

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ANDREW DAVIS**

Claimant

**APPEAL NO. 19A-UI-06341-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BAKER'S PRIDE INC**

Employer

**OC: 07/14/19**

**Claimant: Appellant (2/R)**

Iowa Code Section 96.4(3) – Able & Available

**STATEMENT OF THE CASE:**

Andrew Davis filed a timely appeal from the August 8, 2019, reference 02, decision that denied benefits effective July 14, 2019, based on the deputy's conclusion that Mr. Davis was unable to perform work due to injury. After due notice was issued, a hearing was held on September 4, 2019. Mr. Davis participated. The employer did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Department Exhibits D-1, D-2, D-5 and D-6 were received into evidence.

**ISSUE:**

Whether the claimant has been able to work and available for work within the meaning of the law since he established the original claim for benefits that was effective July 14, 2019.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Andrew Davis commenced his full-time employment with Baker's Pride, Inc. in November 2018 and last performed work for that employer on June 26, 2019. Mr. Davis' regular duties involved rolling dough into baking pans, lifting the dough-filled pans onto a rack, and placing the rack of dough-filled pans into a proofing box with assistance from a co-worker. Mr. Davis' regular work hours were 2:00 p.m. to 10:00 p.m., Monday through Thursday. Deb Zimmerman, Production Assistant Manager, was Mr. Davis' immediate supervisor.

On June 19, 2019, Mr. Davis suffered a workplace injury to his right shoulder in the course of performing his duties. Mr. Davis felt a pop in his right shoulder as he lifted pans onto a rack. Mr. Davis promptly reported his injury to the employer. The employer sent Mr. Davis to an emergency room for evaluation and treatment. The emergency room provider took Mr. Davis off work for the day and referred him to an occupational health clinic. The occupational health clinic referred Mr. Davis to an orthopedic specialist in West Burlington. Mr. Davis was first evaluated by the orthopedist on June 20, 2019. The orthopedist concluded that Mr. Davis' shoulder injury was work-related. The orthopedist released Mr. Davis to return to full-time work, but restricted Mr. Davis from using his right upper arm. Mr. Davis is right-handed. The orthopedist in West Burlington indicated that Mr. Davis could still use his right hand to write.

Mr. Davis returned to work and performed modified duties that involved using his left hand and arm to manipulate and weigh bread and that involved use of his right hand to document weights. The employer also assigned Mr. Davis to perform a metal detecting test every half hour. The employer provided Mr. Davis with only five hours of work per day in the modified duties. The orthopedist Mr. Davis saw in West Burlington referred Mr. Davis to an orthopedic surgeon at the University of Iowa Hospitals and Clinics. On June 26, 2019, the employer notified Mr. Davis that he had to go completely off work until he was released to return to work without restrictions. The employer cited a concern that Mr. Davis might aggravate his injury through performance of the modified duties. The employer assured Mr. Davis that the employer would return him to his full-time employment as soon as he was released to return to work without restrictions. Mr. Davis had not requested to go off work or to commence a leave of absence. After the employer compelled Mr. Davis to go off work, the employer and/or the employer's worker's compensation carrier that the employer had concluded Mr. Davis' injury was not work related and would not be covered by the employer's worker's compensation insurance.

Mr. Davis established an original claim for unemployment insurance benefits that was effective July 14, 2019. At that time, Mr. Davis reported that he was job-attached. Iowa Workforce Development categorized Mr. Davis as a Group 3, job-attached claimant and waived the work search requirement. While Mr. Davis has been off work from his employment with Baker's Pride, he has not applied for other employment. Mr. Davis is waiting for the opportunity to return to the Baker's Pride employment.

At the insistence of the employer's third-party human resources administrator, Insperity PEO Services, Mr. Davis completed a leave of absence application on August 31, 2019.

On September 15, 2019, Mr. Davis has a scheduled appointment with the orthopedic surgeon to discuss whether surgical intervention is necessary to resolve the shoulder injury.

## **REASONING AND CONCLUSIONS OF LAW:**

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".

An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated. Iowa Code Section 96.19(38)(c).

Iowa Admin. Code r. 871-24.22(1)(a) and (2) provide as follows:

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. ...

(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.

Iowa Admin. Code r. 871-24.23(10) and (35) provide as follows:

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

...

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

...

(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.

Analysis of the able and available issues in this case are complicated by three factors. First, the employer did not participate in the appeal hearing. Second, Mr. Davis did not provide any medical documentation for the administrative law judge's consideration. Third, Iowa Workforce Development Benefits Bureau has not adjudicated the employment separation that occurred on June 26, 2019 when the employer indefinitely suspended Mr. Davis from the employment. Mr. Davis lacked the ability to discern that the employer's decision to place him off work until he was released to return to work with no restrictions effectively separated him the employment.

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 Ct. 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.*

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (1993).

Due to the employer's failure to participate in the appeal hearing and the absence of medical documentation, the credibility and reliability of Mr. Davis' testimony factors heavily in this decision. The administrative law judge had the opportunity to ask questions of Mr. Davis and listened carefully to Mr. Davis' responses to those questions. The administrative law judge found Mr. Davis' testimony to be candid, detailed, internally consistent, and truthful.

Based on assurances Mr. Davis received from the employer at the time the employer placed him off work on June 26, 2019, Mr. Davis reasonably believed and reasonably relied upon the employer's assurances that his absence from the employment would be temporary. In short, he reasonably believed that he was job-attached and temporarily laid off. In light of Iowa Workforce Development's categorization of Mr. Davis as a group 3, job-attached claimant, Mr. Davis' lack of a search for other employment during the period July 14, 2019 through the benefit week that ended September 7, 2019 does not prevent him from meeting the able and available requirement.

Because Mr. Davis reasonably believed that he was job-attached at the time he established his claim for benefits and up to the entry day of this decision, the question of whether he was able to work and available for work within the meaning of the law comes down to whether he was able to perform work for Baker's Pride and available for work with Baker's Pride. The employer had an obligation to provide Mr. Davis with reasonable accommodations that enabled him to continue in the employment. See *Sierra v. Employment Appeal Board*, 508 N.W. 2d 719 (Iowa 1993). Mr. Davis demonstrated his ability to perform work for the employer by his performance of the modified work duties following his workplace injury and the orthopedic surgeon's imposition of the lifting restriction concerning Mr. Davis' right arm. The weight of the evidence establishes that Mr. Davis has at all relevant times, since the filing of his unemployment insurance original claim and through the benefit week that ended September 7, 2019, been able to perform full-time work for Baker's Price and available for full-time work with Baker's Pride. The employer demonstrated its ability to reasonably accommodate Mr. Davis' work-related medical restrictions without undue hardship by providing him with modified duties for the limited period before the employer compelled Mr. Davis to go off work.

At no time since Mr. Davis went off work, and at no time since the filing of the unemployment insurance claim, has Mr. Davis been on a leave of absence that he voluntarily requested. The August 31, 2019 leave application that was based on the employer's agent's insistence was not a voluntary request for a leave of absence.

In summary, Mr. Davis has been able to work and available for work within the meaning of the law since he established the original claim for benefits that was effective July 14, 2019 and up through the benefit week that ended September 7, 2019. Mr. Davis is eligible for benefits for the

period beginning July 14, 2019 and through the benefit week that ended September 7, 2019, provided he meets all other eligibility requirements.

Because the evidence establishes there has been a separation from the employment, Mr. Davis shall be subject to the job search requirement effective the benefit week that began September 8, 2019. In addition, Mr. Davis shall be recategorized as a Group 6, non-job-attached claimant.

This matter will be remanded to the Benefits Bureau for determination of whether Mr. Davis has been able to work and available for work within the meaning of the law for the period beginning September 8, 2019.

This matter will be remanded to the Benefits Bureau for adjudication of June 26, 2019 separation and for entry of an appropriate decision regarding the impact of the separation on the claimant's eligibility for benefits and the employer's liability for benefits.

**DECISION:**

The August 8, 2019, reference 02, decision is reversed. The claimant was able to work and available for work within the meaning of the law during the period of July 14, 2019 through the benefit week that ended September 7, 2019. The claimant is eligible for benefits for each of the weeks within that period, provided he meets all other eligibility requirements.

Because the evidence establishes there has been a separation from the employment, the claimant shall be subject to the job search requirement effective the benefit week that began September 8, 2019. In addition, the claimant shall be recategorized as a Group 6 claimant.

This matter is remanded to the Benefits Bureau for determination of whether the claimant has been able to work and available for work within the meaning of the law for the period beginning September 8, 2019.

This matter is remanded to the Benefits Bureau for adjudication of the separation that occurred on June 26, 2019 and for entry of an appropriate decision regarding the impact of the separation on the claimant's eligibility for benefits and the employer's liability for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/scn