

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ZAIMA DRAGANOVIC

Claimant

**RACoon VALLEY PARTNERS LLC
MCDONALD'S**

Employer

APPEAL NO: 11A-UI-01931-S

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/16/11

Claimant: Respondent (4-R)

Section 96.4-3 – Able and Available

Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department decision dated February 8, 2011, reference 01, that held claimant was still employed part-time as of January 16, 2011, and benefits are allowed. A hearing was held in Des Moines, Iowa on April 25, 2011. The claimant participated. The employer did not participate.

ISSUES:

Whether the claimant is able and available for work.

Whether claimant is overpaid benefits.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witness, and having considered the evidence in the record, finds: The claimant has worked for the employer as a grill cook for about three years. She left employment on January 21, 2011 for non-work related surgery. The claimant earned gross wages of \$102.00 for the week ending January 22, 2011, and her WBA is \$147.00. She has not been released by her doctor to return to work. Claimant has been receiving benefits on her claim.

Restaurant Manager O'Donnell called to advise she would not be available to participate for the employer in the hearing. The employer protested claimant's claim as a work reduction of hours, but appealed the department decision as a leaving employment due to surgery.

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".

The administrative law judge concludes that the claimant is not able and available to perform work due to non-work-related surgery effective January 23, 2011.

It does appear the claimant did work fewer hours for the week ending January 22, 2011 that does make her eligible for partial benefits that week. However, the claimant's employment separation on and after January 21 is due to non-work-related surgery and she is disqualified from receiving benefits, as she has not been released by her doctor to return to work.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Since the claimant has been receiving benefits, the overpayment issue is remanded to Claims for a decision.

DECISION:

The department decision dated February 8, 2011, reference 01, is modified. The claimant is eligible for partial benefits the week ending January 22, 2011, but she is disqualified effective January 23 as not being able and available for work due to surgery. The overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css