

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

HOLLY J NADOLSKY
Claimant

TUCKER LAW OFFICE
Employer

APPEAL 17A-UI-05981-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/14/17
Claimant: Appellant (1)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions
Iowa Admin. Code r. 871-24.22(1) - Able to Work - illness, injury or pregnancy

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 5, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 26, 2017. The claimant participated personally and was represented by Mark King, attorney at law. The employer participated through Robert Tucker, attorney at law/owner. Erin Tucker, associate, testified for the employer. Claimant Exhibits A through G were received into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Is the claimant able to work and available for work effective May 14, 2017?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant began employment as a full-time paralegal with the employer in November 2013. She last physically worked on the job on April 19, 2017. There has been no permanent separation from employment.

The claimant incurred an injury to her neck requiring a cervical fusion due to a herniated disc. The surgery was performed on March 30, 2017. The claimant was unable to identify when the injury occurred or what caused the injury. The claimant did not make the employer aware that she believed the injury was work related until April 18, 2017, after the surgery was completed. The claimant filed a claim with workers' compensation thereafter.

The claimant believes her injury is work related based on research she has done and case law she found. The employer, where she is a paralegal, also handles workers compensation cases in its practice, so the claimant is familiar with the workers' compensation process. No treating physician has identified the injury was work related and no medical documentation was

furnished for the hearing in support of it being a work related injury. In addition, prior to her surgery, the claimant was observed by Erin Tucker, an attorney who shared an office with her, discussing her injury with client and making comments such as “my case is personal, not work related, like yours, but I am familiar with the methods of treatment.”

After two weeks of recovery, the claimant returned to work on April 17, 2017. There was a short “welcome back” meeting and the claimant resumed work. The employer had not requested a return to work note from her treating physician but at the time the claimant returned, she was aware of restrictions that included no lifting greater than 10 pounds, no overhead work, and no repeated bending/twisting of the neck (Claimant Exhibit E). As a paralegal, the claimant was responsible for reviewing discovery, documents, preparing deposition files and trial notebooks, moving medical books or accordion (“expando”) files, and performing other duties to support the staff attorneys (Claimant Exhibit C). The restrictions in place, specifically the bending/twisting, affected her daily job duties. The claimant worked the day without notifying the employer of her restrictions.

Upon reporting her injury to Mr. Tucker on April 18, 2017, he asked her for specific information regarding the date, mechanism and description of the neck injury, and for clarification of her restrictions (Claimant Exhibit D). The claimant continued working on April 19, 2017 and met again with Mr. Tucker, who determined that based on the restrictions, he would be unable to allow or accommodate the claimant to work as the “lifting/bending” restriction could not be avoided as part of her daily job duties. The employer stated it would meet with the claimant again when her restrictions were removed to resume employment. The claimant met again with the employer on May 11, 2017, for an unrelated matter, and was again reminded the employer would not accommodate the restrictions. As of the date of hearing, the claimant’s restrictions remain in place and she has a next scheduled doctor’s appointment on August 23, 2017 (Claimant Exhibit G).

REASONINGS AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to and available for work effective May 14, 2017.

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.

For an individual to be eligible to receive benefits, she must be able to work, available for work, and actively seeking work as required by the unemployment insurance law. Iowa Code § 96.4(3) In the context of analyzing whether the claimant meets the availability requirements, the determination of whether the injury was work-related must be evaluated, as an employer is not obligated to accommodate a non-work related medical condition.

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the claimant has not established she incurred a work related injury related to the surgery she had on March 30, 2017.

In this case, the claimant did not report to the employer that she believed her herniated disc in her neck, requiring a cervical fusion, was work related until after she had surgery and returned from recovery. The claimant was unable to identify the date of injury or mechanism of injury which led to the herniated disc, but stated she believes it was a work related injury. The claimant's assertion was not supported by the opinion of her treating physician but rather in part, due to her research of her injury and supporting case law. It cannot be ignored that the claimant is a paralegal at a law firm that handles workers' compensation cases and therefore had some familiarity with work related injuries and the process of pursuing a workers' compensation case.

Further, the claimant was observed by a staff attorney, Erin Tucker, telling clients she assisted that her injury was "personal, not work related" before she had surgery. The administrative law judge is sympathetic to the claimant's injury, but based on the evidence presented and lack of medical documentation provided for the hearing to support that her injury was work related, the administrative law judge cannot conclude the March 30, 2017 surgery was in response to a work related injury.

Inasmuch as the medical condition is not work-related and the treating physician has not released the claimant to return to work without restriction, she has not established her ability to work while still an employee of Tucker Law Office. The administrative law judge is not persuaded this is a case where the employer accommodated the restrictions for a period of time and then stopped. Rather, the claimant didn't disclose the restrictions upon returning to work on April 17, 2017 and so while she may have worked, it was not because the employer knew she had restrictions and was trying to accommodate them. The employer was simply unaware of the extent of her restrictions until she disclosed them on April 18, 2017.

While the claimant may be able to perform restricted or light work duties, the employer is not obligated to accommodate a non-work related medical condition, and since she has not been released to perform her full work duties, she is not considered able to or available for work. Benefits are withheld until such time as the claimant obtains a full medical release to return to work.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding.

DECISION:

The June 5, 2017, (reference 01) unemployment insurance decision is affirmed. The claimant is not able to work and available for work effective May 14, 2017. Benefits are withheld until such time as the claimant obtains a full medical release to return to work unless she is involuntarily separated before that time.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn