

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

COREY M BAILEY
Claimant

APPEAL NO. 15A-UI-00842-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

**OC: 11/02/14
Claimant: Appellant (1)**

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the January 15, 2015, reference 03, decision that denied benefits effective November 2, 2014, based on an Agency conclusion that the claimant was not able to perform work due to injury. After due notice was issued, a hearing was held on February 12, 2015. Claimant participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. The hearing in this matter was consolidated with the hearing in Appeal Number 15A-UI-00843-JTT. Exhibits A through D were received into evidence. The administrative law judge took office notice of the Agency's administrative records (KCCO, DBRO and the administrative law judge in Appeal Number 14A-UI-12370-JTT.

ISSUES:

Whether the claimant has been able to work and available for work since establishing his claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant established a claim for benefits that was deemed effective November 2, 2014 in response to the November 5, 2014 discharge from his employment with Menards. On October 27, 2014, the claimant suffered injury when the tractor/yard horse he was operating on the employer's property rolled over.

As of October 29, 2014 the claimant was released to perform "light/sedentary" work with the following restrictions. The claimant was allowed by his doctor to sit frequently and to reach outward frequently. The claimant was restricted by his doctor to only occasional head/neck movements and reaching above the shoulder. The claimant was restricted to minimal standing, walking, bending at the waist, stooping/squatting/crouching, and twisting/turning his torso. The claimant was restricted from any kneeling, climbing, or crawling.

As of November 4, 2014, the claimant was released to perform light/sedentary work with the following restrictions. The claimant was allowed to sit frequently, but was restricted to minimal standing and walking. The claimant's doctor instructed the claimant to sit, stand, or walk as needed. The claimant was restricted from any climbing or crawling. The claimant was restricted to minimal bending at the waist, stooping/squatting/crouching, and twisting/turning his torso. The claimant was restricted to minimal reaching above his shoulder with his left arm and to no reaching above the shoulder with his right arm. The claimant was restricted to only occasionally reaching outward with his left arm and to minimal reaching outward with his right hand. In addition, the doctor placed restrictions on the claimant's use of his right hand. The doctor restricted the claimant's use of his right hand to only occasional typing, minimal repetitive movement and minimal grip/hold. The doctor further indicated that the claimant was to do no overhead lifting work, that he was to restrict himself to sedentary work, and that he was not to run or jump.

As of December 4, 2014, the claimant was released to perform light/sedentary work with the following restrictions. The claimant was to be allowed to sit continuously. The claimant was restricted to minimal use standing, walking, bending at the waist, and stooping/squatting/crouching. The claimant was restricted from kneeling, climbing and crawling. The medical provider who provided these restrictions also indicated that the provider was done providing treatment to the claimant and that the claimant had been referred to an orthopedic specialist. The claimant did not have a follow up appointment with the orthopedic specialist due to finances and because he thought the referral order was in error insofar as it referred him for additional evaluation and treatment of his shoulder. The claimant cancelled the referral appointment with the orthopedist and has not returned to a doctor for evaluation or easing of his medical restrictions since December 4, 2014. During the first couple weeks of December 2014, the claimant underwent physical therapy for his back and hip.

On December 18, 2014, the claimant participated in an unemployment insurance appeal hearing in Appeal Number 14A-UI-123790-JTT. At that hearing, the claimant testified under oath that he had been unable to work since he had established his claim for benefits. That testimony is referenced in the administrative law judge's decision in Appeal Number 14A-UI-123790-JTT and prompted the remand to address the claimant's ability to work and availability for work.

Since the claimant filed his claim for benefits, he has made two employer contacts per week. The majority of those contacts had been for positions that a reasonable person would conclude were outside the most recent medical statement of the claimant's work restrictions. During the week that ended November 8, 2014, the claimant contacted prospective employers for a cashiering position and for a warehouse worker position. During the week that ended November 15, 2014, the claimant contacted a bank and a bank call center. During the week that ended November 22, the claimant contacted another center and a research group. During the week that ended November 29, the claimant contacted an insurance firm and a printing company. During the week that ended December 6, the claimant contacted two insurance firms. During the week that ended December 13, the claimant contacted Casey's and Dollar General for cashiering positions. During the week that ended December 20, the claimant contacted a McDonald's restaurant for a cashiering position and a delivery service for a box moving position. During the week that ended December 27, the claimant contacted Wal-Mart and pizza restaurant for a cook position. During the week that ended January 3, 2015, he contacted another restaurant for a host position and a post office for a rural carrier position. During the week that ended January 10, the claimant contacted an employer for a data entry position and restaurant for a food server position. During the week that ended January 17, the

claimant contacted an employer for a forklift operator position and another for a telemarketing position. During the week that ended January 24, the claimant contacted a bread maker for a general laborer position and a hotel for a greeter position. During the week that ended January 31, the claimant contacted a business interiors firm for a desk building position and contacted a Burger King restaurant for a cashiering position. During the week that ended February 7, the claimant contacted a tool company for a customer service position and another company for an unspecified position. At the time of the appeal hearing on Thursday, February 12, 2015, the claimant had not yet made any job contacts for the week that would end on February 14, 2015. The claimant has secured interviews in connection with three recent job contacts.

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, (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.

(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.

(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. 871-24.23(1), (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 physician and has not been released as being able to work.

The claimant has failed to present sufficient evidence to establish that he has met the work ability and work availability requirement since establishing his claim for benefits. The medical documentation provided by the claimant indicates that the claimant was unable to perform work prior to December 4, 2014. Prior to that date, the claimant's restrictions were such that there was really no work in the labor market that he could perform. While medical documentation from December 4, 2014 indicates a relaxing of certain medical restrictions, that same documentation indicated a referral to an orthopedic specialist for further evaluation and treatment. The claimant indicated that the referral order pertained to his shoulder, but asserts he did not need further evaluation or treatment for his shoulder and cancelled the referral appointment. The claimant has never had that further evaluation and/or treatment. Since testifying under oath on December 18, 2014 that he had been unable to perform work since he had filed his claim for benefits, the claimant has revised his position on that issue. The claimant has failed to present sufficient evidence to establish that he is indeed physically able to perform full-time work of any sort available in his local labor market. The claimant's job contacts with employers for positions that are clearly beyond his most recently stated medical restrictions undermines that notion that the search for new employment has been active or earnest. The fact that the claimant had made not job contacts for the week that ended February 14 as of Thursday, February 12 likewise undermines the notion that the search has been active or earnest.

Benefits are denied effective November 2, 2014. The able and available disqualification continued as of the February 12, 2015 appeal hearing. The claimant can demonstrate his ability to perform work for purposes of his future benefit eligibility by providing medical documentation that clearly states he is able to perform some type of work that laborers perform in the labor market that exists in his area.

DECISION:

The January 15, 2015, reference 03, decision is affirmed. The claimant has not demonstrated eligibility based on the able and available requirement since he established his claim for benefits. Benefits are denied effective November 2, 2014. The able and available disqualification continued as of the February 12, 2015 appeal hearing. The claimant can demonstrate his ability to perform work for purposes of his future benefit eligibility by providing medical documentation that clearly states he is able to perform some type of work that laborers perform in the labor market that exists in his area.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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