

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KAROL J GILMORE
Claimant

APPEAL NO: 06A-UI-08952-MT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ALUMINUM CO OF AMERICA
DAVENPORT WORKS**
Employer

**OC: 07/30/06 R: 04
Claimant: Appellant (2)**

Section 96.4-3 - Able and Available

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated September 1, 2006, reference 02, which held claimant not able and available for work. After due notice, a telephone conference hearing was scheduled for and held on September 21, 2006. Claimant participated personally. Employer participated by Jill Williams, Human Resources Generalist. Exhibits One and Two were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds: Claimant went off work due to a non-work-related injury February 1, 2006. Claimant was released to return to work July 31, 2006 with a 25-pound work restriction. Claimant's job required the ability to lift 25 pounds. The employer's company doctor refused to allow claimant to return to work due to a lack of full range of motion. The company was concerned over re-injury. Claimant was able and available for her regular work effective July 31, 2006 based on restrictions imposed by her treating surgeon. The restrictions imposed by the treating surgeon are more credible, as they came from a doctor more familiar with the situation, having performed surgery on claimant.

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".

871 IAC 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.

871 IAC 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 physician and has not been released as being able to work.

Inasmuch as the illness was not work-related and the treating physician has released the claimant to return to work, the claimant has established the ability to work. Benefits shall be allowed effective July 31, 2006. The restrictions from the treating surgeon are more credible than those of a company doctor. Claimant was restricted by the company doctor as a preventative measure to avoid any risk of re-injury. The treating surgeon was more familiar with the case and, as such, the restrictions are found credible. Claimant was able and available for work upon release by the treating doctor July 31, 2006.

DECISION:

The decision of the representative dated September 1, 2006, reference 02, is reversed. Claimant is eligible to receive unemployment insurance benefits effective July 31, 2006, provided claimant meets all other eligibility requirements.

Marlon Mormann
Administrative Law Judge

Decision Dated and Mailed

mdm/kjw