

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HEIDI L CLEMENS

Claimant

APPEAL NO. 12A-UI-03129-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOMESTIC DETAILING INC

JULIE A PEET WOOLF

Employer

OC: 01/29/12

Claimant: Appellant (4)

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Heidi Clemens filed a timely appeal from the March 22, 2012, reference 01, decision that denied benefits effective January 29, 2012, based on an Agency conclusion that she was not able to perform work due to injury. After due notice was issued, a hearing was held on April 11, 2012. Ms. Clemens participated. Julie Peet-Woolf, President, represented the employer. Exhibits A and B were received into evidence.

ISSUE:

Whether the claimant has been able to work and available for work since establishing her claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer operates a small cleaning business that serves mostly residential customers. Heidi Clemens has been employed by Domestic Detailing as a part-time house cleaner since May 2011 and continues in the same position at this time. Ms. Clemens' duties include cleaning bathrooms. This would involve scrubbing shower walls and doors, toilets, sinks, and mirrors. Ms. Clemens' work also involved cleaning kitchens, vacuuming, mopping, dusting and washing windows and sliding glass doors. In the course of vacuuming, Ms. Clemens might have to move chairs or light pieces of furniture. In the course of dusting, Ms. Clemens would need to pick up objects. Prior to January 16, 2012, Ms. Clemens worked as part of a cleaning duo. The employer would leave it to the pair to divide the work on a particular cleaning assignment.

On January 16, 2012, Ms. Clemens fell at home and broke her left wrist in three places. Ms. Clemens is right-handed. Ms. Clemens sought immediate medical attention at an emergency room and was able to see an orthopedic surgeon the same day. The orthopedist fitted Ms. Clemens with a cast. The cast started at Ms. Clemens' palm and terminated past the elbow on Ms. Clemens' upper arm. The cast effectively immobilized Ms. Clemens' left arm. The cast immobilized Ms. Clemens' left elbow in a bent position. The orthopedist told

Ms. Clemens that she could expect to wear the cast for six to eight weeks. Ms. Clemens received IV pain medication while she was at the hospital emergency room. Ms. Clemens was prescribed hydrocodone to further treat the pain and was instructed to take the pain medication every four to six hours as needed. The orthopedist directed Ms. Clemens to return in two weeks for a follow up appointment.

On the date of the injury, Ms. Clemens' fiancé had notified Julie Peet-Woolf, President and owner of Domestic Detailing, that Ms. Clemens had broken her arm in three places, was in a full-arm cast, was on pain medication, and would not be able to work for the rest of the week. Ms. Clemens was in too much pain to communicate directly with the employer.

Later in the week, Ms. Clemens sent a text message to Ms. Peet-Woolf indicating that she was "hanging in there" with the injury, but was still in pain. Ms. Clemens was still relying on the pain medication and does not remember what exactly she put in her message to the employer.

Four days after the injury, Ms. Clemens transitioned from treating her pain with hydrocodone to treating her pain with ibuprofen.

On January 31, Ms. Clemens returned to the orthopedist for a follow up appointment. The orthopedist released Ms. Clemens to return to work without restrictions, despite Ms. Clemens' left arm being effectively immobilized by the cast. Ms. Clemens retained use of her fingers and thumb on her left hand. Ms. Clemens had discussed the nature of her employment with the doctor.

On January 31, Ms. Clemens contacted Ms. Peet-Woolf. Ms. Clemens told the employer that she had a medical release and asked Ms. Peet-Woolf whether she wanted her to bring the medical excuse. See Exhibit A. Ms. Peet-Woolf said that was fine. Ms. Peet-Woolf told Ms. Clemens that she was in the process of consulting with her insurance company's underwriting department and with her attorney about Ms. Clemens return to work. Ms. Peet-Woolf told Ms. Clemens that the initial word from the insurance company was that it would be okay for Ms. Clemens to return to work if she had a medical release.

Ms. Peet-Woolf had concerns about allowing Ms. Clemens to return to work in light of the multiple breaks in Ms. Clemens' left arm and the arm being immobilized by a cast. Ms. Peet-Woolf did not see how Ms. Clemens would be able to perform her cleaning duties without the use of her left arm. Ms. Peet-Woolf was also concerned that even if Ms. Clemens was able to perform some of her assigned tasks, she would perform them at a substantially reduced speed in light of the injury.

Ms. Peet-Woolf did not hear from the insurance underwriter or speak with her attorney until after the conversation with Ms. Clemens on January 31. Both counseled against allowing Ms. Clemens to return to work at that point, because the non-work-related injury would expose the employer, the carrier, and the employer's clients to potential liability in the event Ms. Clemens suffered further injury to the arm at work. On the evening of February 1, Ms. Peet-Woolf telephoned Ms. Clemens and shared with Ms. Clemens that she could not allow her to return to work at that time, but to let her know when the cast was off so the employer could return her to work.

Ms. Clemens established a claim for unemployment insurance benefits that was effective the week that started January 29, 2012. The claim was filed in response to the employer's decision not to allow Ms. Clemens to return to work while her arm was in a cast. Ms. Clemens did not search for any other work while she was off work from Domestic Detailing. While Ms. Clemens

was off work in connection with her injury, she and the employer both intended that the employment would continue.

On February 14, Ms. Clemens returned to the orthopedist for a follow up appointment. The orthopedist removed the original cast and replaced it with a shorter one. The new cast started in the same place, at Ms. Clemens' palm, and terminated just before her elbow. At this point, Ms. Clemens could bend her elbow. Ms. Clemens sent Ms. Peet-Woolf a text message indicating that she had a new cast. Ms. Clemens did not mention that the new cast was shorter. Ms. Clemens indicated in her text message that getting the new cast was painful, that she was on pain medication, and that she was unable to drive.

On February 27, Ms. Clemens returned to the orthopedist so that her arm could be x-rayed.

From February 29 to March 14, Ms. Clemens was gone to Texas to visit a friend.

In early March, Ms. Peet-Woolf hired a new part-time cleaner.

On March 20, Ms. Clemens returned to the orthopedist. The orthopedist removed the cast, had Ms. Clemens' arm x-rayed, stated the injury "looked good," and provided Ms. Clemens with a soft brace to wear. The brace started just behind the first knuckles on Ms. Clemens' left hand and terminated halfway up her forearm.

After the text message to the employer on February 14, Ms. Clemens did not make further contact with Ms. Peet-Woolf until Tuesday, March 20, after her cast was removed. Ms. Clemens advised that her cast was off. Ms. Clemens told Ms. Peet-Woolf that she could not work that week because her doctor wanted her to do physical therapy exercises at home to strengthen her arm and reduce the risk of further injury. The end of that week was Saturday, March 24, 2012.

Ms. Clemens discontinued the claim for unemployment insurance benefits with the week that ended March 31, 2012.

The employer did not have any work for Ms. Clemens until April 3, 2012. In the meantime, Ms. Peet-Woolf was arranging cleaning assignments for Ms. Clemens. Ms. Peet-Woolf had herself started new employment while Ms. Clemens had been away from work. The new work assignments the employer had for Ms. Clemens would be solo work assignments and would no longer involve working as a cleaning duo. Ms. Clemens returned to work at Domestic Detailing, Inc., on April 3, 2012, and received 20 hours of work from the employer. This was comparable to the 14-28 hours per week Ms. Clemens had enjoyed prior to her injury. Prior to injury, Ms. Clemens had received 30 hours per week a couple of times. Ms. Clemens understood that the number of hours the employer could make available for her in the part-time employment was contingent upon the needs of the employer's customers. Ms. Clemens has advised the employer that she does not wish to work on Mondays or to work beyond 2:30 p.m. on Thursdays.

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.

Iowa Administrative Code rule 871 IAC 24.23 provides, in relevant part, as follows:

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

24.23(25) If the claimant is out of town for personal reasons for the major portion of the workweek and is not in the labor market.

24.23(34) Where the claimant is not able to work due to personal injury.

24.23(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

24.23(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.

The January 31, 2012 work release from Dr. Pilcher creates the rebuttable presumption that Ms. Clemens was physically able to perform the cleaning work she had previously performed for the employer. See 871 IAC 24.22(1)(a). The question becomes whether there is sufficient evidence in the record to rebut the presumption that Ms. Clemens was able to perform her duties during any of the nine weeks between January 29 and March 31, 2012, when she had an active claim for unemployment insurance benefits. It was Ms. Clemens' non-dominant wrist that was injured. Ms. Clemens at all times had full use of her dominant arm. For the time Ms. Clemens established her claim for benefits, she had use of the fingers and thumb on her left hand. The weight of the evidence fails to support the employer's assertion that Ms. Clemens would need to have full use of both arms in order to perform her cleaning duties in a satisfactory manner. The vast majority of the cleaning duties could be performed in a satisfactory manner and timeframe using just the dominant hand and arm. For those that might require use of two hands, for example, moving a light piece of furniture while vacuuming or wringing a mop head, Ms. Clemens would have had the assistance of her cleaning partner. The weight of the evidence does not support the employer's assertion that Ms. Clemens' temporary loss of ability to use her non-dominant arm would have significantly slowed the work or had a significant negative impact on the coworker. The employer's concern about potential liability did not prevent Ms. Clemens from meeting the work ability requirement for unemployment insurance eligibility purposes. In any event, one of the primary purposes of the cast was to protect the arm or wrist from further injury. Many people continue to perform physical labor despite having an arm, or some portion of an arm, in a cast.

Ms. Clemens' statement to the employer on Tuesday, February 14, that the recasting was painful, that she was on pain medication, and that she was unable to drive, prevented Ms. Clemens from meeting the work availability requirement during the week that ended February 18, 2012.

Ms. Clemens' out-of-state travel during February 29 to March 14 prevented her from meeting the work availability requirements for the weeks ending March 3, 10 and 17, 2012. See 871 IAC 24.23(25).

Ms. Clemens statement to the employer on Tuesday, March 20, that she could not work that week because her doctor wanted her to do physical therapy exercises at home to strengthen her arm and reduce the risk of further injury prevented Ms. Clemens from being available for work during the week that ended March 24, 2012.

The weight of the evidence indicates that Ms. Clemens met the work ability and availability requirements during the weeks that ended February 4, 11 and 25, and the week that ended March 31, 2012. Ms. Clemens was eligible for benefits for those weeks, provided she was otherwise eligible. The employer's account may be charged. The weight of the evidence indicates that Ms. Clemens did not meet the work availability requirements during the weeks that ended February 18, and March 3, 10, 17, and 24, 2012. Ms. Clemens is not eligible for benefits for those weeks.

DECISION:

The Agency representative's March 22, 2012, reference 01, is modified as follows. The claimant was able to work and available for work during the weeks that ended February 4, 11 and 25, 2012 and the week that ended March 31, 2012. The claimant is eligible for benefits for those weeks, provided she was otherwise eligible. The employer's account may be charged for benefits paid to the claimant for those weeks. The claimant did not meet the work availability requirements during the weeks that ended February 18, 2012, and March 3, 10, 17, and 24, 2012. The claimant is not eligible for benefits for those weeks.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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