

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KELVIN L JONES
1011 N 5TH ST APT A
RED OAK IA 51566

OMG IOWA INC/NUCKOLLS CONCRETE
SERVICES
AMERICAN CONCRETE PRODUCTS
5550 NE 22ND ST
DES MOINES IA 50316

Appeal Number: 04A-UI-12689-H2T
OC: 10-24-04 R: 03
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.4-3 - Able and Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 22, 2004, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on December 20, 2004. The claimant did participate. The employer did participate through Dan Jungbluth, Human Resources Director, and Derrick Frederickson. Claimant's Exhibit A was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a ready mix truck driver full time beginning May 10, 2004 through November 12, 2004 when he was discharged. The claimant sustained a work related shoulder injury on October 19, 2004. He sought medical treatment that same day and presented a note

from Dr. Warren Hays to Gail Garey that removed him from work until he could be seen for further examination. Mr. Garey told the claimant on October 19, 2004 that he would let other members of the company know of his work release. On October 21, 2004, the claimant was seen by orthopedic specialist Dr. Miller who refused to release him for work until he could obtain an MRI and an evaluation by another orthopedic specialist Dr. Trihn. On November 5, 2004, the claimant spoke to Dan Jungbluth after he received a letter indicating that his employment had ended due to his failure to report to work. During the conversation with Mr. Jungbluth, the claimant explained that he was out on a doctor's excuse and that he had told his supervisor, Gail Garey, that same thing. Mr. Garey had said he would relay the claimant's doctor's excuse and reason for absence to the proper management officials. The conversation ended with the claimant believing the misunderstanding had been resolved and that he was still employed. On November 9, 2004, Dr. Trihn released the claimant to return to light duty work effective November 12, 2004. When the claimant contacted Derrick Frederickson about returning to work with work restrictions, he was told that he was no longer an employee of the company.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work

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.

Inasmuch as the injury was work-related and the treating physician has released the claimant to return to work, the claimant has established ability to work effective November 12, 2004. The claimant was not able to and available for work from October 19, 2004 until November 12, 2004. Because the employer had no work available or was not willing to accommodate the work restrictions, benefits are allowed.

DECISION:

The representative's decision dated November 22, 2004, reference 02, is affirmed. The claimant is able to work and available for work effective November 12, 2004. Benefits are allowed, provided the claimant is otherwise eligible.

tkh\smc