

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRENDA L WESSELY
Claimant

APPEAL NO. 07A-UI-06317-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLACK HAWK COUNTY
Employer

OC: 05/20/07 R: 03
Claimant: Appellant (1)

Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Brenda Wessely filed a timely appeal from the June 13, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 11, 2007. Ms. Wessely participated. Sherri Niles, Administrator, represented the employer. Exhibits One and Two were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brenda Wessely commenced her employment with Black Hawk County on November 17, 2005, and was a full-time food service worker at the time she suffered a non-work-related injury on April 30, 2007. Ms. Wessely landed on her foot wrong and broke her foot. Mr. Wessely sought medical treatment from Dr. Chris Eagan, D.O., and was fitted with a cast. On May 1, Ms. Wessely requested a medical leave of absence under the Family and Medical Leave Act (FMLA). On May 8, Ms. Wessely's immediate supervisor approved the leave. At the time the leave was approved, Ms. Wessely's tentative return date was June 26, 2007. On May 8, Dr. Eagan provided medical certification for the leave of absence. On the certification, Dr. Eagan indicated that Ms. Wessely would need six to eight weeks to heal, that she would be in a cast for four weeks, and then would be in an immobilizing boot for two to four weeks. Dr. Eagan indicated that Ms. Wessely would be restricted to non-weight bearing activity for six to eight weeks, but that Ms. Wessely could perform sedentary work. Ms. Wessely utilized crutches while the cast remained on her foot.

Ms. Wessely established a claim for unemployment insurance benefits that was effective May 20, 2007.

On May 30, Dr. Eagan removed Ms. Wessely's cast and fitted Ms. Wessely with an immobilizing "boot." At that time, Ms. Wessely asked her supervisor if she could return to work, either in the

dietary department or folding laundry. The supervisor advised Ms. Wessely that the employer was unable to accommodate the work restrictions based on the non-work-related injury.

On June 18, Dr. Eagan provided a medical release that indicated Ms. Wessely's foot would need to continue in the immobilizer boot for three additional weeks. On the same day, Ms. Wessely and her immediate supervisor agreed to extend Ms. Wessely's FMLA absence three weeks, with a return to work date of July 9, 2007. On July 9, Dr. Eagan indicated that Ms. Wessely would need to continue off work for two additional weeks while she attempted to transition to wearing a shoe on her injured foot. At the time of the hearing, Ms. Wessely had not yet requested or received a full-medical release from Dr. Eagan.

Ms. Wessely continues on an approved leave of absence. Ms. Wessely and the employer intend for Ms. Wessely to return to her regular duties once she is granted a full work release. Ms. Wessely has not sought other employment while she has been on her leave of absence.

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, (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.

Workforce Development rule 871 IAC 24.23 provides, relevant part, as follows:

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

24.23(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.

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.

The evidence indicates that Ms. Wessely requested and was approved for a medical leave of absence for a non-work-related injury and continued on that approved absence at the time of the July 11, 2007 hearing. The evidence indicates that Ms. Wessely continued under the care of her doctor throughout the leave of absence and had not been released to perform weight-bearing work at the time of the hearing. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Wessely has not met the able and available requirements of Iowa Code section 96.4(3) since establishing her claim for benefits and, therefore, is not eligible for benefits.

DECISION:

The Agency representative's June 13, 2007, reference 01, decision is affirmed. The claimant has not been able and available for work since establishing her claim for benefits. Accordingly, the claimant is not eligible for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw