

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEWEL A HOWARD
Claimant

APPEAL NO. 07A-UI-02515-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GENESIS HEALTH SYSTEM
Employer

**OC: 01/28/07 R: 04
Claimant: Respondent (1)**

Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Genesis Health System filed a timely appeal from the February 28, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 28, 2007. Claimant Jewel Howard participated. Craig Fields, Human Resources Director, Ambulatory and Physician Services, represented the employer and presented additional testimony through Joyce Gay, Employee Health Nurse. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two, and A through G into evidence.

ISSUE:

Whether the claimant has been able to work and available for work since establishing her claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jewel Howard, R.N., commenced her employment with Genesis Health System in February 2004 and worked as a full-time hospice nurse.

On April 28, 2006, Ms. Howard fell as she was entering a patient's home and suffered injury. Ms. Howard establishes a claim for workers' compensation in connection with the fall. From May 3 to July 16, 2006, Ms. Howard performed light-duty clerical work for the employer.

On June 7, 2006, Dr. Rick Garrels, M.D., of Genesis Occupational Health, completed a Patient Status Report concerning Ms. Howard. Dr. Garrels' was the employer's workers' compensation physician. Dr. Garrels concluded that Ms. Howard had health conditions that were work related and others that were non-work-related. Dr. Garrels indicated that Ms. Howard's lumbar or lower back pain was work-related and related to a work-related fall. Dr. Garrels indicated that Ms. Howard had cervical (neck) issues that were non-work-related. Ms. Howard agrees that her cervical issues are non-work-related. Dr. Garrels indicated that Ms. Howard had degenerative disc disease and degenerative joint disease in the lumbar (lower) region of her spine that was non-work-related. Dr. Garrels imposed a 20-pound lifting restriction. Dr. Garrels restricted

Ms. Howard to occasional bending, stooping, and twisting. Dr. Garrels indicated that Ms. Howard should alternate sitting, standing, and walking as tolerated. On July 16, Dr. Garrels indicated that Ms. Howard could return to her regular duties.

On July 18, 2006, Ms. Howard underwent cervical fusion, a surgical procedure to fuse vertebrae in her neck. After the surgery, Ms. Howard was on a medical leave of absence until August 30, 2006. From August 30 to December 12, 2006, Ms. Howard performed light-duty clerical work for the employer. In the middle of September, Dr. Garrels and the employer's workers' compensation carrier deemed Ms. Howard's workers' compensation claim closed and denied further benefits. The parties continue to litigate the claim.

In December, Ms. Howard notified the employer that she needed to undergo fusion of vertebrae in the lumbar region of her spine. Marianne Meyers, Hospice Director, notified Ms. Howard that she would have to undergo and pass a functional capacity evaluation (FCE) before she would be allowed to return to work. On December 13, 2006, Ms. Howard underwent lumbar fusion. From December 13 to January 24, 2007, Ms. Howard was on a medical leave of absence. At the time Ms. Howard notified Employee Health Nurse Joyce Gay of her impending spinal fusion and need for medical leave, Ms. Gay notified Ms. Howard that the employer was reviewing its policy and/or practices regarding light-duty work. Ms. Gay told Ms. Howard that she could present the employer with a release to work restrictions, but that the employer would have to decide what its policy/practice regarding light-duty work was going to be.

On January 23, 2007, Neurosurgeon Loren J. Mouw, M.D., released Ms. Howard to return to work on January 26, 2007 with a 20-pound lifting limit and a restriction against repetitive bending or twisting. Dr. Mouw further indicated on the medical release that he would not release Ms. Howard to undergo a functional capacity evaluation (FCE) until March 10, 2007, so that Ms. Howard's a bone graft could heal before she underwent the FCE. Dr. Mouw scheduled a follow-up appointment for March 6.

On January 26, 2007 Ms. Howard presented the medical release to Heidi Kahly-McMahon, Human Resources Manager for Genesis Visiting Nurses Association and Hospice. Ms. Howard's personal finances dictated that she return to work. Ms. Howard was interested in returning to work under light-duty status, returning to her former position with accommodations, or returning to another nursing position that would be less physically taxing. If Ms. Howard would have returned to her position, she would have needed an aid to turn or otherwise move patients when necessary, but would otherwise have been able to perform her duties. Ms. Kahly-McMahon initially indicated that she was willing to facilitate Ms. Howard's return to work on light-duty status. However, Dr. Rick Garrels, M.D., of Genesis Occupational Health was not willing to allow Ms. Howard to return to work under the restrictions set forth in the medical release. Ms. Kahly-McMahon told Ms. Howard that her continued absence from the workplace required Ms. Howard to complete an application for a personal medical leave because Ms. Howard's remaining leave under the Family and Medical Leave Act would be exhausted on January 28, 2007. Ms. Howard completed the application for personal medical leave and it was approved by Ms. Kahly-McMahon. Under the terms of the application, the personal medical leave commenced on January 29, 2007, with an expected return date of March 16, 2007. The employer notified Ms. Howard that the employer was no longer going to accommodate personal medical restrictions.

Soon thereafter, Marianne Meyers, Hospice Director, notified Ms. Howard that she would not be allowed to return to the employment unless she could lift 50 pounds. This was the first mention of a 50-pound lifting requirement. A 50-pound lifting requirement does not appear in Ms. Howard's job description, which indicates as follows:

Physical Demands:

Low Intensity: Work requires a light or low amount of physical exertion. The job requirements for manual dexterity or physical manipulation are limited. The need for physical stamina and endurance is of minimal or low significance. The degree of physical strain produced on the job is somewhat taxing, but does not usually produce fatigue and require periods of rest. Freedom of movement exists and the job does not confine the employee to a prescribed body posture. Body movement usually involves sitting and intermittent walking. The position exceeds these low intensity demands routinely 36-70% of the time.

Ms. Howard established a claim for unemployment insurance benefits that was effective January 28, 2007 and received benefits.

On February 12, 2007, Craig Fields joined Genesis Health System as Human Resources Director, Ambulatory and Physician Services. Mr. Fields reports to Ms. Kahly-McMahon.

On March 6, 2007, Neurosurgeon Loren Mouw, M.D., released Ms. Howard to return to work on March 7 without restrictions and further released her to undergo a functional capacity evaluation.

On March 12, Mr. Fields announced via broadcast e-mail the employer's new policy/practice that it would no longer accommodate staff members who were released to return to work with "personal medical restrictions." Mr. Fields acknowledged in the e-mail prior inconsistencies in the employer's approach to the issue.

On March 20, 2007, Ms. Howard returned to her regular duties as a hospice nurse. Ms. Howard continued in those duties at the time of the appeal hearing.

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".

871 IAC 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.

871 IAC 24.22(2) 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.

(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.

The greater weight of the evidence in this record indicates that the health condition that prompted the December 2006 leave of absence was related to the employment. Though the employment may not have been the cause of the degenerative disc or joint disease, the evidence indicates that the employment aggravated the condition when Ms. Howard fell on April 28, 2006. The evidence indicates that the employer approved a leave of absence that commenced on December 13, 2006. The evidence indicates that Ms. Howard's doctor released her to work with restrictions on January 26, 2007, but that the employer refused to accommodate the restrictions. The evidence indicates that Ms. Howard desired to return to the employment. The employer had a duty to reasonably accommodate Ms. Howard by providing Ms. Howard with comparable work once she established her availability. See Sierra v. Employment Appeal Board, 508 N.W.2d 719 (Iowa 1993), citing Foods v. Civil Rights Commission, 318 N.W.2d 162 (Iowa 1982). Instead of accommodating the restrictions, the employer imposed the new requirement that Ms. Howard demonstrate the ability to lift 50-pounds, imposed the requirement that Ms. Howard undergo a functional evaluation test that would likely cause her further injury, and changed its policy/practice regarding accommodating medical restrictions. The evidence indicates that Ms. Howard did not desire the further leave that commenced January 29, but was compelled to apply for the leave to preserve her employment.

The evidence indicates that Ms. Howard was both able to work and available for work effective January 26, 2007. Accordingly, Ms. Howard was eligible for benefits from January 28, 2007 until she returned to work on March 20, 2007.

DECISION:

The claims representative's February 28, 2007, reference 01, decision is affirmed. The claimant was able to work and available for work during the period of January 28, 2007 through March 20, 2007. The claimant was eligible for benefits for that period, provided she was otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs