

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TOBY SWAIM

Claimant

APPEAL NO: 11A-UI-10724-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC

Employer

OC: 07/17/11

Claimant: Appellant (2)

Iowa Code § 96.4-3 - Able and Available for Work

STATEMENT OF THE CASE:

Toby Swaim (claimant) appealed an unemployment insurance decision dated August 11, 2011, reference 03, which held that he was not eligible for unemployment insurance benefits because he was not able and available to work with West Liberty Foods, LLC (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 6, 2011. The claimant participated in the hearing. The employer did not comply with the hearing notice instructions and did not call in to provide a telephone number at which a representative could be contacted, and therefore, did not participate. Claimant's Exhibit A was admitted into evidence. Based on the evidence, the arguments of the party, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant is able and available to work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant sustained an injury to his left hand and also fractured his mandible. Treating provider Sarah Kluesner, ARNP documented that the claimant was incapacitated as of July 11, 2011 and had surgery on July 20, 2011. He was released to return to work on July 25, 2011 with light-duty restrictions for four to six weeks.

The claimant is restricted to lifting, pulling or pushing zero to ten pounds. He is only allowed to work with his left hand and has limited use of his right hand in confinements of his splint. The claimant is also restricted from pulling, pushing, reaching, grasping and finger movement. He is unable to perform any of his job functions due to these restrictions and has to sit for 15 minute increments several times a day.

The claimant subsequently separated from his employer and that separation will be addressed in a separate appeal hearing.

REASONING AND CONCLUSIONS OF LAW:

The issue to be determined is whether the claimant is able and available for work. In order for an individual to be eligible to receive unemployment insurance benefits, the evidence in the record must establish that he is able to work, available for work, and earnestly and actively seeking work. See Iowa Code § 96.4(3) and 871 IAC 24.22.

An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but that which is engaged in by others as a means of livelihood. 871 IAC 24.22(1). Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. See 871 IAC 24.22(1)(a).

Iowa Code § 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 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.

The claimant has the burden of proof in establishing his ability and availability for work. *Davoren v. Iowa Employment Security Commission*, 277 N.W.2d 602 (Iowa 1979). The medical evidence confirms the claimant is medically able to work as of July 25, 2011, although he is unable to perform any of his job functions with West Liberty Foods, LLC. The claimant qualifies for unemployment insurance benefits as of the week ending July 30, 2011, provided he is otherwise eligible.

DECISION:

The unemployment insurance decision dated August 11, 2011, reference 03, is reversed. The claimant meets the availability requirements of the law as of July 25, 2011 and qualifies for benefits as of that date, provided he is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css