

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEVEN C STEINBERG
Claimant

APPEAL NO. 08O-UI-06086-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALUM LINE INC
Employer

OC: 03/23/08 R: 04
Claimant: Appellant (4R)

Iowa Code § 96.4(3) - Able and Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 15, 2008, reference 02, decision that found the claimant unable to work and denied benefits. After due notice was issued, a telephone conference hearing was held on July 17, 2008. Claimant participated. Employer participated through Gary Gooder, Dale Snow, Sharon Ryan and Dee Farrell.

ISSUE:

The issue is whether claimant is able to and available for work effective March 23, 2008.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a part time delivery truck driver from November 23, 2007 until July 7, 2008. The separation has not yet been determined at the fact-finding level and the employer would not waive the right to a fact-finding interview or notice of the separation issue on the hearing notice.

His last day of work was February 29, 2008 and with a couple of days he was injured in a non-work-related incident. He had surgery in mid-March 2008 after swelling went down and on April 14 his physician Bruce Wulfsberg, M.D. opined that claimant was placed on "sedentary handicapped access work only" as of March 23 and estimated that he "probably will require this for three months." Employer does not have light duty work available. On May 20 claimant spoke to Dale Snow, transportation director, and told him he was on one crutch, was still undergoing physical therapy, and might be able to drive a truck with automatic transmission. Employer did not have work available under those terms and would not consider him for the in-house sales job posed online on April 28, 2008. Employer did not tell him he must return to work by a date certain, provide medical information to employer or communicate with any particular person within any specific time frequency in order to retain his job. On July 7 Snow left a message for claimant that his job had ended but gave no reason. As of that date, claimant was still under the care of his physician and his restrictions had not changed since May 23, 2008.

Claimant had previous work experience at Debuhr & Casper Plumbing & Heating as an office and billing manager. At Cover-All of Wisconsin he worked in sales, which involved travel, driving and walking. Prior to those jobs he had worked in sales over the phone and in person at a machinery dealership and as a teacher.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work from March 23, 2008 through the week ending July 5, 2008.

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".

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.

871 IAC 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.

The Iowa Court of Appeals has informally interpreted the Iowa Code § 96.5(1) subsection (d) exception not to require a claimant to return to the employer to offer services after a medical

recovery if the employment has already been terminated. *Porazil v. IWD*, No. 3-408 (Iowa Ct. App. Aug. 27, 2003).

Inasmuch as the medical condition was not work-related and the treating physician had not released the claimant to return to work with or without restriction, the claimant has not established his ability to work while still an employee of Alum Line, Inc. through the week ending July 5, 2008. Employer is not obligated to accommodate a non-work-related medical condition, and since he was not released to perform his full work duties, he was not considered able to or available for work.

Since the employment ended officially on Monday, July 7, 2008, claimant is no longer obligated to return to employer upon his medical release to offer his services. At that point, his ability to work is not measured by the job he held most recently, but by standards of his education, training, and work history. Since he has performed sedentary jobs within his work history, he is considered able to work even if he cannot yet return to a job such as he most recently performed for employer. Thus claimant is considered as able to work as of July 6, 2008, the week of his separation from Alum Line, Inc. He is on notice as of July 17, 2008 that he must conduct at least two work searches per week in order to retain eligibility for benefits.

DECISION:

The April 15, 2008, reference 02, decision is modified in favor of the appellant. The claimant is not able to work and available for work from March 23, 2008 to July 5, 2008. Claimant is able to work and available for work effective July 6, 2008 and benefits are allowed as of that date.

REMAND:

The separation issue delineated in the findings of fact is remanded to the claims section of Iowa Workforce Development for an initial investigation and determination.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs