

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHAWN M ELSTON

Claimant

APPEAL NO. 07A-UI-10703-N

**ADMINISTRATIVE LAW JUDGE
DECISION**

SCHILDBERG CONSTRUCTION CO INC

Employer

**OC: 09/09/07 R: 01
Claimant: Respondent (1)**

Section 96.4-3 – Able and Available for Work

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated November 16, 2007, reference 06, which held the claimant eligible for unemployment insurance benefits. After due notice was issued, a hearing was held in Council Bluffs, Iowa, on December 12, 2007. The claimant failed to respond to the hearing notice and did not participate. The employer participated by Tim Baier and Katherine Sherer. Exhibits One and Two were received into evidence.

ISSUE:

The issue in this matter is whether the claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all the evidence in the record finds: The claimant was employed by Schildberg Construction Company Inc., from September 22, 2006, until September 20, 2007. Mr. Elston held the position of full-time loader/scale operator and was paid by the hour. The claimant sustained a work-related injury on April 20, 2007, and was off work and under the care of medical practitioners for an extended period of time. In late August 2007, the claimant was released to return to work; however, the claimant believed, based upon his physical condition, that he was unable to return at that time and requested to be further examined by his personal physician. On September 10, 2007, the claimant was fully released both by the workers' compensation examining physician as well as his personal physician. Although the employer offered to accommodate Mr. Elston by temporarily placing him in the position of scaler at its Malvern, Iowa, facility and allowing the claimant to vary his work schedule, the claimant did not return at that time, stating that he was in "too much pain" and that the work and/or location would require him to exceed his physical abilities. The claimant was discharged on September 20, 2007, when he had exhausted all available time away from work under the Family Medical Leave Act.

On November 15, 2007, the claimant was certified to Iowa Workforce Development that he was able and available for work had had been released by his doctor to return to work without restrictions (Exhibit 1). On November 13, 2007, Dr. James P. Devney of the Nebraska Spine

Center LLP submitted a work status report, specifically stating that the claimant was able to return to work on November 13, 2007, without work restrictions (Exhibit 2).

REASONING AND CONCLUSIONS OF LAW:

In this matter, the employer appealed from the fact-finders decision holding that the claimant was available and medically able to work beginning November 11, 2007, and finding the claimant eligible to receive unemployment insurance benefits, provided that he meets all other eligibility requirements. While the evidence establishes that Mr. Elston previously had not been available for work and was not medically able to work, the evidence in the record supports a finding that the claimant had been determined fully released to return to work without any medical restrictions as of the week of November 11, 2007. The claimant's treating physician for his back injuries specifically provided a work status report that indicated the claimant was able to return to work without restrictions on a permanent basis as of that time, and the claimant, as well, certified that he had been fully released and able and available for work. The claimant's continuing eligibility to receive unemployment insurance benefits is contingent upon Mr. Elston actively seeking work, reporting his work-seeking activities, and meeting all other eligibility requirements imposed by Iowa Workforce Development for individuals claiming unemployment insurance benefits each week.

While the evidence clearly establishes that the claimant was not available nor medically able to work prior to the week of prior to the week of November 11, 2007, the evidence in the record establishes that, as of that week, the claimant was able and available for work (Exhibits 1 and 2).

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.

For the reasons stated herein, the administrative law judge concludes that the claimant is physically able to work in some gainful employment that is engaged in by others as a means of livelihood. The claimant's eligibility is contingent upon meeting all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated November 16, 2007, reference 06, is hereby affirmed. Claimant is available and medically able to work beginning November 11, 2007, providing he meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw