

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ALICIA ALFARO**  
Claimant

**APPEAL NO. 15A-UI-06668-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MARZETTI FROZEN PASTA INC**  
Employer

**OC: 05/17/15**  
**Claimant: Respondent (5)**

871 IAC 24.1(113) – Layoff  
Iowa Code section 96.4(3) – Able & Available

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the June 2, 2015, reference 02, decision that that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had offered to return to work on April 24, 2015, but that no work was available. After due notice was issued, a hearing was started on July 6, 2015 and concluded on July 8, 2015. Claimant Alicia Alfaro participated and presented additional testimony through Alejandro Chavez. Frank Chase of Thomas & Thorngren represented the employer and presented testimony through Joan Tapps. Spanish-English interpreters Rafael Geronimo and Ana Pottebaum assisted with the hearing. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit One into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

**ISSUES:**

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

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

Whether the claimant was overpaid benefits.

Whether the claimant is required to repay benefits.

Whether the employer's account may be charged.

## **FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Alicia Alfaro is a Spanish-speaking person who has limited ability to read and understand English. Ms. Alfaro started her full-time employment with Marzetti Frozen Pasta, Inc., in 2012. Ms. Alfaro was a Tech 2/Line Operator (machine operator). On June 4, 2014, Ms. Alfaro reported an over use/repetitive use shoulder injury to the employer. The injury was to Ms. Alfaro's right shoulder cuff. Ms. Alfaro is right-handed. The employer reported the matter as a worker's compensation injury. In August 2014, Ms. Alfaro underwent surgery on her right shoulder. Ms. Alfaro then remained off work through October 19, 2014. Ms. Alfaro was then released to return to work on light-duty.

The employer utilizes a third-party agency, Vokworks, for purposes of placing injured employees in light-duty assignments outside the employer's workplace. Vokworks arranged a light-duty work assignment for Ms. Alfaro at a thrift store. Ms. Alfaro's work duties at the thrift store involved packing, folding and organizing clothes. Her duties also involved moving the clothes to the sales floor. Ms. Alfaro's medical restrictions limited her use of her right arm. Due to the need to perform the bulk of the work with her left, non-dominant arm, Ms. Alfaro began to experience overuse discomfort in her left arm. Ms. Alfaro performed her assigned duties in good faith. Ms. Alfaro last performed work at the thrift store on April 24, 2015.

On April 14, Ms. Alfaro's son, Alejandro Chavez, sent an email message to Joan Tapps, Assistant Human Resources Manager at Marzetti Frozen Pasta. Ms. Tapps had been involved in Ms. Alfaro's work matters since Ms. Alfaro's surgery on August 2014. Mr. Chavez wrote on behalf of his mother, "Alicia Alfaro told me to let you know that her left arm now is been hurting and feeling very exhausted from over using it because of her right shoulder injury. She wants to be seen by a doctor and if you guys can get her an appointment to be seen sometime soon." The message went to Ms. Tapps' email junkmail and Ms. Tapps the message on April 21. On April 24, Ms. Tapps sent an email message to Ms. Alfaro's supervisor at the thrift store. Ms. Tapps indicated that she needed to suspend Ms. Alfaro's work at the thrift store. Ms. Tapps wrote that it had come to her attention that Ms. Alfaro was having overuse issues with her "other arm" and that Ms. Tapps thought it best for her to stop working until the employer could get more information on the issue. Ms. Tapps asked the supervisor at the thrift store to have Ms. Alfaro get ahold of her that day, so that Ms. Tapps could explain the situation to her. Ms. Tapps advised that she was going to be out of the office the next week. The thrift store supervisor responded that Ms. Alfaro had been a blessing, was a hard worker, and that the supervisor had instructed Ms. Tapps only to perform the work she was comfortable performing. Ms. Alfaro had not asked to be removed from the light-duty assignment at the thrift store. The thrift store supervisor provided Ms. Alfaro with a copy of the email from Ms. Tapps. Ms. Alfaro had her son translate the email message for her.

On April 24, 2015, Mr. Chavez telephoned Ms. Tapps on behalf of Ms. Alfaro. Ms. Tapps told Mr. Chavez that she had notified the thrift store supervisor that she was suspending Ms. Alfaro's assignment and that she would be out of town the next week. Ms. Tapps told Mr. Chavez that Ms. Alfaro should rest her arm and that Ms. Tapps would be back in touch with Ms. Alfaro.

Ms. Chavez had last seen a doctor at the end of March. At that time, the doctor had restricted Ms. Chavez from lifting more than five pounds with her right arm and restricted from performing work that required her to raise her right arm above her shoulder. The March 31 appointment concerned her right shoulder, not her left arm.

After Ms. Tapps removed Ms. Alfaro from the thrift store assignment, Ms. Tapps consulted with the employer's worker's compensation claims adjuster. The claims adjuster instructed Ms. Tapps to refer Ms. Alfaro to her own attorney concerning any further evaluation. In other words, the employer and the worker's compensation carrier decided against sending Ms. Alfaro for any evaluation of the left arm issue Ms. Alfaro had notified the employer about through her son's email on April 14, 2015.

On or about May 1, the employer's attorney for the worker's compensation matter sent a letter to the physician who had been treating Ms. Alfaro's right shoulder. In the letter, the attorney set forth a series of assertions regarding the medical restrictions applicable to Ms. Alfaro's right shoulder and asked the doctor confirm that the assertions were accurate. The doctor confirmed that Ms. Alfaro was at that point, able to lift and carry 25-30 pounds and that the doctor recommended that against extended overhead work or work duties that involved extended periods of reaching away from the body. The letter and confirmation of restrictions did not include an evaluation of any issues relating to Ms. Alfaro's left arm.

After Ms. Tapps told Ms. Alfaro's son on April 24 that she was taking Ms. Alfaro off the light-duty assignment, that Ms. Alfaro should rest her arm, and that Ms. Tapps would be back in touch, Ms. Tapps did not make any further contact with Ms. Alfaro or Mr. Chavez until May 14, 2015. On that day, she responded to an email message that Mr. Chavez had sent to her on May 13, 2015. Mr. Chavez wrote that his mom had asked him to send an email message to see what was going to happen next, that her arm was still in pain and bothering her, that Ms. Alfaro was concerned that she was only receiving worker's compensation checks and was no longer working. Mr. Chavez requested a call with further information from Ms. Tapps. Ms. Tapps did not call. Instead, Ms. Tapps sent an email message asking whether the arm Ms. Alfaro was having the problems with was the same arm on which the surgery was performed. Ms. Tapps further indicated that she would need to consult with the employer's insurer. Ms. Tapps had prior notice through the email message of April 14 and the telephone conversation of April 24 that the arm that was bothering Ms. Alfaro at that point was her left arm, not the arm on which she had surgery. Mr. Chavez responded to Ms. Tapps email message with a short and erroneous message that it was the same arm. Ms. Tapps sent an email response that Ms. Alfaro needed to contact her own attorney.

When the employer had failed to return her to work or arranged for further evaluation of her left arm, Ms. Alfaro established a claim for benefits that was effective May 17, 2015. Workforce Development categorized Ms. Alfaro as a group 3 claimant, someone is attached to an employment, but laid off from the employment. Ms. Alfaro's weekly benefit amount was set at \$285.00. Ms. Alfaro received that amount for each of the weeks between May 17, 2015 and June 27, 2015.

On June 1, 2015, a Workforce Development claims deputy held a fact-finding interview concerning the employment. Ms. Tapps represented the employer at that proceeding.

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

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of

laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

The weight of the evidence in the record establishes that the employer laid off Ms. Alfaro effective April 24, 2015, when Ms. Tapps notified the thrift store supervisor and notified Ms. Alfaro through Mr. Chavez that Ms. Tapps was "suspending" the work assignment at the thrift store. Ms. Alfaro had at no time asked to be released from the light-duty assignment at the thrift store. At no time did Ms. Alfaro assert that she was incapable of performing work in the light-duty assignment. Ms. Alfaro merely requested evaluation of her left arm in the context of performing work that required favoring her left arm. The employer never recalled Ms. Tapps to the light-duty assignment or any other work. Because Ms. Alfaro did not voluntarily quit the employment and because she was not discharged for misconduct, the involuntary separation that occurred on April 24, 2015 would not disqualify her for benefits or relieve the employer of liability for benefits. See Iowa Code section 96.5(1) (regarding voluntary quits without good cause attributable to the employer) and 96.5(2)(a) (regarding discharges for misconduct in connection with the employment). Ms. Alfaro would be eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

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 § 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 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.

Because Workforce Development coded Ms. Alfaro as a group 3, laid off claimant, the Agency would not have put Ms. Alfaro on notice that she needed to search for new employment. Ms. Alfaro reasonably waited for the employer to get back to her regarding further employment. The weight of the evidence indicates that Ms. Alfaro reasonably operated under the belief that she was temporarily laid off during the period of May 17, 2015 through June 27, 2015, when her claim for unemployment insurance benefits was active. Ms. Alfaro remained available to return to the work she had been performing prior to the layoff. Ms. Alfaro demonstrated the ability to perform that work over the course of several months. Indeed, Ms. Alfaro continued to perform the same duties after her son's April 14 email message and continued to perform the duties up until the employer made her stop on April 24, 2015. Accordingly, Ms. Alfaro satisfied the able and available requirement during the period of May 17, 2015 through June 27, 2015, and was eligible for benefits for that period provided she met all other eligibility requirements. See Iowa Code section 96.19(38)(c) (regarding temporarily unemployed workers).

Given the length of time Ms. Alfaro has been separated from the employment, and other evidence indicating a permanent separation, Ms. Alfaro is hereafter required to comply with the work search requirement set forth at Iowa Code section 96.4(3) during any week for which she claims unemployment insurance benefits.

**DECISION:**

The June 2, 2015, reference 02, decision is modified as follows. The claimant was laid off effective April 24, 2015. The layoff did not disqualify the claimant for benefits. Based on the layoff, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits. The claimant met the able and available requirement during the period of May 17, 2015 through June 27, 2015, and was eligible for benefits she received for that period, provided she was otherwise eligible. The claimant must hereafter comply with the work search requirement set forth at Iowa Code section 96.4(3) during any week for which she claims unemployment insurance benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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