

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EARLENE M HENNINGER
Claimant

APPEAL NO. 15A-UI-06402-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BICKFORD SENIOR LIVING GROUP LLC
Employer

OC: 11/30/14
Claimant: Appellant (1/R)

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Earlene Henninger filed a timely appeal from the May 21, 2015, reference 05, decision that denied benefits effective May 3, 2015, based on an Agency conclusion that Ms. Henninger was unable to perform work due to injury. After due notice was issued, a hearing was held on July 13, 2015. Ms. Henninger participated personally and was represented by attorney, Nathan Schroeder. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Exhibits A, B and C were received into evidence. The administrative law judge took official notice of the Agency's administrative record of claimant's weekly benefit claims and of benefits disbursed to the claimant (KCCO and DBRO). The administrative law judge took official notice of the December 18, 2014, reference 01, decision, the May 21, 2015, reference 04, decision, and of the June 3, 2015, reference 06, decision. The administrative law judge provided the claimant with an opportunity to submit her job search log immediately following the hearing. The claimant provided that material, which was received into evidence as Exhibit D.

ISSUES:

Whether the claimant was able to work and available for work within the meaning of the law from March 15, 2015 through May 30, 2015.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: In September 2014, Earlene Henninger, suffered a non-work-related fall that resulted in injury to her neck. The fall ruptured vertebral disks in Ms. Henninger's neck. Ms. Henninger underwent emergency surgery to fuse the C-5, C-6 and C-7 vertebrae. At the time of the injury, Ms. Henninger was employed by Bickford Senior Living Group, L.L.C., as a Licensed Practical Nurse and medication aide. Ms. Henninger has not worked since her injury.

On October 14, 2014, Dr. Loren Mouw, M.D., a Cedar Rapids neurosurgeon, released Ms. Henninger to work, effective October 22, 2014, with multiple restrictions. Dr. Mouw restricted Ms. Henninger from lifting greater than 10 pounds. Dr. Mouw restricted Ms. Henninger from providing any patient care. Dr. Mouw restricted Ms. Henninger from

performing work in “elevated positions.” Dr. Mouw indicated that Ms. Henninger could sit, stand, and walk as tolerated.

On November 25, 2014, Dr. Mouw released Ms. Henninger to work, effective December 1, 2014, with the single restriction that she not lift more than 20 pounds. When Bickford Senior Living Group did not allow Ms. Henninger to return to work, Ms. Mouw established a claim for unemployment insurance benefits that was effective November 30, 2014. On December 18, 2014, a Workforce Development claims deputy entered a reference 01 decision that denied benefits effective November 30, 2014, based on an Agency conclusion that Ms. Henninger was not able to work due to injury. At that time of the decision, Ms. Henninger was still attached to her employment with Bickford. Ms. Henninger did not appeal the reference 01 decision until April 10, 2015. On May 11, 2015, Administrative Law Judge Duane Golden entered a decision that affirmed the reference 01 decision, based on the untimeliness of the appeal from that decision. See Appeal Number 15A-UI-04376-JTT.

Ms. Henninger did not make weekly claims for benefits until after she was discharged from her employment on March 12, 2015. Ms. Henninger did not make a weekly claim for benefits until March 22, 2015, when she made a claim for the week that ended March 21, 2015. Ms. Henninger continued to make weekly claims for benefits. Ms. Henninger made weekly claims for benefits for each of the 11 weeks between March 15, 2015 and May 30, 2015. For each week, Ms. Henninger reported that she was able to work, was available for work, that she had made two employer contacts. Ms. Henninger has provided the log of her job search for the 11-week period in question, which log reflects at least two job contacts during each week of the period in question.

The start of Ms. Henninger’s weekly claims followed Ms. Henninger’s March 12, 2015, discharge from Bickford Senior Living Group. The employer had discharged Ms. Henninger for attendance. On May 21, 2015, a Workforce Development claims deputy entered a reference 04 decision that concluded Ms. Henninger had been discharged for no disqualifying reason. The decision allowed benefits to Ms. Henninger, subject to Ms. Henninger meeting all other eligibility requirements. The employer did not appeal the decision that conditionally allowed benefits in connection with the employment separation.

On the same day the claims deputy entered the decision that conditionally allowed in connection with the separation from employment, the claims deputy entered the reference 05 decision that denied benefits effective May 3, 2015 based on the agency conclusion that Ms. Henninger was not able to perform work due to injury. The reference 05 decision is the basis the present appeal.

Ms. Henninger has suffered from Type 1 diabetes for four decades and is insulin dependent. Ms. Henninger has provided a June 2, 2015 note from Dr. Tulsi Sharma, M.D., an endocrinologist. The note indicates that in the opinion of Dr. Sharma Ms. Henninger “is able to return to work at any time.” Why Ms. Henninger elected to submit a note from the endocrinologist, rather than an updated note from a treating neurologist or orthopedist who has provided evaluation and/or treatment regarding in connection with her injury is unclear.

Even after Ms. Henninger was released effective December 1, 2014 with the 20-pound lifting restriction, she continued to have medical issues related to the September 2014 fall and injury. Ms. Henninger reports that she had difficulty turning her head to the right. Ms. Henninger reports that she has difficulty lifting her head and must use her hand to lift her chin, in order to look straight ahead. Ms. Henninger continued to have severe pain in her right arm and shoulder, which the treating physicians initially attributed to the neck injury. On April 23, 2015,

Ms. Henninger underwent an MRI that revealed two torn tendons in her right shoulder blade and an additional partial tear at the front of her shoulder by her collar bone. Ms. Henninger is right-handed. Dr. Roswell Johnston, D.O., an orthopedist, ordered the MRI. Ms. Henninger did not discuss with Dr. Johnston what type of work she should be performing or whether she should be performing work at all. Dr. Johnston referred Ms. Henninger to the University of Iowa Hospitals & Clinics for additional evaluation and/or treatment. Ms. Henninger had her first appointment at UIHC on July 6, 2015. The UIHC physician with whom Ms. Henninger met on July 6, 2015, told her that he believes she will need surgery on her right shoulder.

REASONING AND CONCLUSIONS OF LAW:

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(1)a, (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.

(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 Admin. Code r. 871-24.23(1), (35) provides:

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.

Ms. Henninger presented insufficient evidence to establish that she was able to work and available for work during the 11-week period of March 15, 2015 through May 30, 2015. Effective December 20, 2014, Ms. Henninger was released to work with a 20-pound lifting restriction that did not take into consideration the undiagnosed injury to her right shoulder. Since that time, Ms. Henninger has continued to suffer pain in her right arm and shoulder. Ms. Henninger has provided no updated medical documentation regarding the impact of her neck and shoulder injury on her ability to perform work. In April 2015, Ms. Henninger learned that she had three separate injuries to her right shoulder and that the injuries related to her September 2014 fall. Ms. Henninger is still in the process of having her shoulder injury evaluated and anticipates undergoing surgery on her shoulder in the foreseeable future. Ms. Henninger provided a June 2, 2015 medical release from a physician who had no role in evaluating or treating her neck or shoulder. That medical release should be given no weight whatsoever when determining whether Ms. Henninger is able to work or available for work in light of the neck and shoulder issues. Ms. Henninger concedes that she has had no discussion with a treating physician about her ability to perform work in light of her shoulder injury. Ms. Henninger is not eligible for unemployment insurance benefits for the period of March 15, 2015 through May 30, 2015.

Due to the June 3, 2015, reference 06, decision that allowed benefits effective May 31, 2015, the administrative law judge did not adjudicate the claimant's ability to perform work since May 31, 2015. Based on the evidence presented at the appeal hearing, the administrative law judge concludes that this matter should be remanded to the Benefits Bureau for further review of the claimant's ability to perform work subsequent to the June 3, 2015, reference 06, decision. In connection with such further review, the claimant should be required to provide medical documentation from Dr. Johnston, the orthopedist in Waterloo, as well as from the treating physician(s) at the University of Iowa Hospitals and Clinics.

DECISION:

The May 21, 2015, reference 05, decision is affirmed. The claimant was not able to work during the 11-week period of March 15, 2015 through May 30, 2015 due to injury. Benefits are denied for the period of March 15, 2015 through May 30, 2015.

This matter is remanded to the Benefits Bureau for further review of the claimant's ability to perform work during the period subsequent to the June 3, 2015, reference 06, decision. In connection with such further review, the claimant should be required to provide medical documentation from Dr. Johnston, the orthopedist in Waterloo, as well as from the treating physician(s) at the University of Iowa Hospitals and Clinics.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs