

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

LOIS L SHEPARD

Claimant

MCI HOSPITALITY LLC

Employer

APPEAL NO. 20A-UI-03287-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/22/20

Claimant: Respondent (2R)

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 15, 2020, reference 01, decision that allowed benefits effective March 22, 2020, provided the claimant was otherwise eligible, based on the deputy's conclusion that the claimant was able to work, available for work, but partially unemployed. The decision also held that the employer's account would not be relieved of charges for benefits, based on the deputy's conclusion that the employer was not providing the same employment as has been provided during the base period. After due notice was issued, a hearing was held on May 12, 2020. Claimant Lois Shepard participated. Dev Patel represented the employer. The administrative law judge took official notice of the agency's administrative record of wages reported by or for the claimant and benefits disbursed to the claimant (DBRO).

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: Dev Patel owns MCI Hospitality, L.L.C., which does business as Quality Inn & Suites in Mason City. Claimant Lois Shepard began her employment at the Quality Inn & Suites in July 2018 and last performed work for the employer on April 5, 2020. Throughout the employment, Ms. Shepard worked as a part-time front desk clerk. Ms. Shepard regularly worked three eight-hour shifts per week. The majority of the shifts were 3:00 p.m. to 11:00 p.m. Ms. Shepard also worked weekend breakfast shifts. Ms. Shepard averaged 24 hours per week. Ms. Shepard's supervisors have been Samantha Anderson, Manager, and Janesh Patel, General Manager. Ms. Shepard's hourly wage for the last 1.5 years has been \$12.00.

During the week of March 22-28, 2020, the employer scheduled Ms. Anderson to work four shifts, these consisted of eight-hour shifts on Sunday, March 22, Wednesday, March 25, Thursday, March 26, and Saturday, March 28, 2020. Ms. Anderson suffered a non-work related fall on March 16, 2020. Ms. Shepard's fall prompted someone to call for an ambulance. Ms. Shepard was examined by paramedics at the scene and did not require any additional

medical evaluation or treatment. On March 24, Ms. Anderson sent Ms. Shepard a work schedule and asked Ms. Shepard whether she was well enough to work the March 25 and 26 shifts. Ms. Anderson offered to cover those shifts, if Ms. Shepard did not feel she had sufficiently recovered from her fall to work those shifts. Ms. Shepard declined the March 25 and 26 shifts and referenced the Saturday, March 28, breakfast shift as a factor in her decision to decline the Wednesday and Thursday shifts. Ms. Shepard worked the Sunday and Saturday shifts, for a total of 16 hours that week. Ms. Shepard's wages for the worked shifts totaled \$194.00.

For the week of March 29, 2020 through April 4, 2020, the employer scheduled Ms. Shepard to work three shifts: Wednesday, April 1, Thursday, April 2, and Saturday, April 4. Ms. Shepard worked all three shifts, for a total of 24 hours. Ms. Shepard's wages for those shifts totaled \$288.00.

For the week of April 5-11, 2020, the employer scheduled Ms. Shepard to work just two shifts for a total of 16 hours. The employer had reduced Ms. Shepard's shifts to just two per week, based on a COVID-19 related reduction in hotel occupancy. The employer scheduled Ms. Shepard to work an eight-hour shift on Sunday, April 5 and an eight-hour shift on Tuesday, April 7. Ms. Shepard ended up working nine hours in connection with the Sunday shift. Ms. Shepard declined to work the April 7 shift and cited a concern with exposure to the coronavirus as the basis for not appearing for the shift.

Ms. Shepard established an original claim for unemployment insurance benefits that was effective March 22, 2020. Ms. Shepard established the claim *before* the employer-initiated reduction in her work hours took effect. Iowa Workforce Development set Ms. Shepard's weekly benefit amount at \$252.00. Ms. Shepard had made consecutive weekly claims since establishing her original claim.

When Ms. Shepard made her weekly claim for the week that ended March 28, 2020, she reported the \$194.00 in wages she made for working the Sunday and Saturday shift that week. Ms. Shepard reported that she was able to work and available for work that week, even though she had declined two of the four shifts she was scheduled to work that week. Iowa Workforce Development disbursed \$121.00 in reduced benefits to Ms. Shepard for that week.

When Ms. Shepard made her weekly claim for the week that ended April 4, 2020, she reported the \$288.00 in benefits for the three shifts she worked that week and received no unemployment insurance benefits for that week.

When Ms. Shepard made her weekly claim for the week that ended April 11, 2020, she reported zero wages, even though she had earned \$108.00 in wages for the nine-hour shift on Sunday, April 5. Ms. Shepard reported that she was not working that week, even though she had worked one shift that week. Ms. Shepard reported that she was able to work and available for work, even though she had declined one of the two shifts she was scheduled to work that week.

Since working the shift on Sunday, April 5, 2020, Ms. Shepard has declined to work additional shifts for the employer, based on her concerns about the potential for exposure to the novel coronavirus. The employer has continued to have two shifts, 16 hours of work, available for Ms. Shepard each week.

On April 13, 2020, Ms. Shepard provided the employer a note from her doctor. The note begins with a peculiar statement: "In light of Covid-19, this patient wants me to make you aware that she is at high risk due to asthma and diabetes." The note goes on to reference Centers for

Disease Control (CDC) recommendations pertaining to the novel coronavirus and pertaining to high-risk individuals. However, the note does not indicate that the doctor believes Ms. Shepard to be at high risk, does not indicate that the doctor is taking Ms. Shepard off work, and does not indicate that the doctor believes it necessary for Ms. Shepard to self-quarantine at home. Despite the absence of such statements in the note, Ms. Shepard presented the note to the employer to support her assertion that she needed to immediately commence staying at home “until this stuff is done.” Based on Ms. Shepard’s statement to the employer that she was unavailable to work, the employer did not schedule her for additional hours. The employer recognized the need for “social distancing” barriers in the workplace to protect front desk staff. In mid-April, after Ms. Shepard went off work, the employer installed an acrylic/Plexiglas barrier to shield the front desk staff and built a half-wall to keep patrons at least six feet away from the front desk staff. The employer’s booking and payment process does not require staff to handle the customer’s credit card or to pass documents.

Ms. Shepard has continued to make weekly claims, reports zero wages, and receives weekly regular state benefits and Federal Pandemic Unemployment Compensation (FPUC) benefits.

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 Administrative Code rule 871-24.23 provides, in relevant part, as follows:

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.

...

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

...

(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

...

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

...

(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

...

(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.

An individual shall be deemed *partially unemployed* in any week in which, while employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars. Iowa Code Section 96.19(38)(b). This definition of partial unemployment assumes the employer, rather than the claimant, has reduced the hours of available work.

Ms. Shepard was not partially unemployed and was not available for work within the meaning of the law during the week that ended March 28, 2020. During that week, the employer had four shifts for Ms. Shepard. Ms. Shepard worked just two of the four shifts. Ms. Shepard did not make herself available for the majority of the scheduled work week. Ms. Shepard's purported reason for missing the shifts was a fall more than a week earlier that required first aid, but required no further medical evaluation or treatment. A reasonable person would conclude such a fall would not require such an extended recovery period and that Ms. Shepard would be able to perform her front desk duties on March 25 and 26, 2020. Ms. Shepard is not eligible for benefits for the week that ended March 28, 2020.

During the week that ended April 4, 2020, Ms. Shepard was able to work and available for work, but not partially unemployed. During that week, Ms. Shepard worked her usual hours and shifts and earned wages that exceeded her weekly benefit amount by more than \$15.00. Ms. Shepard is not eligible for benefits for the week that ended April 4, 2020.

During the week that ended April 11, Ms. Shepard was not available for work within the meaning of the law. Ms. Shepard could have been deemed partially unemployed, if she had made herself available to work the hours the employer scheduled for her, Ms. Shepard elected to appear for only one of the two shifts and was not available for the majority of her work week. Ms. Shepard is not eligible for benefits for the week that ended April 11, 2020.

Ms. Shepard has not been available for work within the meaning of the law since April 7, 2020. Ms. Shepard cites the Covid-19 pandemic as the basis for her decision to take herself off work. The doctor's note that Ms. Shepard did not indicate that the doctor believed Ms. Shepard to be at increased risk due to the novel coronavirus, did not indicate that the doctor was taking Ms. Shepard off work, and did not indicate that the doctor had advised Ms. Shepard to quarantine. In the face of the Covid-19 pandemic, and based on the CARES Act, Iowa Workforce Development administration has carved out some temporary exceptions to the able and available requirement. These are published at the Iowa Workforce Development website. These include exceptions for workers who are sick with Covid-19 and workers who are immune-compromised *and* have been advised by a doctor to quarantine. The weight of the evidence indicates that Ms. Shepard's circumstances do not fall within those exceptions to the able and available requirement. Whatever concerns Ms. Shepard had about exposure to the novel coronavirus should have been alleviated by the employer's installation of social distancing physical barriers. Ms. Shepard has elected not to return to work. Though Ms. Shepard still

considers herself employed by this employer, she continues to decline to make herself available for any work with this employer. Ms. Shepard is not eligible for benefits for the period she had taken herself off work over her concern with possible exposure to the novel coronavirus. That period began and continued as of the May 12, 2020 appeal hearing.

This matter will be remanded to the Benefits Bureau for determination of whether there has been a separation from the employment and for determination of whether that separation disqualifies the claimant for benefits or relieves the employers account of liability for benefits.

This matter is also remanded for entry of overpayment decisions pertaining to the state and Federal Pandemic Unemployment Compensation (FPUC) Ms. Shepard has received in connection with her claim.

DECISION:

The April 15, 2020, reference 01, decision is reversed. The claimant has not met the availability requirements since she established the claim for benefits that was effective March 22, 2020. Benefits are denied effective March 22, 2020. The availability disqualification continued as of the May 12, 2020 appeal hearing.

This matter is remanded to the Benefits Bureau for determination of whether there has been a separation from the employment and for determination of whether that separation disqualifies the claimant for benefits or relieves the employers account of liability for benefits.

This matter is remanded to the Benefits Bureau for entry of overpayment decisions pertaining to the state and Federal Pandemic Unemployment Compensation (FPUC) the claimant has received in connection with her claim.



James E. Timberland
Administrative Law Judge

May 20, 2020
Decision Dated and Mailed

jet/scn