

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI	
JULIUS M DUDLEY Claimant PEPSI-COLA GENERAL BOTTLERS INC Employer	APPEAL NO. 07A-UI-06385-JTT ADMINISTRATIVE LAW JUDGE DECISION OC: 05/13/07 R: 02 Claimant: Appellant (1)

Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Julius Dudley filed a timely appeal from the June 18, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was commenced on July 12, 2007 and concluded on July 20, 2007. Mr. Dudley participated. Lucas Gray, Human Resources Generalist, represented the employer. The administrative law judge received Exhibits One through Five and A through D into evidence. The hearing in this matter was consolidated with the hearing in appeal number 07A-UI-06386-JTT.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Julius Dudley commenced his employment with Pepsi-Cola General Bottlers on August 5, 2002 and was a full-time Driver/Merchandiser at the time he started a vacation on April 9, 2007. Mr. Dudley's job duties require him to be able to lift 85 pounds. On April 9, 2007, Mr. Dudley slipped, hit the back of his head on concrete, and suffered injury to his neck. The injury to the nerves in Mr. Dudley's neck caused Mr. Dudley to experience muscle spasms in his right arm and shoulder. Mr. Dudley is right-handed. Mr. Dudley was treated at an emergency room and was prescribed pain medication. Mr. Dudley was scheduled to return from his vacation on April 16, but requested and was granted April 16 and 17 off so that he could continue to recover from his injury. The employer provided Mr. Dudley with a toll-free number Mr. Dudley could utilize to request short-term disability benefits for the non-work-related injury. The same number could be used to report a workers' compensation injury or request family and medical leave. When Mr. Dudley contacted the number, Mr. Dudley erroneously reported his off-duty injury as a workers' compensation injury, which resulted in a subsequent denial of short-term disability benefits. Mr. Dudley returned to work on April 18 and, though he continued to experience pain related to the April 11 injury, Mr. Dudley continued to perform his normal duties until May 7, 2007.

On April 26, Mr. Dudley bumped his head on the top of the doorway of his delivery truck as he was exiting the truck. The contact caused Mr. Dudley to experience pain in the same area he had injured on April 11. On April 26, Mr. Dudley advised the employer that he was unable to make his two last scheduled deliveries and these were reassigned to another driver. Mr. Dudley did not report the incident as a workplace injury. Mr. Dudley said nothing more about the April 26 incident until Monday, May 7.

On May 7, Mr. Dudley spoke to Andy Hobbes, Sales Support Manager, and requested to see the employer's workers' compensation doctor. Mr. Dudley told Mr. Hobbes, for the first time, about bumping his head on April 26. Mr. Hobbes asked Mr. Dudley whether the pain he was experiencing was attributable to the April 11 off-duty injury. Mr. Dudley said he was unsure. Mr. Hobbes instructed Mr. Dudley to wait to speak with human resources employee Cheryl Reida to make arrangements to see the employer's doctor. Mr. Dudley did not wait for Ms. Reida. Instead, Mr. Dudley went to see his personal doctor regarding the neck pain. The doctor prescribed pain medication and restricted Mr. Dudley from using his right arm. The doctor provided a note that excused Mr. Dudley from work for the remainder of the week. The doctor referred Mr. Dudley to a neurologist.

On May 11, Mr. Dudley consulted the neurologist. On May 14, Mr. Dudley underwent magnetic resonance imaging (MRI). Mr. Dudley was referred for physical therapy, which he commenced on May 16.

On May 15, Mr. Dudley took the medical restrictions document to his workplace and met with Mr. Hobbes and Lucas Gray, Human Resources Generalist. During this meeting, Mr. Dudley made no mention at all of the April 26 head bump and the matter was not discussed. The employer advised Mr. Dudley that it would require a full release before it would allow Mr. Dudley to return to work.

Mr. Dudley established a claim for unemployment insurance benefits that was effective May 13, 2007.

On May 16, Mr. Dudley again met with his neurologist, who prescribed an anti-inflammatory medication. The neurologist indicated he was not willing to release Mr. Dudley to return to work and, instead, wanted Mr. Dudley to be off work while the doctor saw how Mr. Dudley's condition responded to the medication.

On May 21, the neurologist completed a release document that indicated Mr. Dudley *might* be able to return to work on May 22, but would be subject to a 15-pound lifting restriction. The doctor put a question mark next to the tentative return date. The neurologist indicated that he had diagnosed Mr. Dudley with cervical radiculopathy, pressure on the nerve root at the base of the cervical spine (neck). Mr. Dudley provided a copy of the release to Ms. Reida, who indicated that the employer had no work for Mr. Dudley while he was subject to the restrictions. Ms. Reida advised Mr. Dudley to renew his request for short-term disability benefits. Mr. Dudley then mentioned the alleged April 26 workplace injury. In response to this information, Ms. Reida scheduled an appointment for Mr. Dudley with the employer's workers' compensation doctor. Mr. Dudley met with the employer's doctor on May 21. That doctor concluded Mr. Dudley's injury was non-work-related and referred Mr. Dudley back to his personal doctor(s). Mr. Dudley returned and spoke again with Ms. Reida. From Ms. Reida's office, Mr. Dudley spoke by telephone with a representative from the employer's short-term disability benefits carrier. Mr. Dudley told the short-term disability representative that his injury was a workers' compensation matter. Because Mr. Dudley characterized his injury as a workplace injury, the request for short-term disability benefits was again denied.

On May 23, Mr. Dudley returned to the workplace and met with Mr. Gray. Mr. Dudley indicated that he wished to pursue the matter as a workers' compensation matter. Mr. Dudley and Mr. Gray completed appropriate paperwork. Mr. Gray made arrangements for Mr. Dudley to speak with a representative of the employer's workers' compensation insurance carrier. Mr. Gray asked Mr. Dudley why he had not reported the head bump at the time it occurred and Mr. Dudley said he had wanted to continue to work and thought the pain medications would resolve the matter. Mr. Dudley spoke to the workers' compensation representative the same day. The representative advised Mr. Dudley that *if* the matter concerned a work related injury, the employer would make work available for Mr. Dudley that would meet his restrictions.

On May 30, Mr. Dudley met with his neurologist. The neurologist would not return Mr. Dudley to his regular work duties. The neurologist scheduled Electromyography (EMG), which Mr. Dudley underwent on May 31. Mr. Dudley spoke with the neurologist approximately one week later, at which time the neurologist recommended that Mr. Dudley return for additional treatment/therapy. Mr. Dudley had discontinued attending physical therapy due to a lack of funds.

On June 21, the workers' compensation representative reported to Mr. Gray that she had received documentation from Mr. Dudley's neurologist that indicated Mr. Dudley's condition was not work related, but was attributable to the April 11 vacation injury. Based on this information, the insurance carrier denied Mr. Dudley's request for workers' compensation benefits.

On June 21, Mr. Gray sent Mr. Dudley a letter by certified mail, which letter Mr. Dudley received on June 22. On June 14, Mr. Gray had left a message on Mr. Dudley's cell phone and requested a return call, which Mr. Dudley did not return. Mr. Gray told Mr. Dudley that he was concerned about a lack of contact from Mr. Dudley and that the employer would deem Mr. Dudley to have voluntarily quit if it did not hear from Mr. Dudley by June 27. In response to the letter, Mr. Dudley returned to the neurologist. On June 22, the neurologist imposed the following restrictions: light duty, 10-pound lifting restriction, no working or reaching above the shoulder or pulling with the right arm. These restrictions were more restrictive than the previous restrictions. The neurologist referred Mr. Dudley to a neurosurgeon.

On June 25, Mr. Dudley went to the workplace and met with Ms. Reida and Mr. Hobbes. The employer indicated it had no work for Mr. Dudley that would meet his restrictions. Ms. Reida suggested that Mr. Dudley renew his request for short-term disability benefits. Thereafter, Mr. Dudley's request for short-term disability benefits was approved and Mr. Dudley was approved to receive short-term disability benefits of \$130.00 per week.

Mr. Dudley continues on an approved medical leave. Mr. Dudley and the employer both intend for Mr. Dudley to return to work once Mr. Dudley receives a full medical release. Mr. Dudley continues under the care of his doctor(s). Mr. Dudley has an appointment with the neurosurgeon on July 31, 2007.

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, (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.

(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, relevant part, as follows:

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

24.23(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.

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 indicates that Mr. Dudley's medical condition is not attributable to a minor head bump at work on April 26, 2007, but is instead attributable to a much more serious non-work-related injury that occurred on April 11, 2007. The evidence indicates that Mr. Dudley continues under a doctor's care, that his condition has not sufficiently

responded to rest and medication, and that Mr. Dudley is now faced with the possibility that surgical intervention is required to treat his neck injury. Mr. Dudley continues under medical restrictions that prevent him from being able to work. Since Mr. Dudley established his claim for benefits he has been interested only in returning to his prior employment at Pepsi and has not sought other employment.

While the administrative law judge is sympathetic to Mr. Dudley's situation, the administrative law judge must conclude, based on the evidence in the record and application of the appropriate law, that Mr. Dudley has not met the able and available requirements set forth in Iowa Code section 96.4(3) since he established his claim for benefits. Mr. Dudley continues to not meet those requirements. Accordingly, Mr. Dudley is not eligible for unemployment insurance benefits.

DECISION:

The Agency representative's June 18, 2007, reference 01 is affirmed. The claimant had not been able and available for work since establishing his claim for benefits. Accordingly, the claimant is not eligible for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs