

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**NORA E PEREZ GARCIA DE GARCIA**  
Claimant

**SMITHFIELD FRESH MEATS CORP**  
Employer

**APPEAL 18A-UI-09876-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/26/18**  
**Claimant: Appellant (2R)**

Iowa Code § 96.4(3) – Ability to and Availability for Work  
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the September 21, 2018, (reference 02) unemployment insurance decision that denied benefits based upon a determination that she is not able to perform work due to illness. The parties were properly notified about the hearing. A telephone hearing was held on October 11, 2018. Claimant participated and testified with the assistance of a Spanish language interpreter from CTS Language Link and was represented by attorney Dennis McElwain. Witness Sergio Trejo also testified on behalf of the claimant. Employer participated through Human Resource Manager Becky Jacobsen. Claimant's Exhibits A through D were received into evidence.

**ISSUE:**

Is claimant able to and available for work effective August 26, 2018?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on February 21, 2012. In November 2014 claimant suffered a work-related injury to her left shoulder. Claimant subsequently returned to work with some restrictions. In August 2018 claimant was performing the position of bacon arranger. Work in this position caused claimant come discomfort but she testified she was still able to work without issue. At some point in early August the employer's medical manager determined the bacon arranger job did not fall within the work restrictions attributable to claimant's 2014 workplace injury. Jacobsen was not certain what specifically it was about this position that fell outside claimant's restrictions. Based on this determination claimant was removed from the bacon arranger position and moved to the positions of RTE/cut clip and BEP, performing each on alternating days.

On August 10, 2018, claimant's attorney sent a letter to the employer's counsel expressing concern that the RTE duties fell outside of claimant's work restrictions and requesting she be removed from those duties. (Exhibit B). Despite this letter claimant continued to be assigned to

RTE/cut clip. The cut clip task consists of cutting and removing large staples from hams. Jacobsen contends claimant could have performed this task by using only her left hand, rather than her left arm. Claimant and her witness both testified that the cut clip duties required her to use her left arm extensively throughout the entire work day. On August 27, 2018, claimant saw her doctor and was given the following restrictions: "Limited use of left arm at work. No overheard lifting. OK to work BEP activity."

The next day, claimant complained that she was experiencing too much pain in her left shoulder to continue to perform the RTE/cut clip duties. Claimant was advised to go home and return when she was either willing to perform the duties assigned or had an updated medical directive. Due to the parameters of the worker's compensation decision, claimant is limited in what doctor she can see for her injury and when. Claimant's next appointment is not until mid-October. The employer was not able to accommodate claimant by permanently placing her in the approved BEP position as it is a contract position and there were no openings. The employer testified returning to a job within her restrictions is no longer an option for claimant, as it separated her from employment effective October 2, 2018.

### **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

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

Iowa Admin. Code r. 871-24.23(1) provides:

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

(1) An individual who is ill and presently not able to perform work due to illness.

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 decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The employer contends claimant was moved from the bacon arranger position to the cut clip position in order to accommodate her restrictions. However, the witness could provide no explanation as to why the bacon arranger position fell outside claimant's restrictions and her testimony that claimant could perform the cut clip position without having to utilize her left arm is unconvincing. Claimant on the other hand, provided direct first-hand testimony that she was able to perform the bacon arranger position with only relatively minor issues, but that the cut clip position required her to utilize her left arm extensively, causing her a great deal of pain. Trejo's testimony supported claimant's description of the position. After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events.

Claimant suffered a work-related injury, but was released to return to work with restrictions. Claimant was assigned to a job that was outside her restrictions. The job identified by claimant's medical provider as being within her restrictions was not available. Inasmuch as the injury is considered work-related and the treating physician has released the claimant to return to work, even with restrictions the claimant has established ability to work effective August 26, 2018. Because the employer had no work available or was not willing to accommodate the work restrictions, benefits are allowed.

During the hearing the employer provided testimony that claimant has been separated from employment. Since the employment ended on October 2, 2018, claimant is no longer obligated to return to employer to offer her services. At that point, her ability to work is not measured by the job she held most recently, but by standards of her education, training, and work history. Even with her injury, claimant has been able to perform a variety of jobs, including several jobs with this employer. As such, she is considered able to work even if she cannot yet return to a job as most recently performed for the employer. Benefits are allowed. Claimant is on notice that she must conduct at least two work searches per week and file weekly claims in order to retain eligibility for benefits.

Testimony was provided that claimant was separated from work on October 2, 2018. Accordingly, the issue of claimant's separation from employment must be remanded to the benefits bureau of Iowa Workforce Development for initial investigation and determination.

**DECISION:**

The representative's decision dated September 21, 2018, (reference 02) is reversed. The claimant is able to work and available for work effective August 26, 2018. Benefits are allowed, provided she is otherwise eligible.

**REMAND:**

The issue of claimant's separation is remanded to the Benefits Bureau of Iowa Workforce Development for initial investigation and determination.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs