

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

SCOTT R MILLER
Claimant

S & G MATERIALS
Employer

APPEAL 23A-UI-01299-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/08/23
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

On February 9, 2023, claimant Scott R. Miller filed an appeal from the January 30, 2023 (reference 01) unemployment insurance decision that found claimant was not able to and available for work effective January 8, 2023. The parties were properly notified of the hearing. A telephone hearing was held at 9:00 a.m. on Wednesday, February 22, 2023. Claimant Scott R. Miller participated personally. Witness Carrie Campbell testified on claimant's behalf. Employer S & G Materials participated through witness/representative Linnette Rittenmeyer, Office Manager. Claimant's Exhibits A and B were received and admitted into the record.

ISSUE:

Whether claimant is able to and available for work.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant Scott R. Miller began working for the employer on March 30, 2009. He worked full-time hours as an equipment operator and laborer at the quarry. Claimant is still an active employee; he is off work on medical leave for a non-work-related condition.

On Friday, September 2, 2022, claimant told the plant superintendent he was having issues with his neck. He then said he was leaving work to go to the doctor and anticipated they would put him right into surgery. The plant supervisor immediately sent a text message to Rittenmeyer, who handles all of the employer's workers compensation matters. She was on vacation at the time and was not able to take immediate action.

The following week, Rittenmeyer set up an appointment for claimant to go to Mercy Occupational Health. When claimant arrived, he was asked to submit to a drug test. Claimant refused the test and left the appointment prior to seeing a doctor. He went to the emergency room instead. Rittenmeyer told the claimant he needed to see the employer's doctor if this was a workplace injury. Claimant had his tests from the emergency room sent over to Mercy Occupational Health for the doctor to review. Claimant then went to another appointment set up

by Rittenmeyer at Mercy Occupational health, but he walked out again when he was asked to submit to a drug test.

Claimant had previously claimed he injured his neck at work in 2013. However, the employer's worker's compensation carrier denied this claim and determined the neck issue was a degenerative condition and not a work-related injury. Claimant has reported other work-related injuries in the past and understood what process to follow and how to file a first report of injury form.

Claimant presented the employer with a doctor's note stating he can return to work on January 5, 2023, with restrictions. These restrictions include a lifting restriction of 20 pounds; no repeated bending or twisting; and avoiding riding in bumpy vehicles. (Claimant Exhibit A) As the employer operates a rock quarry, the work performed by laborers is physical in nature and the ground is bumpy and rough. Therefore, the employer had no work that fit claimant's restrictions.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes:

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 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, 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) 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.

An individual claiming benefits has the burden of proof that he is be able to work, available for work, and earnestly and actively seeking work. Iowa Admin. Code r. 871-24.22.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

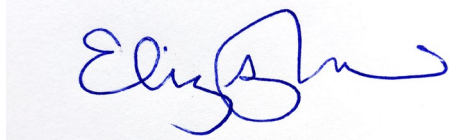
The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find Rittenmeyer's testimony credible regarding the nature of claimant's injuries and the repeated refusal to comply with the employer's instructions for attending the proper medical appointments.

The claimant could not recall, at the outset of the hearing, whether the reason he was off work in the fall of 2022 was due to his hip or his neck. This confusion was concerning. Additionally, it is not believable that the same doctor treating claimant for his neck issue would automatically handle a brand-new hip injury, and it is even less credible that such doctor would tell claimant to simply stay off work for one of the issues pending full healing of the other. Finally, claimant was being given information by Campbell during the hearing and when I questioned him about her whispering answers to him, he lied about it under oath. These issues combine to, quite simply, completely undermine claimant's credibility.

Claimant was experiencing and may be continuing to experience a non-work-related medical condition. As claimant's medical condition is not work-related and the treating physician has not released claimant to return to work for full duty without restrictions, claimant has not established his ability to work while still an employee of S & G Materials. While claimant may be able to perform light-duty work, employer is not obligated to accommodate a non-work-related medical condition or injury. Because claimant had not been released to perform his full work duties, claimant was not able to or available for work. Accordingly, he is not eligible for unemployment insurance benefits.

DECISION:

The January 30, 2023 (reference 01) unemployment insurance decision is affirmed. Claimant is not able to or available for work effective January 8, 2023. Benefits are withheld until such time as the claimant obtains a full medical release to return to work unless he is involuntarily separated before that time.



Elizabeth A. Johnson
Administrative Law Judge

February 28, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.