

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KACI M HURKA
Claimant

APPEAL NO. 08A-UI-08135-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

OC: 06/15/08 R: 04
Claimant: Appellant (4-R)

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Kaci Hurka filed a timely appeal from the September 4, 2008, reference 04, decision that denied benefits effective June 22, 2008. After due notice was issued, a hearing was held on September 25, 2008. Ms. Hurka participated. The administrative law judge took official notice of the July 31, 2008, reference 01 decision, the July 29, 2008, reference 02 decision, and the July 29, 2008, reference 03 decision. The administrative law judge took official notice of the notice of claim mailed to employer Hucklebery Entertainment, L.L.C., (employer account number 348167) and the Agency's administrative record of benefits disbursed to the claimant. The administrative law judge took official notice of the Agency's administrative record of the claimant's weekly reports via the automated telephonic weekly claim reporting system. Exhibit A and Department Exhibit D-1 were received into evidence.

ISSUE:

Whether Ms. Hurka has been able to work and available for work since the June 15, 2008, effective date of her claim for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: During the week of June 15-21, 2008, Kaci Hurka was employed as a pizza maker for Hucklebery Entertainment, L.L.C., doing business as Fun City in Burlington. Ms. Hurka was still within a 90-day probationary period, at the end of which she would become a permanent, full-time employee. On Tuesday, June 17, 2008, the Burlington area experienced flooding that prevented Ms. Hurka from reporting for work for one or two days.

On June 19, 2008, Ms. Hurka was heading to work in Burlington, by means of the Fort Madison Bridge, when she was in a rollover accident near Burlington. Ms. Hurka suffered significant injury to her left hand. The accident took approximately one-fourth of the skin off the back of Ms. Hurka's left hand, by her index and middle finger. The accident tore portions of the index finger, ring finger and middle finger, and caused damage to the skin and bone. Ms. Hurka is right-handed. Ms. Hurka was transported to a Burlington Hospital and then transported to the

University of Iowa Hospitals & Clinics in Iowa City, where she underwent surgery. Ms. Hurka continued in the hospital until June 25, 2008 and underwent a skin graft surgery on June 24, 2008.

On June 25, Ms. Hurka was discharged from the hospital and returned with her mother to her parents' home in Gladstone, Illinois. On Saturday, June 28, Ms. Hurka and her mother went to stay with Ms. Hurka's aunt in Burlington, so that Ms. Hurka's mother could return to work and so that Ms. Hurka would be near a hospital if she experienced any medical complications. Ms. Hurka's mother worked for the same employer, Fun City.

A week after Ms. Hurka came home from the hospital, she went to Fun City and spoke with a manager. Ms. Hurka showed the manager her injured left hand. The manager told Ms. Hurka that she would not be allowed to return to the employment until she was granted a full medical release. In addition, the manager told Ms. Hurka that she would only be allowed to return to the employment if the employer had openings at the time she was able and available to return to work.

During the week that ended July 12, 2008, Ms. Hurka learned about the Emergency Unemployment Compensation (EUC) program and decided to apply for EUC benefits. Ms. Hurka went to the Burlington Workforce Development Center and completed an application for EUC benefits. Ms. Hurka's injured left hand was evident and Ms. Hurka's left arm was in a sling. Two days later, a Workforce Development representative contacted Ms. Hurka with the news that Ms. Hurka was not eligible for EUC benefits, but could apply for regular unemployment insurance benefits. Ms. Hurka provided information to the Workforce Development representative to initiate her application for regular unemployment insurance benefits. For some reason, a Workforce Development representative backdated the effective date of Ms. Hurka's claim to June 15, 2008. The Workforce Development did not tell Ms. Hurka that she was backdating the claim. Ms. Hurka knew that she had not been able to work since her accident and that she had been unable to work during the weeks that ended June 28, July 5 and July 12, 2008. Ms. Hurka had concluded that she would not be able to work until her doctor released her to perform work.

On July 16, 2008, Workforce Development mailed a notice of claim to Fun City. The notice of claim indicated that: "Claim is filed as temporary layoff, job attached; work search is waived. If status changes during claim, notify your local workforce center." The employer did not protest or otherwise respond to the notice of claim.

On July 29 and 31, 2008, Workforce Development mailed Ms. Hurka three decisions that indicated Ms. Hurka was eligible for benefits, provided she met all other eligibility requirements. The decisions were based on Ms. Hurka's separation from three prior employers and concluded that Ms. Hurka had requalified for benefits since leaving the prior employments. The decisions did not address Ms. Hurka's employment and/or separation from Entertainment, L.L.C., doing business as Fun City. Ms. Hurka was confused by the decisions. Ms. Hurka took no additional steps at that time to collect unemployment insurance benefits.

On July 17, 2008, Workforce Development disbursed unemployment insurance benefits to Ms. Hurka for the four-week period of June 15, 2008 through July 12, 2008. The Agency issued \$190.00 in benefits for the week ending June 21, 2008, and \$200.00 in benefits for each of the next three weeks. The total amount of the benefits disbursed was \$790.00.

Ms. Hurka started occupational therapy at the end of July, 2008. Ms. Hurka continues to participate in occupational therapy two times per week. In therapy, Ms. Hurka initially worked

on being able to make a fist with her left hand. Ms. Hurka then worked on straightening out the fingers on her left hand. Ms. Hurka is currently working on getting the fingers on her left hand to straighten out without external force being applied.

On September 8, 2008, Ms. Hurka returned to the surgeon in Iowa City for a follow-up appointment. Ms. Hurka asked whether the doctor would grant her a partial medical release. The doctor provided a partial medical release, but imposed a two-pound lifting restriction applicable to Ms. Hurka's left hand. Ms. Hurka is able to grip items with her left hand. Ms. Hurka still needs to be careful in using her left hand so as not to disturb the skin graft. Ms. Hurka is next scheduled to see her doctor about her hand on October 20, 2008. At that time, the doctor will review Ms. Hurka's progress and determine whether to relax the medical restrictions.

On September 9, 2008, Ms. Hurka took the partial medical release document to Fun City. Ms. Hurka asked the employer whether they had any light-duty work for her. The manager consulted with the human resources department and then told Ms. Hurka that Fun City had no current openings. The employer directed Ms. Hurka to complete a new application for employment and Ms. Hurka completed a new application.

Ms. Hurka did not start using the automated telephonic weekly claim reporting system to continue her claim for unemployment insurance benefits until the week that ended September 13, 2008. Thereafter, Ms. Hurka continued her claim for benefits by using the reporting system for the week that ended September 20, 2008. For each week, Ms. Hurka reported two in-person employer contacts.

Ms. Hurka has full use of her right hand. Based on her prior experience operating a cash register at Casey's General Stores, Ms. Hurka believes she would be able to work as a cashier without using her left hand.

Ms. Hurka is currently seven months pregnant and is due to give birth in December 2008. Ms. Hurka's obstetrician has placed her on a 25-pound lifting restriction, but has imposed no other medical restrictions at this point.

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 and (2) provide:

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 in relevant part as follows:

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

24.23(2) An individual presently in the hospital is deemed not to meet the availability requirements of Iowa Code section 96.4(3) and benefits will be denied until a change in status and the individual can meet the eligibility requirements. Such individual must renew the claim at once if unemployed.

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 greater weight of the evidence in the record indicates that Ms. Hurka was partially unemployed, due to the flood, during the benefit week that ended June 21, 2008. The greater weight of the evidence indicates that Ms. Hurka was available to work at her regular employment for the majority of that week. See 871 IAC 24.23(29). Ms. Hurka was eligible for \$190.00 in unemployment insurance benefits for the week ending June 21, 2008, provided she met all other eligibility requirements. During the week that ended June 21, 2008, the employer had the same work available to Ms. Hurka as it had previously made available. Accordingly, the

employer's account will not be charged for benefits paid to Ms. Hurka for the week that ended June 21, 2008. See Iowa Code section 96.7(2)(a)(2).

The greater weight of the evidence indicates that Ms. Hurka was unable to work and unavailable for work during the period of June 22, 2008 through at least September 8, 2008. Ms. Hurka had concluded she was unable to work until her doctor released her to return to work. The evidence indicates that even though Ms. Hurka's right hand was not implicated, the medical condition of her left hand prevented her from being able to safely perform work at least until September 8, 2008, when the surgeon provided a partial medical release. Prior to September 8, Ms. Hurka was still under the care of the surgeon and had not been granted any medical release. Ms. Hurka was not eligible for benefits for the period of June 22, 2008 through September 6, 2008.

The greater weight of the evidence indicates that Ms. Hurka has been able to perform some types of work, and available for work, since she received the partial release from her doctor on September 8, 2008. Ms. Hurka is right-handed and has full use of her right hand. On September 8, 2008, Ms. Hurka's doctor concluded that her healing had sufficiently progressed that she was able to use her left hand, provided she did not exceed the two-pound lifting restriction. The greater weight of the evidence indicates that Ms. Hurka is able to perform the duties associated with being a cashier. Ms. Hurka is not required to be able to perform the pizza making duties she performed for Fun City to be deemed able and available for work. Ms. Hurka must only demonstrate that she is able to perform some form of gainful employment that people perform in the labor market. Ms. Hurka has demonstrated that ability, effective September 8, 2008. The greater weight of the evidence indicates that Ms. Hurka's pregnancy-related 25-pound lifting restriction does not prevent her from engaging in some type of gainful employment in the labor market. Effective Sunday, September 7, 2008, Ms. Hurka has met the work ability requirements of Iowa Code section 96.4(3).

This matter will need to be remanded to the Claims Division to address two sets of issues. The first issue is whether Ms. Hurka was overpaid benefits during the period of June 22, 2008 through July 12, 2008. That matter was not set for hearing before the administrative law judge and Ms. Hurka exercised her right not to have the administrative law judge rule on that issue in connection with the September 25, 2008 hearing or the decision in this matter. The second issue, or set of issues, is whether Ms. Hurka has separated from the employment at Fun City, when the separation occurred, and whether the separation would disqualify Ms. Hurka for unemployment insurance benefits.

DECISION:

The Agency representative's September 4, 2008, reference 04, is amended as follows. The claimant was able to work and available for work during the benefit week that ended June 21, 2008. The claimant is eligible for benefits for the week ending June 21, 2008, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to the claimant for the week ending June 21, 2008. The claimant was not able to work or available for work during the period of June 22, 2008 through September 6, 2008, and is not eligible for benefits for that period. Effective September 7, 2008, the claimant is able to work and available for work. Effective September 7, 2008, the claimant is eligible for benefits, provided she is otherwise eligible.

This matter is remanded to the Claims Division for determination of whether the claimant was overpaid benefits during the period of June 22, 2008 through July 12, 2008. The matter is also remanded to the Claims Division for determination of whether the claimant has separated from

the employment at Fun City, when the separation occurred, and whether the separation would disqualify the claimant for unemployment insurance benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css