

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SAVON W LOVE
Claimant

S M I CO
SEEDORFF MASONRY INDUSTRIES CO
Employer

APPEAL NO. 21A-UI-07328-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/05/20
Claimant: Respondent (2R)

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 4, 2021, reference 02, decision that allowed benefits effective January 3, 2021, provided the claimant was otherwise eligible, based on the deputy's conclusion that the claimant was able to work, available for work, but on a short-term layoff. After due notice was issued, a hearing was held on May 20, 2021. Claimant, Savon Love, participated. Allan Hermesen represented the employer. Exhibits 1 and 2 were received into evidence. The administrative law judge took official notice of the following Agency administrative records: KCCO and DBRO.

ISSUES:

Whether the claimant was able to work and available for work for the period beginning January 3, 2021.

Whether the claimant was partially and/or temporarily unemployed for the period beginning January 3, 2021.

Whether this employer's account may be charged for benefits in connection with the claimant's current claim year.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant established an additional claim for benefits that was effective January 3, 2021. The additional claim is part of a claim year that began for the claimant on July 5, 2020. The claim year will end on July 3, 2021. After the claimant established the January 3, 2021 additional claim, the claimant made weekly claims for each of the weeks between January 3, 2021 and April 10, 2021. For each week during that period, the claimant reported that he was able to work and available for work. The claimant is coded in Iowa Workforce Development records as a Group 3, job-attached claimant. The claimant made his claim for the week that ended January 9, 2021 by speaking directly to an IWD representative. The claimant reported he had made three job contacts that week, though he had not looked for work that week. For each subsequent claim week, the claimant reported that he was able to work, available for work, and had not refused work. However, the claimant did not search for new employment at any point between January 3, 2021 and April 10, 2021. The claimant discontinued his claim after the

week that ended April 10, 2021. No benefits have been paid to the claimant in connection with the additional claim.

At the time the claimant established his additional for benefits, he was employed by Seedorff Masonry Industries Company (SMI) as a full-time production laborer. SMI is not a base period employer for purposes of the claim year that began for the claimant on July 5, 2020. The employer manufactures pallets for John Deere. The claimant's work involved using an industrial nail gun to put finishing nails in the end of boards. The claimant then had to stack the boards and stamp the boards. The nail gun weighed several pounds. The claimant would have to handle heavier objects in the course of performing his duties. The claimant's duties involved repetitive bending and twisting. The claimant's work hours were 5:00 a.m. to 3:30 p.m., Monday through Thursday. The claimant was also required to work a seven or eight-hour shift on Friday as needed. Production Supervisor Ed Burke was the claimant's immediate supervisor. Rick Burke is Plant Manager.

The claimant last performed work for SMI on December 28, 2020. The claimant was next scheduled to work on December 29, 2020. Prior to that next shift, and at a time when the claimant was away from the workplace, the claimant fell and suffered injury to his spine. The injury included two herniated vertebral discs. The claimant sought medical attention for his injury. The doctor took the claimant completely off work through January 7, 2021. The doctor prescribed a pain medication, a muscle relaxing medication, and an anti-inflammatory medication. The pain medication and muscle relating medication came with warnings against operating machinery while taking the medication. The claimant continues on all three medications.

On December 29, 2020, the claimant called the workplace and left a message regarding his need to be absent from work. On December 30, 2020, the claimant again called the workplace and left a message regarding his need to be absent. The claimant mentioned in one or both messages that he had a medical note that he would present to the employer.

On December 30, 2020, Rick Burke, Plant Manager, called the claimant to discuss the claimant's need to be away from work. Mr. Burke acknowledged the claimant's messages. Mr. Burke asked the claimant how long he thought he would be away from the employment. The claimant said he would let the employer know when he had more information. Mr. Burke asked the claimant to keep in touch.

On January 8, 2021, the claimant reported to the workplace an hour after the scheduled started of his shift. The claimant went with the intention of speaking with the employer about his medical restrictions and whether the employer could provide work that complied with the medical restrictions. The claimant brought with him a copy of medical documents supporting his need to be completely off work through January 7, 2020, as well as a document setting forth his medical restrictions. The medical restrictions included a 10-pound lifting limit and restrictions against bending or twisting more than 15 times per hour. The claimant was unable to perform his regular duties with his medical restrictions. Mr. Burke advised the claimant that the employer did not have any work that would match what was in essence a medical restriction to light-duty work. The employer has about 60 employees at the Cresco location where the claimant worked. The employer has a small number of office personnel and a small number of forklift operators. The rest of the employees at that location are production laborers performing work that would not comply with the claimant's medical restrictions. The employer was fully staffed with forklift operators and did not have another position to move the claimant into. The claimant had not been trained to operate the forklift and had not previously operated a forklift for the employer during his brief employment. In addition, the employer had a policy of not

accommodating non-work related medical restrictions. The employer was concerned about the possibility of a worker's compensation injury arising from what started as a non-work related injury. Mr. Burke told the claimant that not only did the employer not have work that would meet his restrictions, but that Mr. Burke was not allowed on company grounds with such non-work related medical restrictions. Mr. Burke told the claimant that there was no disability program available to the claimant through the employment. This contact with the employer was the last contact between the parties. The claimant appears in the employer's payroll records as "inactive."

The claimant continues under the same medical restrictions imposed in early January 2021. The claimant is waiting to undergo a planned steroid injection in his spine, which he hopes will help move the herniated discs back into place. The medical provider has advised the claimant that it will take a week after the procedure before the effect will be apparent. The steroid injection procedure has not yet been scheduled. The claimant has not clarified with his doctor whether he should be driving a vehicle while he continues to take the prescription pain medication and muscle relaxer medication.

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(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. 871-24.22(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(1) and (35) 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.

...

(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

Iowa Code section 96.1A(37) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) While employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

An employer has an obligation to provide an employee with reasonable accommodations that enable the employee to continue in the employment. See *Sierra v. Employment Appeal Board*, 508 N.W. 2d 719 (Iowa 1993).

The weight of the evidence establishes that the claimant has not been able to work or available for work within the meaning of the law since he established the additional claim for benefits that was effective January 3, 2021. Since that time, the claimant has been living with a significant spinal injury, has continued under a doctor's care for that injury, has not completed treatment and has not recovered, has had medical restrictions that substantially limit his availability for work, and has been on pain medication and muscle relaxers that further limit his ability to perform work. Since the injury, the claimant has been unable to perform work for this employer, with or without reasonable accommodation. This employer was not obligated to create a new position for the claimant or to displace another employee from his or her position. In other words, this employer was not obligated to provide an unreasonable accommodation. In any event, the claimant's medical restrictions and medications prevented the claimant from being able to safely perform such alternative work as operating a forklift. In the absence of ability to perform work for the employer, the claimant cannot be deemed temporarily or partially unemployed from this employment.

Effective January 3, 2021, the claimant is not eligible for unemployment insurance benefits. This able and available disqualification continued through the benefit week that ended April 10, 2021, the last week for which the claimant made a weekly claim. In the event the claimant reactivates his claim or establishes a new claim year, his ability to perform work and availability for work during that future period will be considered in connection with that future claim. This employer is not a base period employer, has not been charged for benefits, and would not be charged under any circumstances for benefits in connection with claimant's current claim year. See Iowa Code section 96.7(2), regarding base period employer liability.

Because no benefits have been paid in connection with the additional claim, there is not overpayment of benefits to address.

This matter will be remanded to the Benefits Bureau for a decision regarding the employment separation.

DECISION:

The March 4, 2021, reference 02, decision is reversed. The claimant has not been able to work or available for work since he established the additional claim for benefits that was effective January 3, 2021. Effective January 3, 2021, the claimant is not eligible for unemployment insurance benefits. This able and available disqualification continued through the benefit week that ended April 10, 2021, the last week for which the claimant made a weekly claim. In the event the claimant reactivates his claim or establishes a new claim year, his ability to perform work and availability for work during that future period will be considered in connection with that future claim. This employer is not a base period employer, has not been charged for benefits, and would not be charged under any circumstances for benefits in connection with claimant's current claim year.

This matter is **remanded** to the Benefits Bureau for a decision regarding the employment separation.

A handwritten signature in cursive script that reads "James E. Timberland". The signature is written in dark ink on a light-colored background.

James E. Timberland
Administrative Law Judge

May 28, 2021
Decision Dated and Mailed

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