

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

CAROLYN M DUDLEY

Claimant,

and

EXPRESS SERVICES INC

Employer.

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HEARING NUMBER: 08B-UI-03694

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1-d

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED IN PART, ALLOWED IN PART

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board, one member concurring, reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED, IN PART, and REVERSED, IN PART.**

FINDINGS OF FACT:

The claimant, Carolyn M. Dudley, worked for Express Services, Inc. (a temporary employment agency) beginning January 15, 2007 as a full-time laborer who was assigned to Legacy. (Tr. 2, 5) The claimant's last day of work was December 27th, as she received a medical release from her doctor to have surgery the following day for a nonwork-related injury. (Tr. 2-3, 5)

On February 27th, 2008, the claimant visited her doctor who gave her a medical release to return to work on March 5th, 2008 without any restrictions. (Tr. 3, 4) She contacted the employer on March 4th to inquire if she could return to Legacy. The employer informed her that that assignment was no longer

available, nor did they have any work available for her at that time. (Tr. 4, 6) The employer did not inform her that she must have a doctor's note to return. (Tr. 8)

The claimant obtained other temporary work from March 10th through the 25th. (Tr. 4) On March 25th, she re-contacted Express Services to see if there were any assignments available. It wasn't until April 9th, that the employer offered her a job assignment; however, Ms. Dudley could not accept it because she had a doctor's appointment the next day. (Tr. 7-8)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.4(3) (2001) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds:

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 requirement 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 the benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(96) 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.

24.22(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.

b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides.

24.22(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.

Both parties agree that Ms. Dudley was off work for a nonwork-related injury beginning December 28th, 2007 through March 5, 2008, at which time she was allegedly released to return to work. For this reason, we agree with the administrative law judge's determination that the claimant was *not* able and available for work during this time period. As for the claimant's brief re-employment stint (March 10th – March 25th), we also agree that she was not able and available at this time as well.

As for the period between March 5th and March 10th, the claimant provided credible testimony that she was released to return to work on March 5th, 2008 for which she notified the employer on the previous day. (Tr. 4, 6, 8) Although the employer argues that Ms. Dudley never provided the necessary medical documentation, they do not dispute her testimony that she contacted them with said information. The fact that she worked soon thereafter establishes that the claimant was able to physically re-enter the labor market; however, Express had no work available for her at that time. For this reason, we would conclude that she was able and available during this interim and should receive benefits.

As for her eligibility status as of March 25th, Ms. Dudley resumed being able and available for work from that point forward when she contacted Express, yet again, to be told they had no work for her. (Tr. 4) For this reason, we conclude that the claimant is not totally disqualified for unemployment compensation.

DECISION:

The administrative law judge's decision dated May 8, 2005 is **AFFIRMED, in part**, as to the claimant's not being able and available for work from December 28th - March 5th, 2008 and March 10th - 25th, 2008. However, we **REVERSE, in part**, the administrative law judge's decision by finding the claimant eligible to receive benefits for the period between March 5th - 10th, 2008 and, again, beginning March 25th, 2008, provided she is otherwise eligible.

John A. Peno

AMG/fnv

Elizabeth L. Seiser

CONCURRING OPINION OF MONIQUE F. KUESTER:

I agree with my fellow board members that the administrative law judge's decision should be affirmed; however, I would affirm the administrative law judge's decision in its entirety.

Monique F. Kuester

AMG/fnv