

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOSEPH H MARCOV
Claimant

HAWKEYE STATE SCALE INC
Employer

APPEAL 18A-UI-10855-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/07/18
Claimant: Respondent (2R)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The employer filed an appeal from the October 29, 2018, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 16, 2018. Claimant participated and was represented by attorney Erik Bair. Employer participated through attorney Terri Davis and witness Gary Knorr. Employer's Exhibits 1 through 6 and Claimant's Exhibit A were received into evidence.

ISSUE:

Is the claimant able to work and available for work effective October 7, 2018?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on December 15, 2015. Claimant last worked as a full-time scale technician. Claimant was separated from employment on October 4, 2018, when he was discharged.

In April 2018, claimant began experiencing pain in his right shoulder. On April 13, the pain became so severe he could not continue working. Claimant went to the doctor and on July 31, 2018, was taken off work by his doctor due to the ongoing issue with his shoulder. There is a dispute between the parties as to whether claimant's shoulder issue is work related. The employer provided an Independent Medical Examination from a Dr. Robert L. Broghammer which states, in his medical opinion, claimant's injury is not work related. (Exhibit 1).

On August 28, 2018, claimant was released to return to work with restrictions prohibiting from lifting more than 20 pounds or riding in a "bouncy" truck. (Exhibit 3). The employer did not have work available within these restrictions, so claimant remained off work. On October 3, 2018, claimant's lifting restriction was changed to no more than 15 pounds and his doctor recommended sedentary work. (Exhibit 2). The employer was not able to accommodate these

restrictions. As claimant was not able to return to work without restriction, he was separated from employment on October 4, 2018. (Exhibit A). This decision was made based on the employer's need to fill the position.

Since opening his claim for unemployment, claimant has been applying for at least two jobs every week. Claimant has been applying primarily for maintenance jobs, as that is an area where he has prior work experience. Claimant has also worked as a welder. Claimant testified he is not sure if the jobs for which he is applying would comply with his work restrictions, but many list lifting requirements over 15 pounds. Claimant explained he is hopeful that if he could get an interview, a potential employer would be able to work with him on finding a way to accommodate his restrictions.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work effective October 7, 2018.

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".

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.

Iowa Admin. Code r. 871-24.23(35) provides:

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

(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.

To be able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

Here, there is a dispute between the parties as to whether claimant's medical condition is work related. Claimant has failed to provide sufficient evidence, for the purposes of unemployment insurance benefits only, to show his medical condition is work related, as the only medical opinion offered into evidence at the time of the hearing concludes the condition is not work related.

Since the employment ended on October 4, 2018, claimant is no longer obligated to return to employer upon his medical release to offer his services. At that point, his ability to work is not measured by the job he held most recently, but by standards of his education, training, and work history. Claimant testified his training and experience is primarily in the areas of maintenance and welding work. Claimant further testified that most of the jobs for which he has been applying have lifting requirements outside of his restrictions. As such, claimant has not shown he is able to work based upon his current restrictions and work history.

Benefits are withheld until such time as the claimant obtains a medical release to return to some type of work of which he is capable of performing, given any medical restrictions or can establish he is applying for work that falls within his restrictions and for which he is qualified based on his education, training, and work history.

As benefits have been withheld effective October 7, 2018, the issue of whether claimant has been overpaid benefits and is required to repay those benefits must be remanded to the Benefits Bureau of Iowa Workforce Development for initial investigation and determination.

DECISION:

The October 29, 2018, (reference 02) unemployment insurance decision is reversed. The claimant is not able to work and available for work effective October 7, 2018. Benefits are withheld until such time as the claimant obtains a full medical release to return to work or can establish he is applying for work that falls within his restrictions and for which he is qualified, based on his education, training, and work history.

REMAND:

The issue of whether claimant has been overpaid benefits is remanded to the Benefits Bureau of Iowa Workforce Development for initial investigation and determination.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/scn