

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICK L GRISHAM

Claimant

APPEAL NO. 07A-UI-08446-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KEOKUK COUNTRY CLUB

Employer

**OC: 11/19/06 R: 04
Claimant: Appellant (4-R)**

Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Rick Grisham filed a timely appeal from the August 29, 2007, reference 02, decision that denied benefits effective July 29, 2007. After due notice was issued, a hearing was held on September 17, 2007. Mr. Grisham participated. Nancy Symmonds, Manager, represented the employer. Exhibit A was received into the record. The hearing in this matter was consolidated with the hearing in Appeal Number 07A-UI-08447-JTT.

ISSUE:

Whether the claimant has been able to work and available for work since establishing an additional claim for benefits that was effective July 29, 2007.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Rick Grisham commenced his full-time employment with Keokuk Country Club in 1999 and performed work as an assistant groundskeeper until August 1, 2007. Mr. Grisham and the employer each continue to consider Mr. Grisham an employee of Keokuk Country Club. Mr. Grisham's immediate supervisor is Danny Carr, Superintendent. Mr. Grisham's regular duties include operating riding lawn mowers, operating a weed trimmer, changing holes on golf course greens, operating a chain saw, performing machine maintenance and, occasionally, digging ditches in connection with field tiling.

In the middle of June 2007, Mr. Grisham began to experience what he thought was a pulled muscle. The symptoms arose a day after Mr. Grisham had been operating a grass and weed trimmer at work. Mr. Grisham attempted to address the problem with topical lotions and muscle relaxing medication, but the pain worsened. On or about June 27, Mr. Grisham was examined by his personal doctor at the Veterans' Administration Medical Center in Iowa City. The V.A. doctor scheduled Magnetic Resonance Imaging (M.R.I.) for July 13. In the meantime, Mr. Grisham returned to his regular work duties. After the M.R.I., the V.A. doctor's office contacted Mr. Grisham on July 16 or 17, to advise Mr. Grisham that the doctor was referring Mr. Grisham to a neurosurgeon. Mr. Grisham told Mr. Carr about his trip to the V.A. doctor. Mr. Grisham told Mr. Carr that the doctor believed that Mr. Grisham might have a problem with a

vertebral disk. Mr. Grisham told Mr. Carr that the doctor wanted Mr. Grisham to undergo more medical tests. At some point during the latter half of July, Mr. Grisham was evaluated by a neurosurgeon, who concluded that Mr. Grisham should be evaluated at a nerve clinic. Mr. Grisham informed Mr. Carr of the trip to the neurosurgeon and the impending trip to the nerve clinic. The nerve clinic appointment was scheduled for July 31.

On July 18, Mr. Grisham had spoken to Nancy Symmonds, Keokuk Country Club Manager, about pain in his arm, his recent evaluation at the V.A., and the V.A. doctor's belief that he might have two bad vertebral disks. Following this conversation, Ms. Symmonds contacted the employer's insurance agent, who directed Ms. Symmonds to file a first report of injury. Ms. Symmonds also contacted the employer's workers' compensation carrier directly. Ms. Symmonds reported the matter to the country club's golf chairman. On July 27, Ms. Symmonds advised the country club's board of directors that Mr. Grisham had probably suffered the injury at work and that she had filed a first report of injury. The board indicated that it wanted a medical release that allowed Mr. Grisham to perform his duties. Though Mr. Grisham had continued to perform his regular duties up to this point without a request for any accommodation, the board wanted a medical release that allowed Mr. Grisham to perform his duties. Mr. Grisham had experienced some discomfort or pain when performing some of his duties, but wanted to work and performed the duties nonetheless. Ms. Symmonds asked Mr. Grisham to provide the employer with a medical release indicating that he was released to perform his regular duties. On July 31, Mr. Grisham obtained a medical release from the V.A. doctor. On the same day, Mr. Grisham was evaluated at the nerve clinic and underwent a Computed Tomography (C.T.) scan. The nerve clinic ruled out problems with Mr. Grisham's nervous system or muscles.

On August 1, Mr. Grisham returned to his regular work duties. Mr. Grisham provided Ms. Symmonds with the requested medical release. The medical release from the V.A. doctor stated as follows:

To whom it may concern

Mr. Grisham should not work any strenuous activities until evaluated and deemed able by neurosurgery.

Ms. Symmonds contacted Mr. Grisham that afternoon. Ms. Symmonds advised Mr. Grisham that she would need to present the medical release to the country club's board of directors. Ms. Symmonds thought that all of Mr. Grisham's duties were strenuous.

On August 2, Mr. Carr advised Mr. Grisham that the board of directors did not want him to continue working because the board was concerned he was going to suffer injury. Mr. Grisham told Mr. Carr that he wanted to work, but complied with the employer's decision to place him on an indefinite leave of absence.

Mr. Grisham established an additional claim for unemployment insurance benefits that was effective July 29, 2007. Mr. Grisham received benefits totaling \$581.00 for the four-week period of August 4-25, 2007. For the week that ended August 4, Mr. Grisham received \$128.00. For the weeks that ended August 11, 18, and 25, Mr. Grisham received \$151.00.

On August 16, Mr. Grisham returned to the neurosurgeon for a scheduled appointment. At this point, the employer's workers' compensation carrier had become involved and had assigned a nurse to go to the appointment with Mr. Grisham. The neurosurgeon advised Mr. Grisham that he wanted him to be seen by two additional specialists. At this point, the nurse from the workers' compensation carrier asked Mr. Grisham to be seen by the employer's doctor and

Mr. Grisham was seen by a Dr. Abernathy on August 22. Dr. Abernathy ordered another M.R.I. Dr. Abernathy told Mr. Grisham that he did not want him to work at all. Mr. Grisham concurred in the judgment that he should not work. Mr. Grisham had concluded the previous weekend, August 18-19, that he should not work. As noted above, Mr. Grisham's last weekly claim for unemployment insurance benefits was the week ending Saturday, August 25, 2007.

On August 31, Mr. Grisham returned to the workers' compensation doctor, Dr. Abernathy, for a scheduled appointment after undergoing the M.R.I. Dr. Abernathy discussed with Mr. Grisham the possible need for Mr. Grisham to undergo spinal fusion surgery, but indicated he wanted to try something else before proceeding with surgical intervention. Dr. Abernathy referred Mr. Grisham to an orthopedist. Mr. Grisham had his first appointment with the orthopedist on September 12. The orthopedist advised Mr. Grisham that he wanted to proceed as if the prior M.R.I.s did not exist and wanted to pursue a course of pain management. The orthopedist referred Mr. Grisham for physical therapy. Mr. Grisham had his first physical therapy session on September 13 and was scheduled to under the second session on September 17, the date of the appeal hearing.

On or about August 25, 2007, Mr. Grisham commenced receiving workers' compensation temporary disability benefits. The benefits were made retroactive to August 1, 2007. After Mr. Grisham received the first benefit check, he did not receive another benefit check until three weeks later. The temporary disability checks have not arrived on a regular basis.

REASONING AND CONCLUSIONS OF LAW:

The greater weight of the evidence indicates that the employer placed Mr. Grisham on an involuntary leave effective August 2, 2007. The greater weight of the evidence indicates that the employer did not intend to discharge Mr. Grisham. The evidence indicates that Mr. Grisham and the employer both consider Mr. Grisham job attached. The weight of the evidence indicates that Mr. Grisham's job status is best characterized a layoff. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker and includes temporarily furloughed employees and employees placed on unpaid vacations. See 871 IAC 24.1(113)(a). Accordingly, Mr. Grisham would be eligible for unemployment insurance benefits, provided he was otherwise eligible. See Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989).

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.

The greater weight of the evidence indicates that Mr. Grisham continued to be able and available for work through the week ending August 18, 2007. Prior to the employer's decision to lay off Mr. Grisham, Mr. Grisham had continued to demonstrate the ability to perform work without accommodation. Even if Mr. Grisham had required reasonable accommodation to continue in the work, the employer had the duty to provide such accommodations. See Sierra v. Employment Appeal Board, 508 N.W.2d 719 (Iowa 1993), citing Foods, Inc. v. Civil Rights Commission, 318 N.W. 2d 162 (Iowa 1982).

However, as of August 19, 2007, Mr. Grisham had concluded he could no longer work. This conclusion was reinforced on August 22, when Mr. Grisham met with Dr. Abernathy and Dr. Abernathy recommended that he not work. This conclusion is further reinforced by the onset of workers' compensation benefits for temporary disability. Accordingly, effective August 19, 2007, Mr. Grisham was no longer eligible for unemployment insurance benefits.

The administrative law judge concludes that Mr. Grisham was able and available for work until August 18, 2007, and eligible for benefits, provided he was otherwise eligible. The administrative law judge concludes that, effective August 19, 2007, Mr. Grisham was no longer able and available for work and, therefore, was not eligible for benefits.

The evidence presented at the hearing suggests that Mr. Grisham received workers' compensation benefits for temporary disability for the weeks he also received unemployment insurance benefits. Workers' compensation benefits for temporary disability are deductible from unemployment insurance benefits. See Iowa Code section 96.5(5)(b). This issue was not

before the administrative law judge and there was insufficient available evidence for entry of a decision on this issue. This matter will need be remanded to a claims representative so that the impact of the workers' compensation benefits on Mr. Grisham's eligibility for unemployment insurance benefits may be determined.

DECISION:

The Agency representative's August 29, 2007, reference 02, decision is modified as follows: The claimant was able and available for work for the period of July 29, 2007 through August 18, 2007. The claimant was not able and available for work effective August 19, 2007. The claimant was eligible for unemployment insurance benefits for the period of July 29, 2007 through August 18, 2007, provided he was otherwise eligible. The claimant was not eligible for unemployment insurance benefits effective August 19, 2007.

The matter is remanded for determination of the impact of workers' compensation benefits for temporary disability on claimant's eligibility for unemployment insurance benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw