

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

NATHANIEL J FOREST
Claimant

APPEAL NO. 18A-UI-01939-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CENTRO INC
Employer

**OC: 01/14/18
Claimant: Appellant (5)**

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Nathaniel Forest filed a timely appeal from the February 2, 2018, reference 04, decision that denied benefits effective January 14, 2018, based on the Benefits Bureau deputy's conclusion that Mr. Forest was unable to perform work and did not meet the availability requirements. After due notice was issued, a hearing was held on March 8, 2018. Mr. Forest participated personally and was represented by attorney Charles Pierce. Tracy Barre represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 18A-UI-01938-JTT. Exhibits A through F were received into evidence. The administrative law judge took official notice of the following Agency administrative records: DBRO (database readout) and KCCO (continued claims).

ISSUE:

Whether Mr. Forest has been able to work and available for work within the meaning of the law since she established the original claim for benefits that was effective January 14, 2018.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nathaniel Forest established an original claim for benefits that was effective January 14, 2018. Mr. Forest did not make a weekly claim for the benefit weeks that ended January 20 or 27, 2018. Mr. Forest made weekly claims for the five consecutive benefit weeks between January 28, 2018 and March 3, 2018. Mr. Forest resides in North Liberty. Mr. Forest involuntarily separated from full-time employment with Centro, Inc. in connection with his need to undergo shoulder reconstruction surgery on his left shoulder on December 29, 2017 to repair a rotator cuff injury. Mr. Forest is right-handed. Mr. Forest did indeed undergo the reconstructive surgery on December 29, 2017. Dr. Brian Wolf, M.D., M.S., is the orthopedic surgeon who performed the reconstructive surgery.

On January 16, 2018, Mr. Forest asked Dr. Wolf or his nurse for a medical release note he could use in connection with his unemployment insurance claim. On January 16, Dr. Wolf's office provided Mr. Forest with a note that stated as follows: "Nathan Forest has reconstructive left shoulder surgery on 12/29/2017. He can return to work sedentary, desk type work with no

use of the right arm.” Dr. Wolf’s nurse signed the note on behalf of Dr. Wolf. The note misstated the arm affected by the shoulder surgery as Mr. Forest’s right arm. Despite the note, Mr. Forest did not make weekly claims for the benefit weeks that ended January 20 and 27, 2018 because he was still in too much pain to work and was taking prescription pain killers.

On January 31, 2018, Mr. Forest participated in a fact-finding interview that addressed his separation from Centro, Inc. and that also addressed Mr. Forest’s ability to work and availability for work. At that time, Mr. Forest told the deputy the he had a weight lifting restriction on his left hand and could not lift more than 20 or 30 pounds. Mr. Forest asserted that he was able to work and available for work. Mr. Forest stated that he could use his right arm and both hands. Mr. Forest advised that he was still participating in physical therapy. Mr. Forest asserted that the only work he felt he could not perform was high intensity work. Later that same day, Mr. Forest sent an email message to the Benefits Bureau advising that he had spoken with his doctor and that doctor could not send an update regarding his work restrictions until an appointment that was set for February 7, 2018.

At the time of the follow-up medical appointment, Mr. Wolfe obtained a note from Dr. Wolf’s office that stated as follows:

Nathan J Forest was seen and treated today in the orthopedic clinic with the diagnosis of status post left shoulder surgery. Nathan J Forest can return to work on 2-7-18 with restrictions. These restrictions include: No lifting greater than 10 lbs over waist height. No repetitive overhead lifting/reaching. No lifting to chest level. He may lift up to 10 lbs with both hands below waist height, provided he does not have to reach away from his body or above waist. These restrictions are in effect until next clinical follow up visit.

The February 7, 2018 medical restriction statement remains in place at this time.

Mr. Forest has completed the equivalent of three years of college coursework, primarily in mechanical engineering. Mr. Forest is capable of operating a computer to perform word processing and other tasks.

Mr. Forest commenced his search for new employment during the benefit week that ended February 3, 2018. Mr. Forest did not look for work prior to the benefit week of January 28 through February 3, 2018. During the benefit week that ended February 3, 2018, Mr. Forest applied for a cashier/server work at McDonald’s in North Liberty. Mr. Forest also applied for a cashier position at Walgreens in North Liberty. During the week that ended February 10, 2018, Mr. Forest applied for a cashiering job at Casey’s in North Liberty and a similar job at Smoking Joes in North Liberty. Mr. Forest did not apply for work during the benefit week that ended February 17, 2018. Mr. Forest spent that week in his hometown of Tipton and taking care of his father in North Liberty. Mr. Forest forgot about the need to search for work. During the week that ended February 24, 2018, Mr. Forest applied for at The Station, a convenience store located in North Liberty, and at a BP station located in North Liberty. During the benefit week that ended March 3, 2018, Mr. Forest applied for a cashier/cook job at Arbies in North Liberty and returned to apply at BP in North Liberty. Mr. Forest also returned to apply at the Walgreens store in North Liberty. Mr. Forest has a vehicle, but has restrictive his job search activities to locations very near to his home in North Liberty. Mr. Forest has intentionally not sought work in Coralville or Iowa City, despite the close proximity of those communities and that sizable labor market. Mr. Forest wants to avoid a commuting expense. Coralville is about four miles from North Liberty. Iowa City is about 9 miles from North Liberty.

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".

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.

Iowa Admin. Code r. 871-24.22(2) 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.

(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(1) provides:

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

(1) An individual who is ill and presently not able to perform work due to illness.

Iowa Admin. Code r. 871-24.23(18) provides:

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

(18) Where the claimant's availability for work is unduly limited because such claimant is willing to work only in a specific area although suitable work is available in other areas where the claimant is expected to be available for work.

Iowa Admin. Code r. 871-24.23(25) provides:

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

(25) If the claimant is out of town for personal reasons for the major portion of the workweek and is not in the labor market.

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

Mr. Forest was not able or available for work during the two-week period of January 14-27, 2018. Mr. Forest did not make a weekly claim for those weeks. Mr. Forest was in too much pain during those weeks. Mr. Forest is not eligible for benefits for those weeks.

The weight of the evidence establishes that Mr. Forest has been able to perform clerical work since January 28, 2018, but little more. The weight of the evidence also establishes that Mr. Forest has not been available work within the meaning of the law since he established his claim for benefits. Mr. Forest's medical restrictions have undergone minimal change since he established his claim for benefits. Despite the rewording of the medical restrictions in the February 7, 2018 medical note, Mr. Forest is essentially still only able to perform work requiring minimal physical effort. Mr. Forest has not sought employment he is capable of performing within his medical restrictions. The weight of the evidence establishes that Mr. Forest overstates his ability to perform the work associated with the jobs he has applied for and understates the requirements of such prospective employment. The weight of the evidence establishes that Mr. Forest has not in fact engaged in an active or earnest search for new employment since he established his claim. He has restricted his search to an unreasonably small geographical area close and convenient to his home on North Liberty. He has chosen to avoid the substantial labor market readily available close by in Coralville and North Liberty.

DECISION:

The February 2, 2018, reference 04, decision is modified as follows. The claimant was not able to work during the two-week period of January 14-27, 2018. From January 28, 2018, the claimant was able to perform only clerical work and other similar work requiring minimal physical effort. The claimant has not been available for work within the meaning of the law and has not been engaged in an active and earnest search for new employment since he established his claim for benefits. Benefits are denied effective January 14, 2018. The availability and job search disqualification continues as of the March 8, 2018 appeal hearing and will continue until the claimant demonstrates actual availability for work he is capable of performing and demonstrates an actual active and earnest search for new employment.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs