

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DEBORAH A HOLTORF
Claimant

APPEAL 17A-UI-10018-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

**OC: 08/27/17
Claimant: Appellant (5R)**

Iowa Code § 96.4(3) – Able and Available

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the September 25, 2017 (reference 03) unemployment insurance decision that found claimant was ineligible for unemployment benefits because she requested and was granted a voluntary leave of absence. The claimant was properly notified of the hearing. A telephone hearing was held on October 18, 2017. The claimant participated personally. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits record including the fact-finding documents.

ISSUE:

Is the claimant able to work and available for work effective September 17, 2017?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant was employed full-time for JC Penny in the salon as a hair stylist. Claimant was employed as a stylist at JC Penny for over 30 years. Claimant was working full-time for this employer when the business closed. Her job duties required styling hair, cutting hair, coloring hair and some receptionist duties.

Effective June 9, 2017, claimant requested and was granted a leave of absence from the employer. This was due to surgery she had on her left foot. The surgery was due to a non-work related injury or illness. Prior to her leave of absence expiring, her employer closed the business. Claimant had surgery on June 9, 2017. She was restricted from putting any weight on her left foot until approximately July 21, 2017. At that time, claimant was able to put some weight on her left foot but used crutches and a foot stroller to move. Claimant received short-term disability payments during her time on leave until the business closed because she was unable to work due to this surgery. Claimant's leave of absence would have ended sometime after the business closed. The business closed on or about August 19, 2017.

As of September 15, 2017, claimant had recovered to the extent that she could put full weight on her left foot. But on September 15, 2017, claimant had surgery on her right foot due to a non-work related injury or illness. Claimant had restrictions in place until October 12, 2017 to be completely non-weight bearing on the right foot. Her restrictions were changed on October 12,

2017 to allow her to put some weight on her right foot. Claimant still uses crutches and a foot stroller to move and would not be able to stand for a long period. Claimant has not been released from her doctor without restrictions and is scheduled to visit with her doctor at the end of the month. Claimant does not have any jobs in her work history where she was able to perform sedentary work.

There has been no investigation and determination regarding whether the claimant has been able to and available for work from the date of her original claim, August 27, 2017 to September 16, 2017 and whether claimant was overpaid benefits from August 27, 2017 through September 16, 2017. The issue of whether claimant was able to work from August 27, 2017 through September 16, 2017 due to her injury on her left foot and whether there is an overpayment of benefits due to inability to work will be remanded to the Benefits Bureau for an initial determination and investigation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant is not able to work effective September 17, 2017.

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 § 96.19, subsection 38, paragraph "b", subparagraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(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.

It is claimant's burden to prove that she is able to work. To be 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); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

The injury (recovery from surgery) claimant continues to suffer from is not work-related. She has not been released back to work by her physician and has another appointment at the end of the month.

Since claimant is unable to perform her work duties due to a non-work related injury, she has not established her ability to work. Further, there are no jobs in claimant's work history that she would be able to perform without prolonged periods of standing or putting weight on her foot. Claimant was not able to work from beginning September 17, 2017 due to an injury to her right foot. As such, benefits are denied effective September 17, 2017.

DECISION:

The September 25, 2017, (reference 03) unemployment insurance decision is modified with no change in effect. The claimant is not able to work effective September 17, 2017. Benefits are withheld until such time as the claimant obtains a medical release to return to some type of work of which she is capable of performing given her education, training and work experience, and any medical restrictions. At that point, there must be an evaluation of whether employment, with reasonable accommodation if appropriate, is available.

REMAND: The issue of whether claimant was able to work effective August 27, 2017 through September 16, 2017 due to an injury to her left foot as well as the overpayment issue delineated in the findings of fact is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/scn