

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**GWENDOLYN R BROWN**  
Claimant

**IDA GROVE HEALTHCARE LLC**  
Employer

**APPEAL 15A-UI-11149-DL-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/09/15**  
**Claimant: Appellant (4)**

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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  
Iowa Code § 96.6(2) – Timeliness of Appeal

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the September 22, 2015, (reference 03) unemployment insurance decision that denied benefits based upon not being able to or available for work. The parties were properly notified about the hearing. A telephone hearing was held on October 20, 2015. Claimant participated and was represented by Jerry Jackson, Attorney at Law. Employer participated through administrator Mike Turpin and business office manager Sara Gerke. Department's Exhibit D-1 was received. Neither party provided or offered any documents. Claimant's immediate supervisor Lisa Hendrickson was not called to testify.

**ISSUES:**

Is the appeal timely?

Is the claimant able to and available for work effective August 6, 2015?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: An ineligibility unemployment insurance decision was mailed to the claimant's last known address of record on September 22, 2015. She did not receive the decision. The first notice of the decision was due to the arrival of the reference 07 overpayment, which she timely appealed.

Claimant was employed part time (30 hours) as a activity assistant and was separated from employment on August 21, 2015. [See the September 4, 2015, (reference 01) unemployment insurance separation decision that allowed benefits.] Claimant had a disputed work injury and was kept off work until August 3, 2015, when Steven Meyer, M.D. released her to return to work but restricted her from kneeling or squatting for six weeks. No medical evidence has been presented related to the work-connectedness of the injury.

The employer sent her a certified letter on July 29 asking her to contact Turpin about her medical status. When claimant reported to work on Wednesday, August 5 she did not bring a

release so Henrickson told her to clock out and go home until she had a medical release. Later that night claimant slid the release under Henrickson's door and she gave it to Turpin. Claimant could have returned with restrictions but she had no communication with the employer and did not cooperate with the workers' compensation carrier. Turpin called her and left a message to call but she never called him back. She did not sign for the termination certified letter sent August 7 giving her until August 13 to respond but Turpin gave her until August 21, 2015, before officially ending the employment. Meyers released her to work without restrictions on October 6, 2015. She did not give the release to the employer because she had seen an activity assistant job posted and believed the employment had ended but did not inquire about the status of her employment.

### **REASONING AND CONCLUSIONS OF LAW:**

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

While the ALJ finds it curious that claimant did not receive the separation unemployment insurance decision (which are not sent to representatives) or the employer's certified termination letter, without the certified mail return unsigned receipt, an adverse credibility conclusion cannot be made. Thus, the claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant timely appealed the overpayment decision, which was the first notice of disqualification. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work or available for work effective August 9 through 22, 2015.

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 § 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 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.

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.

The Supreme Court ruled that a claimant with a non-work-related injury was not able to and available for work and that section 96.5(1)d was not applicable when she returned to work with a restricted release, could not perform her prior job and could not establish any other type of work of which she was capable. *Geiken v. Luthern Home for the Aged*, 468 N.W.2d 223 (Iowa 1991).

Since the employer was willing to accommodate the claimant's work restrictions but she failed to maintain communication with the employer, even though she could be considered able to work, she did not make herself available for work between the claim date of August 9, 2015, and the separation week-ending date of August 22, 2015. Because the employment ended on August 21, 2015, claimant was thereafter no longer obligated to return to employer upon her medical release to offer her services. At that point, her ability to work is not measured by the job she held most recently, but by standards of her education, training, and work history. Since this employer is the sole source of employment during the base period and her job duties as activity director did not generally include kneeling or squatting, she is considered able to work. Thus the claimant is considered as able to work as of August 23, 2015. Claimant is on notice that she must conduct at least two work searches per week and file weekly claims in order to retain eligibility for benefits.

**DECISION:**

The September 22, 2015, (reference 03) unemployment insurance decision is modified in favor of the appellant. The claimant's appeal is timely and she was not able to work and available for work from August 9, 2015 through August 22, 2015. Benefits are withheld for that period of time and allowed, provided she is otherwise eligible, effective August 23, 2015.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

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