

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

AMANDA MILLER
Claimant

REGIS CORP
Employer

APPEAL NO. 20A-UI-03375-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/01/20
Claimant: Appellant (4)

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Amanda Miller filed a timely appeal from the April 14, 2020, reference 01, decision that denied benefits effective March 1, 2020, based on the deputy's conclusion that Ms. Miller was on an employer-approved leave of absence that she had requested and that she was not available for work within the meaning of the law. After due notice was issued, a hearing was held on May 14, 2020. Ms. Miller participated. The employer did not provide a telephone number for the hearing and did not participate. Exhibit A was received into evidence. The administrative law judge took official notice of the following Agency administrative records: DBRO and KCCO.

ISSUES:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Amanda Miller established an original claim for unemployment insurance benefits that was effective March 1, 2020, but thereafter did not commence making weekly claims until after she reopened the claim effective March 22, 2020. Since that time, Ms. Miller has made consecutive weekly claims. At the time of the appeal hearing, Ms. Miller had most recently made a claim for benefits for the week that end May 9, 2020. For each weekly claim, Ms. Miller has certified to Iowa Workforce Development that she is not working, that she is physically and mentally able to work and available for work, and that she has no wages to report. Iowa Workforce Development set Ms. Miller's weekly benefit amount at \$437.00, but has not paid any benefits to Ms. Miller. When Ms. Miller filed her claim, she asserted a Covid-19 basis for her claim.

Since September 2018, Ms. Miller has been employed by Regis Corporation, doing business as SmartStyle, as the full-time Salon Manager for the SmartStyle salon located inside the Carroll Walmart. Ms. Miller's work hours in the employment have historically been Tuesday through Saturday, 9:00 a.m. to 6:00 p.m. or 10:00 a.m. to 7:00 pm. Historically, 20 percent of Ms. Miller's work time, the equivalent of one day per week, has been spent performing administrative duties. Historically, 80 percent of Ms. Miller's work time, the equivalent of four

days per week, has been spent cutting and styling hair. The cutting and styling work requires that Ms. Stand for extended periods and bend forward when washing customer's hair.

Until January 2020, Ms. Miller had worked approximately 40 hours per week. Ms. Miller's hourly wage has at all relevant times been \$13.50 per hour. Ms. Miller occasionally receives tips, which she and the employer document as part of her income. Ms. Miller would earn \$540.00 in wages for a 40-hour week, not counting occasional tips. In November 2019, Ms. Miller's supervisor told her that the employer planned to cut employee work hours "slightly" when business slowed to save on labor costs.

In January 2020, Ms. Miller got a new supervisor, Krista (last name unknown). In January 2020, the employer hired a fourth stylist to work in the salon. In January, Ms. Miller's work hours were cut to 32 to 36 per week. Ms. Miller would earn \$432.00 to \$486.00 for a 32 to 36-hour work week, not counting occasional tips.

These changes in work hours and the additional a new stylist happened in the context of Ms. Miller's deteriorated health status. On January 9, 2020, Ms. Miller began to experience pain from what was later diagnosed as a herniated spinal disc. Ms. Miller had gone to a medical appointment that day during her lunch break, but was in pain at the time she returned to work. Ms. Miller left work to go to Urgent Care and was treated for an apparent panic attack. The provider had recommended that Ms. Miller go home for the day and take a prescribed medication. At Krista's request, Ms. Miller returned to the workplace to cover the last hour and a half of her shift. While at the workplace, Ms. Miller experienced the onset of back pain as she stood up after sitting in a chair. Ms. Miller returned to the doctor and her doctor took her off work for a week. Ms. Miller's doctor suspected at that time that Ms. Miller was suffering from a herniated disc. The doctor referred Ms. Miller for physical therapy and Ms. Miller promptly started physical therapy, three sessions per week.

After Ms. Miller had been off work for a week, Krista communicated that she was interested in having Ms. Miller return to the work place as soon as possible. At that time, Ms. Miller's doctor released Ms. Miller to return to work, but restricted her to performing only administrative duties for no more than four hours per day. The administrative duties involved ordering supplies, responding to emails, and participating in meetings. Ms. Miller's doctor restricted Ms. Miller for performing any of the physical duties associated with cutting or styling customers' hair. Krista directed Ms. Miller to just take another week and see how physical therapy went.

Ms. Miller remained off work until February 4, 2020, when her doctor released her to return to work eight hours per day, but restricted her to performing only administrative duties. The employer's corporate staff decided the employer could only provide four to six hours of administrative duty work per day, depending on business needs. After Ms. Miller returned to work, there were three times in which she felt compelled to assist a stylist with a haircut or styling. In each instance, Ms. Miller experienced a flare-up of her back pain. Toward the end of February 2020, Ms. Miller underwent an MRI that confirmed she had a herniated spinal disc.

At the start of March 2020, Krista told Ms. Miller that the employer could not continue to pay Ms. Miller just to perform administrative duties and that if Ms. Miller could not return to work full-time, she would need to commence a continuous leave under the Family and Medical Leave Act (FMLA). Prior to that discussion, Ms. Miller had been approved for intermittent FMLA leave. On March 3, 2020, Ms. Miller applied for and was approved for continuous FMLA leave. At about the same time, Ms. Miller made her initial application for unemployment insurance benefits to establish the original claim for benefits that was effective March 1, 2020.

On March 10, 2020, Ms. Miller had medical appointment with a pain specialist. Up to his point, Ms. Miller had continued to participate in physical therapy, had progressed somewhat toward her treatment goals, but had also repeatedly regressed. On March 10, the pain specialist injected pain medication in to Ms. Miller's spine. The pain specialist instructed Ms. Miller to avoid anything more than basic activities for the following four or five days, after which Ms. Miller would be released to work eight hours per days, but restricted to performing only administrative duties. Ms. Miller did not return to work following the pain medication injection.

Effective Sunday, March 22, 2020, Governor Reynolds issued an order that closed all hair salons in Iowa. It was subsequent to this shutdown order that Ms. Miller reopened her unemployment insurance claim and commenced making weekly claims. Krista notified Ms. Miller that that the salon would be closing.

On March 24, 2020, Ms. Miller returned to the pain specialist and another injection of pain medication. Once again, the pain specialist instructed Ms. Miller to avoid anything more than basic activities for the following four or five days, after which Ms. Miller would be released to work eight hours per days, but restricted to performing only administrative duties. Ms. Miller did not return to work following the pain medication injection. The pain specialist discontinued Ms. Miller's physical therapy sessions after concluding they did not appear to be helping and might be hindering Ms. Miller's recovery.

On March 31, 2020, Ms. Miller participated in a tele-health appointment with the pain specialist. By this time, the coronavirus had prompted the pain specialist to discontinue in-person medical appointments. After concluding that the pain medicine injections were not having the desired effect, the pain specialist advised Ms. Miller that he wanted to perform a radiofrequency ablation to cauterize the affected nerve ending in Ms. Miller's back. From January 2020 to this point in her treatment, Ms. Miller had experienced severe back pain.

Ms. Miller thereafter consulted with an orthopedic specialist. Ms. Miller had her first appointment with the orthopedic specialist on April 10, 2020 and received an epidural injection at that time. The orthopedic specialist counseled Ms. Miller against the radiofrequency ablation and advised that the epidural injection would help with both inflammation and pain. Ms. Miller had to be accompanied to the orthopedic specialist appointment because she was unable to drive subsequent to receiving the epidural injection. The orthopedic specialist did not discuss with Ms. Miller whether or when she would be released to return to work. Ms. Miller had an initial adverse reaction to the epidural injection. Ms. Miller had a follow-up appointment with the orthopedic specialist.

On May 12, 2020, Ms. Miller consulted with an orthopedic surgeon. The surgeon advised Ms. Miller that the epidural injections appeared to be helping for release of pain and that two more such treatments might lead to the herniated disc moving back into alignment and out of its herniated position, thus potentially eliminating a need for surgical intervention. Ms. Miller subsequently performed recommended stretching at home.

As of the time of the May 14, 2020 unemployment insurance appeal hearing, Ms. Miller was scheduled to return to the orthopedic specialist for another epidural injection on May 18, 2020.

Ms. Miller asserted at the time of the appeal hearing that she was ready, willing, and able to return to her full duties, including cutting and styling hair and including washing customers' hair.

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".

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. 871-24.22(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.

(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.

Iowa Admin. Code r. 871-24.23(1) provides:

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

(1) An individual who is ill and presently not able to perform work due to illness.

...

(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.

...

(27) Failure to report on a claim that a claimant made any effort to find employment will make a claimant ineligible for benefits during the period. Mere registration at the workforce development center does not establish that a claimant is able and available for suitable work. It is essential that such claimant must actively and earnestly seek 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.

The weight of the evidence in the record establishes that Ms. Miller has not been able to work and available for work within the meaning of the law since she established the original claim that was effective March 1, 2020 or since she reopened her claim effective March 22, 2020. Ms. Miller's absence from the workplace since she filed her claim for benefits has nothing to do with the Covid-19 pandemic and everything to do with Ms. Miller's serious health condition. Ms. Miller has been job-attached, but on a leave of absence since she established the original claim for benefits. Ms. Miller requested the leave of absence and the employer approved the leave. Because Ms. Miller is attached to a job, her ability to work and availability for work must be evaluated with that particular employment in mind. Since Ms. Miller established her original claim for benefits, she has been physically unable to perform at least 80 percent of the essential functions of her full-time employment. Ms. Miller's assertions that has been able to work and available since she established the original claim and that she recently experienced dramatic improvement that would allow her to immediately return to her full-duties *but for* the Governor's closure order related to the Covid-19 pandemic defy logic and are without merit. Since Ms. Miller established her claim for benefits, she has continued to suffer from a serious medical condition, a herniated spinal disc, that in her words has had her in "a ton of pain" since January. Benefits are denied effective March 1, 2020. The able and available disqualification that was effective March 1, 2020 continued as of the May 14, 2020 appeal hearing. So long as Ms. Miller remains attached to the Regis Corporation employment, she will continue to be disqualified for benefits under the able and available requirements until she is able to perform the essential functions of the employment on a full-time basis. In the event Ms. Miller separates from the employment, any determination of her future ability to work and availability for work will no longer be based on her ability to perform work for this particular employer or her availability for work with this particular employer.

DECISION:

The April 14, 2020, reference 01, decision is modified as follows. The claimant has not been able to work and has not been available for work within the meaning of the law since she established the original claim for benefits that was effective March 1, 2020. The able and available disqualification that was effective March 1, 2020 continued as of the May 14, 2020 appeal hearing.

A rectangular box containing a handwritten signature in cursive script that reads "James E. Timberland".

James E. Timberland
Administrative Law Judge

May 22, 2020
Decision Dated and Mailed

jet/scn