

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANTWAN D DAVIS

Claimant

“O'REILLY AUTOMOTIVE INC

Employer

APPEAL 17A-UI-03362-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/26/17

Claimant: Appellant (1)

Iowa Code § 96.4(3) – Able to and Available for Work

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the March 24, 2017 (reference 10) unemployment insurance decision that found claimant was not eligible for unemployment benefits because he was not able to perform work due to injury. The parties were properly notified of the hearing. A telephone hearing was held on April 19, 2017. The claimant, Antwan D. Davis, participated personally. The employer, “O'Reilly Automotive Inc., participated through witness Julie Akers. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records.

ISSUE:

Is the claimant able to work and available for work effective February 26, 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 from January 4, 2017 until February 28, 2017 when he was discharged. Claimant was working full-time for this employer as an outbound material handler. His job duties required him to locate parts from the warehouse, move them to a pallet and move the pallet to the dock for shipping. His job duties required prolonged standing, stooping, lifting, bending and twisting.

On January 18, 2017 claimant suffered a work related injury involving his back wherein he suffered a strained muscle and tendon. Claimant visited a physician on Monday, January 23, 2017 and was told that he could return to work for a sitting desk job only and could not lift more than ten pounds. He was to return to work effective January 26, 2017. Claimant did not work on January 26, 2017 due to pain in his back. He notified his employer that he could not come to work on January 26, 2017 due to his back pain. He worked for a few hours on January 27, 2017; January 30, 2017; and January 31, 2017. Claimant only worked partial shifts on these three dates due to back pain, which resulted in him being unable to work.

From February 1, 2017 through February 28, 2017 claimant called and reported to his employer that he was unable to work due to his back injury. Claimant reported that he was unable to sit to at the desk job due to the pain in his back. Claimant again saw a physician on February 27, 2017 and had the same work restrictions in place. His diagnosis was the same at this time.

Claimant currently has the same work restrictions in place as far as sitting desk job only and no lifting more than ten pounds.

Claimant reported that he was not able to work due to pain the weeks of February 26, 2017 through March 11, 2017. Claimant's diagnosis has not changed and his work restrictions requiring a sitting job only have not changed to date. Claimant will be attending another doctor appointment in the future and has completed several dates of physical therapy.

Claimant has worked as a fast food server, bartender, and warehouse worker during his work history. Each of these positions required long periods of standing, lifting, bending and twisting.

Claimant filed a claim for benefits with an effective date of February 26, 2017. Claimant made weekly claims each week from February 26, 2017 through benefit week ending April 15, 2017. Claimant asserted that he was able to work each week he filed his weekly claims.

During claimant's testimony claimant admitted that he was not able to work the benefit week ending March 4, 2017 and the benefit week ending March 11, 2017. Claimant testified that he believed that he probably would have been able to work beginning March 12, 2017 and thereafter; however, no evidence was offered by claimant that his diagnosis or work restrictions had changed.

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 February 26, 2017.

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)).

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 regarding his ability to work beginning March 12, 2017 is not credible.

Although the injury was work-related, claimant had not been willing to accept reasonable accommodation from the employer that was offered within his restrictions, and the treating physician has not further modified the restrictions or released the claimant to return to work without restriction. As such, the claimant has not established his ability to work. Thus, since claimant refused the available accommodated work given to him, there was no lack of work.

Further, there are no jobs in claimant's work history that he would be able to perform without prolonged periods of standing, lifting, stooping, bending and twisting. Benefits are denied as claimant is not able to work due to injury.

DECISION:

The March 24, 2017 (reference 10) unemployment insurance decision is affirmed. The claimant is not able to work effective February 26, 2017. Benefits are withheld until such time as the

claimant obtains a medical release to return to some type of work of which he is capable of performing given his education, training and work experience.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

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