

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

JUDY M MACKELLAR
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HOLY SPIRIT RETIREMENT HOME
c/o ADMINISTRATOR
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SIOUX CITY IA 51103-1705

RICHARD STURGEON
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Appeal Number: 04A-UI-00659-DT
OC: 12/07/03 R: 01
Claimant: Appellant (2)

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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.4-3 - Able and Available
871 IAC 24.22(2)j – Leave of Absence
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Judy M. Mackeller (claimant) appealed a representative's January 15, 2004 decision (reference 03) that concluded she was not qualified to receive unemployment insurance benefits in conjunction with her employment with Holy Spirit Retirement Home (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 1, 2004. The claimant participated in the hearing, and was represented by personal representative Richard Sturgeon. Pat Tomscha appeared on the employer's behalf and presented testimony from two other witnesses, Pat Lichty and Linda Brown. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant eligible for unemployment insurance benefits by being able and available for work? Is the employer's account subject to charge?

FINDINGS OF FACT:

The claimant started working for the employer on August 19, 2003. She worked full time as a laundry aide in the employer's long-term care nursing facility. Her last day of physical work was November 14, 2003. She called in sick on November 17. On November 18 she came in to discuss her health situation. She believed she might have hurt her arm doing a project at home; medical personnel in the emergency room on November 17 indicated she might have carpal tunnel. As of November 17 the claimant was restricted to light duty, including a five-pound lifting restriction. She could not perform her regular duties with the restriction, and the employer did not provide her with light duty given its belief that her condition was not work-related. The employer considered the claimant on medical leave for a period of time but eventually did require the claimant to turn over her keys.

A medical specialist subsequently informed the claimant that her condition was known as Kienbock disease and could have been aggravated by her work. As of the date of the hearing, the claimant's work restrictions remain as previously stated, and she is undergoing continued evaluation to determine whether surgery will be necessary. However, she is conducting a search for other employment and has identified various positions she could work even with her restriction.

The claimant established a claim for unemployment insurance benefits effective December 7, 2003.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant is currently eligible for unemployment insurance benefits by being able and available for employment.

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".

To be found able to work, "[a]n 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." Sierra v. Employment Appeal Board, 508 N.W.2d 719, 721 (Iowa 1993); Geiken v. Lutheran Home for the Aged, 468 N.W.2d 223 (Iowa

1991); 871 IAC 24.22(1). The claimant has demonstrated that she is able to work in some gainful employment. While the employer apparently considered her on some form of "leave" for a period of time, it does not appear that the claimant sought or agreed to any leave. 871 IAC 24.22(2). Benefits are allowed, if the claimant is otherwise eligible.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code Section 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code Section 96.19-3. The claimant's base period began July 1, 2002 and ended June 30, 2003. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

During the hearing, it became apparent that there has been a separation from employment. The separation issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's January 15, 2004 decision (reference 03) is reversed. The claimant was and is able to work and available for some work effective December 7, 2003. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer's account is not subject to charge in the current benefit year. The matter is remanded to the Claims Section for investigation and determination of the separation issue.

ld/kjf