

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DENNIS A BARRETT**  
Claimant

**MIDWEST AMBUCARE INC**  
Employer

**APPEAL 17A-UI-04911-DB-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 01/22/17**  
**Claimant: Appellant (1R)**

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Iowa Code § 96.4(3) – Able and Available

**STATEMENT OF THE CASE:**

The claimant/appellant filed an appeal from the May 8, 2017 (reference 03) unemployment insurance decision that found claimant was ineligible for unemployment benefits because he was not able to perform work. The parties were properly notified of the hearing. A telephone hearing was held on May 26, 2017. The claimant, Dennis A. Barrett, participated personally and was represented by Attorney Samuel J. Aden. The employer, Midwest Ambucare Inc., participated through witness Josh Chapman. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records including the fact-finding documents.

**ISSUE:**

Is the claimant able to work and available for work effective January 22, 2017?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time for this employer until January 24, 2017 when he was discharged from employment. Claimant was working full-time for this employer as a van driver transporting clients to and from nursing homes for doctor appointments as well as driving clients to and from their homes. His job duties required operating a vehicle, lifting and pushing fifty or more pounds on a consistent basis, being able to operate the wheelchair system in the van by bending, squatting and twisting.

Claimant suffered an injury while he was on the job on May 2, 2016. Claimant visited a physician and was released back to work without restrictions on September 14, 2016. Following his release back to work claimant visited another physician and was told that he had degenerative arthritis in his hip. He was given the option of hip replacement surgery.

Claimant chose to have hip replacement surgery on January 20, 2017. Claimant did not have enough vacation time or other accrued leave with the employer in order to be away from work for the expected recovery period. Claimant also did not qualify for Family and Medical Leave Act ("FMLA") leave.

Claimant met with his physician on February 6, 2017 and May 22, 2017. He was initially given restrictions regarding movement of his hip following discharge from the hospital. These restrictions included not bringing his legs together, not rotating the leg outward, and not moving further than 90 degrees to reach down. He also had restrictions to refrain from driving for six weeks. Claimant began driving two weeks after his surgery and informed his physician of this.

Claimant met with his physician on May 22, 2017, upon his own request, because he had concerns regarding his healing progress. Claimant currently uses a cane to walk if he has to travel more than 100 feet at a time and was concerned about his continued weakness. During the May 22, 2017 visit claimant did not inquire from the physician whether he was restricted from working.

Claimant is not fully recovered at this time and has not been released from his physician's care. Claimant is uncertain whether his physician gave him a release to return to work at any point in time and if he did, what date he was allowed by his physician to return to the workforce. Claimant testified during the hearing that he was able to work one week following his surgery on January 28, 2017. Claimant also testified that he felt he was able to go back to work three to four weeks following his surgery.

Claimant has another appointment with his physician in September of 2017. No documentation from claimant's physician verifying that he was able to work at any point after January 20, 2017 was submitted as evidence at the hearing.

Claimant's previous work history includes working as an orthopedic technician. His job duties included casting patients, assisting with fractures and splints, setting up traction on patients, and assisting patients in mobility exercises. He also worked for twenty years in orthotics and prosthetics where he fabricated appliances, made components after measurements were taken, and operated machinery, including a sander and grinder. He also worked in a factory during his work history. All of these jobs required prolonged standing and walking.

Claimant testified that he refused an offer of work with O'Reilly Auto Parts after he filed a claim for benefits. There has not been an initial investigation and determination with regard to whether the claimant failed to accept a suitable offer of work by the Benefits Bureau of Iowa Workforce Development. This matter shall be remanded to the Benefits Bureau for an initial investigation and determination regarding whether claimant failed to accept a suitable offer of work with O'Reilly Auto Parts.

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

For the reasons that follow, the administrative law judge concludes the claimant is not able to and available for work effective January 22, 2017.

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.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge finds that claimant's testimony that he is able to work is not credible. Claimant's inconsistent testimony regarding the date he believes he was able to work along with his failure to recollect whether his physician has actually released him back into the workforce leads to the conclusion that his testimony is not credible.

Iowa Code § 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 § 96.19, subsection 38, paragraph "b", subparagraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 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.

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)).

Claimant has not fully recovered from his hip surgery. There was no credible evidence presented at the hearing that the claimant's physician has released claimant back to the workforce and on what date he was released back to the workforce, either with or without restrictions. Claimant has not established his ability to work. Benefits are denied.

**DECISION:**

The May 8, 2017 (reference 03) unemployment insurance decision is affirmed. The claimant is not able to work effective January 22, 2017. Benefits are withheld until such time as the claimant obtains a medical release from his physician to return to some type of work of which he is capable of performing given his education, training and work experience, and any medical restrictions. At that point, there must be an evaluation of whether employment, with reasonable accommodation if appropriate, is available.

**REMAND:** The refusal of an offer of work issue delineated in the findings of fact is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

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Dawn Boucher  
Administrative Law Judge

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Decision Dated and Mailed

db/rvs