

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROBERT J BREKUNITCH
Claimant

PRO WALL CONSTRUCTION INC
Employer

APPEAL 16A-UI-12215-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/16/16
Claimant: Appellant (4)

Iowa Code § 96.4(3) – Able and Available

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the November 4, 2016 (reference 02) unemployment insurance decision that found claimant was not able to work due to injury. The parties were properly notified of the hearing. A telephone hearing was held on December 21, 2016. The claimant, Robert J. Brekunitch, participated personally and was represented by Attorney Siobhan M. Schneider. The employer, Pro Wall Construction Inc., participated through Vice President Rodney Arjes. Claimant's Exhibits A - D were admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits record including the fact finding documents.

ISSUE:

Is the claimant able to work and available for work effective October 16, 2016?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a carpenter. This employer operates a construction business. Claimant's job duties included hanging drywall and studs. Claimant began his employment with the company on March 18, 2013. Claimant's immediate supervisor was Mr. Arjes.

On April 28, 2016 claimant was injured while working on the job. A worker's compensation claim was filed and is currently still pending. Claimant sought medical attention for his work-related injury on this same date. See Exhibit A. Claimant was restricted at this time to no use of his right arm and to ice his arm every 4-6 hours. See Exhibit A. This written medical restriction was given to Ms. Arjes. Claimant returned to work on April 29, 2016 and worked for a partial day. Claimant and Mr. Arjes had a conversation about claimant continuing to work. Claimant told Mr. Arjes that he was unable to continue to work. Mr. Arjes told claimant that he had permission to leave work and to return to work when he was able to do so. This was effectively a leave of absence from work. Claimant was never informed that it was necessary for him to call into work each day that he was absent to report that he would not be in to work, rather, he only had to tell Mr. Arjes when he was ready to return to work.

Claimant did not work after April 29, 2016. Claimant received treatment for a personal, non-work-related illness for one week in May of 2016.

On June 14, 2016 claimant contacted Mr. Arjes by telephone and stated that he was able to work. At this point his leave of absence had ended. Mr. Arjes told him to report to work on June 15, 2016 to sort screws but he never showed up. On June 24, 2016 Mr. Arjes texted claimant stating that he should "meet James at 5:30 Monday Hy Vee gas station". See Exhibit C. Claimant would be handing tools to James for work that day. See Exhibit C. Claimant did not come to work on Monday, June 27, 2016.

Claimant then had surgery regarding his work-related injury on July 18, 2016. See Exhibit B. Following his surgery claimant was not released back to work until September 13, 2016. See Exhibit B. Claimant was released back to work with restrictions of no lifting, pushing, or pulling with the right arm. See Exhibit B. On October 5, 2016 the employer mailed claimant a letter stating that his employment had been terminated because he was considered to have voluntarily quit his employment.

Claimant's work restrictions were eventually changed to no lifting of more than twenty pounds with the right arm. Claimant currently has a lifting restriction of no more than twenty pounds with the right arm but believes he will continue to improve. Claimant has held jobs in his previous work history where he did not have to lift more than twenty pounds with his right arm. Claimant was incarcerated from November 21, 2016 through December 20, 2016 and was not available for work during that time period.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

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".

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)).

Because the treating physician has released the claimant to return to work and he has jobs in his work history that did not require him to lift more than twenty pounds, he has established his ability to work effective October 16, 2016. However, claimant was incarcerated from November 21, 2016 through December 20, 2016 and was not available for work during that time period.

The claimant is able to and available for work effective October 16, 2016 through November 20, 2016 but was not able to and available for work from November 21, 2016 through December 20, 2016. Benefits are allowed for the benefit weeks he was able to and available for work, provided he is otherwise eligible.

DECISION:

The November 4, 2016 (reference 02) unemployment insurance decision is modified in favor of appellant. The claimant is able to and available for work effective October 16, 2016 through November 20, 2016 but was not able to and available for work from November 21, 2016 through December 20, 2016. Benefits are allowed for the benefit weeks he was able to and available for work, provided he is otherwise eligible.

Dawn R. Boucher
Administrative Law Judge

Decision Dated and Mailed

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