.youtube.com/watch?v=_mpCM8FGQoY