

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**MICHELE A FALCK  
507 TERRANCE ST  
STORM LAKE IA 50588**

**BOZ-WELLZ INC  
507 ERIE  
STORM LAKE IA 50588**

**Appeal Number: 05A-UI-01623-LT  
OC: 12-19-04 R: 01  
Claimant: Appellant (1)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Iowa Code §96.4(3) - Able and Available

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the February 2, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 3, 2005. Claimant did participate. Employer did participate through Cindy Bosley.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant is employed as a part-time waitress but was on medical leave as a result of Sara Lee Foods work injury on January 19, 2004 and resulting surgery on October 24, 2004. Claimant returned to work with this employer as of January 3, 2005 in spite of the full release date of February 8, 2005. She also worked light duty at Sarah Lee at the same hours and wages during the recovery period.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant was not able to work from October 24, 2004 through January 3, 2005 and thereafter is not 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".

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 24.23(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.

Inasmuch as the injury was not related to this employer and the treating physician had not released the claimant to return to work until February 8, 2005, but claimant returned without a release, the claimant has not established ability to work for the period of time at issue. Benefits are withheld from October 24, 2004 through January 3, 2005 and thereafter, claimant would not be considered eligible for benefits as she was working her regular hours at both jobs.

DECISION:

The representative's decision dated February 2, 2005, reference 01, is affirmed. The claimant was not able to work from October 24, 2004 through January 3, 2005. Thereafter, claimant is unavailable for work as she is working her regular hours for both employers.

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