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

DWAYNE MARSHALL
Claimant

APPEAL NO: 18A-UI-08408-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

NORDSTROM INC
Employer

OC: 07/08/18
Claimant: Appellant (2)

Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Dwayne Marshall (claimant) appealed a representative's July 31, 2018, decision (reference 04) that concluded he was not eligible to receive unemployment insurance benefits because he was unable to work at Nordstrom (employer) as of July 8, 2018. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 28, 2018. The claimant participated personally. The employer provided a telephone number for Breanna Jacobs, Human Resources Coordinator, but could not be reached at the time of the hearing. Neither the administrative law judge nor Susen Zevin, hearings representative, could reach her at the time of the hearing. Messages were left for the employer. The employer did not participate in the hearing. The claimant offered and Exhibit A was received into evidence.

ISSUE:

The issue is whether the claimant is able and available for 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 was hired on or about June 19, 2018, as a part-time packer. He was required to be able to lift over twenty-five pounds. The claimant's doctor restricted the claimant to lifting ten pounds because he was scheduled to have spinal surgery. The claimant quit work on July 16, 2018, so he could return to work after the surgery.

The surgery was delayed. On August 6, 2018, the claimant's physician released the claimant to return to work without restrictions. The claimant has not provided the release to the employer or indicated to the employer he would like to return to work.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the claimant is able and available for work as of August 6, 2018.

Iowa Admin. Code r. 871-24.23(1) provides:

> 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.

Iowa Admin. Code r. 871-24.22(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). When an employee is ill and unable to perform work due to that illness, he is considered to be unavailable for work. The claimant was released to return to work without restrictions by his physician. He is considered to be available for work because his physician stated he was able and available for work. The claimant is not disqualified from receiving unemployment insurance benefits as of August 6, 2018.

DECISION:

The representative's July 31, 2018 decision (reference 04) is reversed. Benefits are allowed as of August 6, 2018, provided claimant is otherwise eligible.

_____
Beth A. Scheetz
Administrative Law Judge

_____
Decision Dated and Mailed

bas/rvs