

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KATHY L HAGEN
Claimant

FLAGGER PROS USA LLC
Employer

APPEAL 17A-UI-13469-DL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/03/17
Claimant: Respondent (4R)**

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(1) - Able to Work - illness, injury or pregnancy
Iowa Admin. Code r. 871-24.23(35) - Availability Disqualifications

STATEMENT OF THE CASE:

The employer filed an appeal from the December 20, 2017, (reference 01) unemployment insurance decision that allowed benefits based upon being able to and available for work. The parties were properly notified about the hearing. A telephone hearing was held on January 22, 2018. Claimant participated. Employer participated through human resource manager Victoria Johnson. Claimant's Exhibit A was received.

ISSUE:

Is the claimant able to work and available for work effective December 3, 2017?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant is employed as a full-time seasonal flagger. Her last day of work was December 8, 2017. On December 14, 2017, claimant obtained a medical excuse from work indefinitely due to planned surgery and presented a copy to the employer. (Claimant's Exhibit A p. 8) She declined work that day due to feeling unwell due to her sinuses. On December 20 Johnson did not see the medical excuse and called claimant about possible work. When she saw the excuse she called someone else and told claimant she would need a medical release to return to work even though the surgery had been canceled. Continued work is available.

Claimant worked the week of December 3 through 9, a total of 26.25 hours, receiving \$262.50 in gross pay. Claimant only reported gross wages of \$200.00 and received partial benefits of \$301.00.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work effective December 17, 2017, and underreported wages for the week-ending December 9, 2017.

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".

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.

(Emphasis added.)

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

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

(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.

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.

Inasmuch as the claimant was under medical care effective December 14, 2017, she is not considered able to work during that time period. Because the treating physician has not released the claimant to return to work, she has not established her ability to work. 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.

DECISION:

The December 20, 2017, (reference 01) unemployment insurance decision is modified in favor of the appellant. The claimant is not able to work and available for work effective December 17, 2017. Benefits are withheld until such time as the claimant obtains a full medical release to return to work, offers her services to the employer, and no suitable, comparable work is available considering reasonable accommodation; or if she is involuntarily separated before that time. Claimant has underreported wages for the one week-ending December 9, 2017.

REMAND: The recalculation of the wage reporting for the week-ending December 9, 2017, and overpayment effective December 17, 2017, are remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination with notice and appeal rights to both parties.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/rvs