

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANE LATUSICK

Claimant

APPEAL NO: 15A-UI-05130-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM JANITORIAL SERVICES NORTH

Employer

OC: 03/29/15

Claimant: Appellant (4)

871 IAC 24.23(10) – Leave of Absence
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 24, 2015, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 16, 2015. The claimant participated in the hearing with Attorney Paul McAndrew. Tammy Abdulghani, Human Resources Manager and Deniece Norman, Employer Representative, participated in the hearing on behalf of the employer. Claimant's Exhibits One through Five and Employer's Exhibit A were admitted into evidence.

ISSUE:

The issue is whether the claimant is able and available for work and whether she is on a leave of absence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was hired as a full-time crew leader for ABM Janitorial Services North August 14, 2010, and is assigned to work at John Deere Engine Works. She is still employed with this employer.

The claimant injured her rotator cuff and had surgery November 21, 2014. The parties disagree on whether this is a work-related injury. The employer sent her FMLA paperwork but the claimant did not return it so the employer placed her on a medical leave of absence. On December 20, 2014, the claimant talked to her supervisor about returning to work and her supervisor asked her what restrictions she was under. The supervisor spoke to the employer who told her the claimant could not return without a full release to return to work. On January 5, 2015, the claimant presented a handwritten list of her restrictions she compiled as outlined by her physician to her supervisor (Claimant's Exhibit A). Human Resources Manager Tammy Abdulghani denied receiving that paperwork. On February 12, 2015, the employer sent the claimant American's with Disabilities Act paperwork but the claimant did not return it. On March 9, 2015, the employer received one page of a two-page form regarding the claimant's work status with regard to her injury from the claimant's physician (Employer's Exhibit A). The box stating, "No Duty – Not Able To Work At this Time" was checked but the paper indicated the

claimant would be able to “perform the primary functions of the job, with or without reasonable accommodation in the future” (Employer’s Exhibit A). The paper stated the claimant required a leave of absence from work (Employer’s Exhibit A). The expected return to work date was “approximately May 1, 2015” (Employer’s Exhibit A). At the beginning of May 2015 the claimant began asking the employer if she could return to work and was told she needed a full release in order to return. The claimant testified she could not return to work until June 23, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not able and available for work until the week ending June 27, 2015, and did take a leave of absence.

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".

Iowa Admin. Code r. 871-24.22(2)j(1)(2) 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.

(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.

j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

Iowa Admin. Code r. 871-24.23(10) provides:

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

For the purposes of this decision only, the administrative law judge finds the claimant's injury was work-related. As such, the claimant should be allowed to return to light duty work when she receives work restrictions.

The claimant was placed on a leave of absence November 21, 2014, the date she had shoulder surgery. She did not provide a doctor's note to her supervisor covering her absence or any paperwork from a physician until January 5, 2015, listing her restrictions. The employer would not allow her to return at that time because it did not consider her injury to be work-related and would not allow the claimant to return to work with restrictions. On March 9, 2015, the employer received one of two pages of the claimant's medical certification at which time her physician stated "no duty – not able to work at this time." Her doctor estimated she would not be able to return to work until approximately May 2015. The claimant did not receive a release with or without restrictions until June 23, 2015.

The claimant did not have a valid claim for benefits until March 29, 2015. As a result, whether the claimant is able and available for work or whether she could return with restrictions is a moot point until March 29, 2015. The claimant did not need to be able and available for work prior to the time she filed a claim for unemployment insurance benefits. The last week in which the claimant made a claim for benefits was the week ending June 27, 2015.

Consequently, the employer needs to allow the claimant to return to work, with or without restrictions, or determine the claimant is no longer employed by the employer at which time the claimant can reopen her claim for benefits regarding the separation from employment. Accordingly, benefits are denied until the week ending June 27, 2015, because the claimant was removed from work completely by Dr. Tearse effective from February 24, 2015, before she filed her claim for unemployment, through June 23, 2015, at which time the claimant again became able and available for work. Benefits are allowed effective the week ending June 27, 2015.

DECISION:

The April 24, 2015, reference 01, decision is modified in favor of the claimant/appellant. The claimant was not able and available for work and did take a leave of absence from November 21, 2014 to June 23, 2015. Benefits are allowed, effective the week ending June 23, 2015, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs