

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY M ETHIER
Claimant

APPEAL NO. 09A-UI-16016-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KINSETH HOTEL CORPORATION
Employer

OC: 09/13/09
Claimant: Respondent (1)

Iowa Code section 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 15, 2009 (reference 01) decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on December 1, 2009. Claimant responded to the hearing notice instructions but was not available at either number when the hearing was called and did not participate. Employer participated through Carl Deeken and was represented by Jeff Weyand of Employer's Unity.

ISSUE:

The issue is whether claimant is able to and available for work effective September 13, 2009.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant is employed as a cook with Kinseth and has no other current employment. She was hired to work about 30 hours per week and did so until a work injury on May 5, 2009. She filed a claim for unemployment insurance benefits effective September 13, 2009. As of that date the employer argues that her medical restrictions prohibited her from working at all but she reported wages between September 13 and November 28, 2009 for each week except the weeks ending October 10, November 14 and November 28. Some weeks employer has not been able to provide work to meet her medical restrictions. Employer also alleges that she is currently being paid worker's compensation temporary total disability (TTD) workers' compensation benefits of \$173.47 per week but has not provided documentation in support of this position.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant is eligible for UI benefits while receiving TPD or PPD workers' compensation benefits.

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 24.23(1) and (35) provide:

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

(1) An individual who is ill and presently not able to perform work due to illness.

(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.

Iowa Code section 96.5(5) provides:

An individual shall be disqualified for benefits:

5. Other compensation. For any week with respect to which the individual is receiving or has received payment in the form of any of the following:

a. Wages in lieu of notice, separation allowance, severance pay, or dismissal pay.

b. Compensation for temporary disability under the workers' compensation law of any state or under a similar law of the United States.

c. A governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment made under a plan maintained or contributed to by a base period or chargeable employer where, except for benefits under the federal Social Security Act or the federal Railroad Retirement Act of 1974 or the corresponding provisions of prior law, the plan's eligibility requirements or benefit payments are affected by the base period employment or the remuneration for the base period employment. However, if an individual's benefits are reduced due to the receipt of a payment under this paragraph, the reduction shall be decreased by the same percentage as the percentage contribution of the individual to the plan under which the payment is made.

Provided, that if the remuneration is less than the benefits which would otherwise be due under this chapter, the individual is entitled to receive for the week, if otherwise eligible, benefits reduced by the amount of the remuneration. Provided further, if benefits were paid for any week under this chapter for a period when benefits, remuneration or compensation under paragraph "a", "b", or "c", were paid on a retroactive basis for the same period, or any part thereof, the department shall recover the excess amount of

benefits paid by the department for the period, and no employer's account shall be charged with benefits so paid. However, compensation for service-connected disabilities or compensation for accrued leave based on military service, by the beneficiary, with the armed forces of the United States, irrespective of the amount of the benefit, does not disqualify any individual, otherwise qualified, from any of the benefits contemplated herein. A deduction shall not be made from the amount of benefits payable for a week for individuals receiving federal social security pensions to take into account the individuals' contributions to the pension program.

871 IAC 24.13(3)d provides:

(3) Fully deductible payments from benefits. The following payments are considered as wages; however, such payments are fully deductible from benefits on a dollar-for-dollar basis:

d. Workers' compensation, temporary disability only. The payment shall be fully deductible with respect to the week in which the individual is entitled to the workers' compensation for temporary disability, and not to the week in which the payment is paid.

A claimant is not eligible to receive UI benefits while receiving workers' compensation TTD benefits as a status of total disability indicates inability to work. However, employer has failed to establish that she is receiving TTD since her reported wages indicate she is working during those weeks and employer acknowledged not having work to meet her medical restrictions during some weeks. When claimant is not receiving TTD but is receiving temporary or permanent partial disability benefits (TPD or PPD) and employer is not willing or able to provide light duty or regular work, claimant is eligible for UI benefits.

DECISION:

The representative's decision dated October 15, 2009 (reference 01) is affirmed. The claimant is able to work and available for work effective September 13, 2009. Benefits are allowed, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css