

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JANE A HAAS
Claimant

APPEAL NO. 07A-UI-00454-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 11/26/06 R: 02
Claimant: Appellant (2)

Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Jane Haas filed a timely appeal from the January 4, 2007, reference 02, decision that concluded she was not eligible to receive unemployment insurance benefits from November 26, 2006 until December 23, 2006 because she did not meet the able and available requirements set forth in Iowa Code section 96.4(3). After due notice was issued, a hearing was held on January 30, 2007. Ms. Haas participated. Alyce Smolsky of TALX UC eXpress represented the employer and presented testimony through Monte Priske. At the request of the employer, the administrative law judge took official notice of the Agency's administrative file, including the documents submitted for the fact-finding interview. Both parties were provided with a copy of the administrative file prior to the hearing. Claimant's Exhibits A and B were received into evidence.

ISSUE:

Whether the claimant has been able to work and available for work from November 26, 2006 until December 23, 2006.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jane Haas commenced her full-time employment with Care Initiatives in November 2005 and worked as a Certified Nursing Assistant until November 7, 2006, at which time she commenced a medical leave of absence for a non-work-related illness. On November 14, Ms. Haas underwent surgery on her rectum. On November 21, Ms. Haas and her doctor completed a Family and Medical Leave application. At that time, Ms. Haas' doctor indicated that Ms. Haas would be off work for six weeks. Ms. Haas had her teenage sons deliver the FMLA application to the employer on November 21. A week later, Ms. Haas decided that she was ready to go back to work. On November 29, without being examined by a doctor, Ms. Haas obtained a medical release from her doctor that indicated she could return to work without restrictions on November 29, 2006. On the same day, Ms. Haas confirmed with Administrator Monte Priske that the employer had received the release. Mr. Priske told Ms. Haas that he would need to speak to Director of Nursing, Brenda Nichols and get back to Ms. Haas about her return to work. On November 30,

Ms. Haas contacted Mr. Priske, at which time Mr. Priske told Ms. Haas he had not had an opportunity to meet with Ms. Nichols. Ms. Haas indicated a desire to return to work and a need for the income.

On December 4, Mr. Priske contacted Ms. Haas and indicated that he needed to get her back to work. Ms. Haas indicated that she needed to return to her doctor on December 5. Mr. Priske asked Ms. Haas to contact him after she met with her doctor. Mr. Priske was not willing to schedule Ms. Haas to work before he knew the outcome of her December 5 medical appointment.

Mr. Priske told Ms. Haas that the employer needed more information regarding her ability to return to work. The employer was concerned about Ms. Haas returning to work within two weeks of her surgery when the FMLA application had indicated she would need to be off work for six weeks. Ms. Haas indicated that she would discuss the request for additional information with her doctor when she saw him next on December 5. During the same conversation, Ms. Haas asked for her work schedule. Mr. Priske indicated that he had spoken to Ms. Nichols, that Ms. Nichols had already completed the schedule for December, that the employer wanted to transition Ms. Haas back to work by starting her on two to three days per week, and that Ms. Haas would receive her full-time hours back at the beginning of January. After this conversation, Ms. Haas contacted the employer's abuse-reporting hotline to complain that her right to return to work after a Family and Medical Leave (FMLA) was not being honored by the employer.

On December 15, Mr. Priske attempted repeatedly to contact Ms. Haas at her home, but Ms. Haas did not answer. On the same day, a human resources representative ultimately contacted Ms. Haas' teenage children and asked them to have Ms. Haas contact the employer. On Monday, December 18, Ms. Haas contacted Mr. Priske. Mr. Priske told Ms. Haas that he had attempted several times to contact her and would have returned her to full-time work on December 15 if she had been available to receive the call. Mr. Priske instructed Ms. Haas to report for work on Wednesday, December 20 and indicated that she was also scheduled to work on Thursday and Friday, December 21-22.

Ms. Haas returned to work on December 21. On that day, Ms. Haas asserted that her arm and back hurt and that these ailments were caused by a workplace fall on August 2, more than four and a half months earlier. Ms. Haas had not previously indicated to the employer that she had suffered injury requiring medical attention in connection with the August 2 fall. Ms. Haas indicated a desire to file a worker's compensation claim. Based on Ms. Haas' assertion that she had a work-related injury, the employer sent her home on December 21. On December 22, Ms. Haas saw a doctor selected by the employer. The doctor took Ms. Haas off work for a week and then released her to light-duty work on January 3.

Ms. Haas established a claim for benefits that was effective November 26, 2006. Ms. Haas' worker's compensation claim is still pending.

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 and (2) provide:

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.

(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 establishes that Ms. Haas was still under a doctor's care and not able to and available for work prior to November 29, the effective date of the doctor's release. See Workforce Development Rule 24.23(6). Under Workforce Development Rule 871 IAC 24.22(1)(a), the doctor's release without restrictions was prima facie evidence of Ms. Haas' physical ability to perform the work. Accordingly, the greater weight of the evidence indicates that Ms. Haas was able to work effective November 29, 2006. The evidence indicates that Ms. Haas met the able and available requirements for the major portion of the week and, therefore, would be deemed able and available to work for the week that ended December 2. The evidence in the record indicates that Ms. Haas took appropriate steps to provide the employer with the medical release and notify the employer that she was able to return to work. The evidence indicates that the employer did not allow Ms. Haas to return to work at that point. The evidence indicates that Ms. Haas again discussed her desire and ability to come back to work with the employer on December 4, but that Mr. Piske did not want Ms. Haas to return to work until after she saw her doctor on December 5. The evidence indicates that Ms. Haas

continued to take steps after December 5 to demonstrate her ability to work and availability for work after December 4. These steps included contacting the employer's abuse hotline to complain that the employer was not letting her come back to work. After the employer had repeatedly refused to reemploy Ms. Haas, or declined to put Ms. Haas back on the schedule, it was unreasonable for the employer to expect that Ms. Haas would be home daily waiting by the phone to hear from the employer. Despite Mr. Priske's inability to contact Ms. Haas on December 15, the evidence indicates that Ms. Haas continued to be able to work and available for work. The evidence indicates that when Mr. Priske spoke with Ms. Haas on December 18, she continued to express her ability to work and her desire to return to the work. The evidence indicates that Ms. Haas returned to the work on December 21, but left work that day due to a condition that she and the employer at the time treated as a workplace injury. The evidence indicates that Ms. Haas commenced a second medical leave of absence on December 21 and continued on that leave of absence through December 22 and beyond. Accordingly, Ms. Haas was not able to work as of December 21. However, because Ms. Haas was able to work and available for work the major portion of the week that ended December 22, she would meet the able and available requirements during that week. See 871 IAC 24.22(h).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Haas was able to work and available for work during the benefit week that ended December 2 through the benefit week that ended December 23, 2006. Accordingly, Ms. Haas would be eligible for benefits during each of those benefit weeks, provided she was otherwise eligible.

DECISION:

The Agency representative's January 4, 2007, reference 02, decision is reversed. The claimant was able and available for work during the benefit week that ended December 2, 2006 through the benefit week that ended December 23, 2006. Accordingly, the claimant is eligible for benefits during that period, provided she is otherwise eligible.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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