

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

LEWIS LIBBY

Claimant,

and

L GL BARCUS & SONS

Employer.

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HEARING NUMBER: 08B-UI-06045

**EMPLOYMENT APPEAL BOARD
DECISION**

SECTION: 10A.601 Employment Appeal Board Review

D E C I S I O N

FINDINGS OF FACT:

A hearing in the above matter was held July 2, 2008. The administrative law judge's decision was issued July 17, 2008 in which the administrative law judge determined that the claimant was not able and available for work as a driller the employer's place of business. The claimant suffered an injury on or about April 21, 2008 for which he was off work. (Tr. 5-6) He had back surgery on June 18th, which left him with severe work restrictions. The claimant's doctor released him to return to work with a 15-pound weight restriction, no repetitive bending and twisting, etc. (Tr. 4) The employer had no work to accommodate the claimant's restrictions for which the employer considered the injury to be nonwork-related. (Tr. 4, 17, 22, 27-28)

The record contains no evidence on whether the claimant is qualified to perform any type of work, or whether he has applied for other work.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 10A.601(4) (2005) provides:

5. Appeal board review. The appeal board may on its own motion affirm, modify, or set aside any decision of an administrative law judge on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The appeal board shall permit such further appeal by any of the parties interested in a decision of an administrative law judge and by the representative whose decision has been overruled or modified by the administrative law judge. The appeal board shall review the case

pursuant to rules adopted by the appeal board. The appeal board shall promptly notify the interested parties of its findings and decision.

In the instant case, the claimant testified that he was released to work; however, the employer had no work to accommodate his restrictions. Yet, no evidence was adduced to establish what type of work the claimant could perform and what type of work he sought within his restrictions. The claimant needn't obtain an unconditional release to return to work in order to qualify for unemployment benefits.

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:

The individual is able to work, is available for work, and is earnestly and actively seeking work....

In addition, the law also provides that a person "... must be physically able and available for work, not necessarily in the individual's customary occupation, but in some *reasonably suitable, comparable, gainful, full-time endeavor...* that is generally available in the labor market..." (Emphasis added.) See, 871 IAC 24.22(1)"b." As the Iowa Court of Appeals noted in Baker v. Employment Appeal Board, 551 N.W. 2d 646 (Iowa App. 1996), the administrative law judge has a heightened duty to develop the record from available evidence and testimony given the administrative law judge's presumed expertise. Since the record is lacking with regard to the claimant's being able and available to perform other work, we must remand this matter for additional evidence on the same.

DECISION:

The decision of the administrative law judge dated August 6, 2008, is not vacated at this time. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section for the limited purpose of obtaining evidence as to what type of work the claimant can perform with his restrictions and the type of work to which he has thus far applied, if any. The administrative law judge shall conduct a hearing following due notice. After the hearing, the administrative law judge shall issue a new decision (in consideration of the new evidence) which provides the parties appeal rights.

John A. Peno

AMG/fnv

Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

AMG/fnv