

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY K BUTTERBAUGH
Claimant

APPEAL NO. 06A-UI-11405-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

NEW PEKING CHINESE RESTAURANT INC
Employer

OC: 10-22-06 R: 04
Claimant: Appellant (1)

Iowa Code § 96.4(3) – Able and Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 21, 2006, reference 01, decision that denied benefits and found the claimant not able to and available for work. After due notice was issued, a hearing was held on December 13, 2006. The claimant did participate. The employer did participate through Shunyu Chiang, Owner.

ISSUE:

Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was off work from October 17 until December 5, 2006 because she broke her left wrist in a non-work-related accident. As a result of that accident the claimant had work restrictions against lifting over two pounds with her left wrist. As a result of her injury the claimant was unable to work as the employer could not accommodate her work restrictions. The claimant was off work from October 17, 2006 until December 5, 2006 when she returned. The claimant was released to full duty and returned to work on December 13, 2006. The only reason the claimant was not working was because she had work restrictions that the employer could not accommodate.

REASONING AND CONCLUSIONS OF LAW:

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

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".

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 physician and has not been released as being able to work.

Inasmuch as the medical condition was not work-related and the treating physician did not release the claimant to return to work with restrictions the employer could accommodate, the claimant has not established her ability to work. The employer is not obligated to accommodate a non-work-related medical condition, thus until claimant was released to perform her full work duties, she was not considered able to or available for work. The claimant obtained a full release to return to work as of December 13, 2006 and has returned to her full duties.

871 IAC 24.23(26) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

Since the claimant is now working the same hours and for the same wages for which she was hired, she is considered employed at the same hours and wages and not eligible for unemployment insurance benefits. Thus, benefits are denied.

DECISION:

The representative's decision dated November 21, 2006, reference 01 is affirmed. The claimant is not able to work and available for work effective October 5, 2006 through December 12, 2006. Benefits are denied.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css