

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLES ROSEWALL
Claimant

APPEAL NO. 08A-UI-10903-ET

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

WELLS DAIRY INC
Employer

**OC: 12-23-07 R: 01
Claimant: Appellant (2)**

Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 13, 2008, reference 04, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 5, 2008. The claimant participated in the hearing with Attorney Steve Hamilton. The employer provided a phone number prior to the hearing but the witness was not available when called three times for the hearing although its representative was available and chose not to participate. Claimant's Exhibits A, B and C were admitted into evidence.

ISSUES:

The issues are whether the claimant is on a leave of absence and whether he is able and available for work.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant is employed as a full-time production worker for Wells Dairy. He began working for Wells Dairy in late 1990 or January of 1991. He suffered a work-related rotator cuff tear, a bicep tear and bone spurs on the left side of his arm and shoulder approximately one year ago and had surgery in August 2007 and again in March 2008. He was restricted from overhead lifting and although the employer had jobs that did not require overhead lifting it chose not to accommodate his restrictions. His blood pressure then began spiking due to the pain caused by his shoulder and he was restricted from working around heavy equipment or dangerous machinery. Again the employer had jobs that would not have required him to work around heavy equipment or dangerous machinery but chose not to accommodate his restrictions. The claimant presented himself for work with his doctor's excuses approximately three weeks after each surgery but the employer said the doctor's notes were not explanatory enough and then that his blood pressure problem was not work related. The claimant has not yet received a full release to return to work and is not working at this time but is able and available to work in other types of work where his restrictions are not at issue. He never requested or was granted a leave of absence.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant is able and available for work and is not on a leave of absence.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

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".

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant's absences are due to a properly reported job-related injury. He has not requested or been granted a leave of absence. He has attempted to return to work but the employer has chosen not to accommodate his restrictions. Because his absences are related to properly reported injury, and he is able and available for work, no final or current incident of unexcused absenteeism has been established. Benefits are allowed.

AMENDED DECISION:

The November 13, 2008, reference 04, decision is reversed. The claimant is not working at this time due to a work-related injury and not for a disqualifying reason. He is also able and available for work. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css