

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

GINO L ONEAL
Claimant

ABM JANITORIAL SERVICES
Employer

APPEAL NO. 15A-UI-01273-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/28/14
Claimant: Appellant (1)

Iowa Code § 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated January 22, 2015, reference 02, which held claimant not able and available for work. After due notice, a hearing was scheduled for and held on February 24, 2015. Claimant participated personally and was represented by attorney Jim Roth. Employer participated by Michelle Waldinger.

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 considered all of the evidence in the record, finds: Claimant filed her original claim in this matter on December 28, 2014. Claimant had surgery to repair a broken rod in her arm on October 11, 2014. Since that date claimant has not presented a release from her doctor to employer that would allow her to return to work in any capacity.

Claimant had originally broken her arm on or around February 7, 2014 in an accident that was non-work-related. Claimant had a rod placed in her arm. Employer would not accept claimant back to work until claimant was fully released back to work. Claimant was eventually released back to work in June.

On August 8 claimant was working for employer and the rod that was placed in her arm broke. Claimant went to the doctor who allowed claimant to do light duty work after the rod breaking – solely with the uninjured arm. Employer had claimant return to work one handed. Claimant had a second surgery to replace the broken rod on October 11, 2014.

Subsequent to this second surgery, claimant did not produce any more doctor's releases. Claimant had been on FMLA with employer for a number of weeks and had maxed out on the time off that she was afforded in November. On November 18, 2014 employer terminated claimant as claimant did not have any more FMLA time available and did not have a release to return to work.

Claimant argues that she was able to work from the time when she broke the rod that was placed in her arm so she should be able to work in the same manner after this second surgery. Claimant has not produced a doctor's note since the date of her second surgery which indicates that she is able and available to work.

REASONING AND CONCLUSIONS OF LAW:

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 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. 871-24.23(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.

Claimant has not shown that she currently has the ability to work at this time. She has not obtained a medical release of any type to return to work since her second surgery. Inasmuch as the injury was non-work-related and the treating physician has not released the claimant to return to work, the claimant has not established the ability to work. Benefits are withheld until such time as the claimant obtains a full medical release to return to work.

DECISION:

The decision of the representative dated January 22, 2015, reference 02, is affirmed. Claimant is not eligible to receive unemployment insurance benefits as she is not currently able and available to work.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

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