

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WESLEY E BARR

Claimant

APPEAL NO. 07A-UI-09515-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SHAW INDUSTRIES INC

Employer

**OC: 08/26/07 R: 02
Claimant: Appellant (2-R)**

Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Wesley Barr filed a timely appeal from the October 4, 2007, reference 01, decision that denied benefits effective August 26, 2007 and that concluded Mr. Barr did not meet the able and available requirements of Iowa Code section 96.4(3). After due notice was issued, a hearing was held on October 24, 2007. Mr. Barr participated in the hearing and was represented by Attorney Steven Jayne. The employer did not respond to the hearing notice instruction to provide a telephone number for the hearing and did not participate. Exhibits A, B and C were received into evidence. The administrative law judge took official notice of the documents generated in connection with the fact-finding interview, the Agency's record of benefits disbursed to the claimant, and the Agency's record of the claimant's weekly responses to the automated telephonic reporting system.

ISSUE:

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: Wesley Barr was most recently employed as a full-time driver and delivery person for Shaw Industries. On March 28, 2007, Mr. Barr suffered an injury in the course of the employment when he was pulling a pallet and slipped on oil. Mr. Barr suffered injury to his back. The work-related injury resulted in the filing of a worker's compensation claim. Mr. Barr has not performed work for the employer since suffering the injury.

On July 13, 2007, neurosurgeon Thomas Carlstrom, M.D., determined that Mr. Barr had reached maximum medical improvement and that Mr. Barr had "sustained an impairment of about 5% of the body as a whole due to this incident." Dr. Carlstrom recommended permanent work restrictions, as follows: I would recommend for restrictions, avoidance of lifting greater than about 30 pounds, avoidance of bending and twisting. I don't think he will be able to sit in a truck for long periods of time so any truck driving should be short hauls only." The employer

determined that it did not have any work available that would meet Mr. Barr's permanent work restrictions and did not allow Mr. Barr to return to the employment.

Mr. Barr subsequently retained legal counsel. On August 16, 2007, Attorney Steven Jayne sent a letter to the employer's worker's compensation carrier. In the letter, Mr. Jayne asked the employer to clarify whether the employer intended to make work that would meet the permanent medical restrictions available to Mr. Barr. Mr. Jayne advised the employer that Mr. Barr was willing and able to return to employment and perform duties that fell within the medical restrictions. Mr. Jayne and Mr. Barr did not receive the requested clarification.

Mr. Barr established a claim for unemployment insurance benefits that was effective August 26, 2007. On August 30, 2007, Iowa Workforce Development mailed notice of the claim to the employer. The deadline for the employer's protest of the claim was Monday, September 10, 2007. The employer faxed its protest of the notice of claim to Iowa Workforce Development on September 13, 2007. In the protest, Jerry Floyd, Human Resources Manager, indicated that Mr. Barr was still employed full-time and was "out of work due to a worker's compensation claim." Despite the late protest, the Agency scheduled the matter for a fact-finding interview to determine Mr. Barr's ability to work and availability for work. On October 3, 2007, Jerry Floyd, Human Resources Manager, participated in the fact-finding interview, as did the claimant. At the fact-finding interview, Mr. Floyd indicated that Mr. Barr had suffered a work-related injury, that Mr. Barr had been a "resident driver," and that the employer did not have any work available that met Mr. Barr's medical restrictions. Mr. Floyd further indicated that Mr. Barr was receiving worker's compensation benefits and that, "until he settles the case and finds work," would continue to receive worker's compensation benefits.

Since Mr. Barr established his claim for unemployment insurance benefits, he has earnestly and actively sought employment, and has kept a detailed log of his job contacts. Mr. Barr has sought work in a variety of occupations including forklift operator, maintenance worker, customer service representative, sales, and store clerk. Mr. Barr's permanent medical restrictions would not prevent him from performing the work in most, if not all, of these occupations.

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".

871 IAC 24.22(1)a and (2) provide:

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.

The weight of the evidence indicates that Mr. Barr has in fact been able to work and available for since establishing his claim for unemployment insurance benefits. Mr. Barr has actively and earnestly sought gainful employment. Mr. Barr's medical restrictions do not prevent him performing gainful employment. Mr. Barr has met the requirements of Iowa Code section 96.4(3) since establishing his claim for benefits and is, therefore, eligible for benefits, provided he is otherwise eligible.

The evidence in the record, including the employer's statements at the October 3, 2007 fact-finding interview, suggests there has in fact been a separation from the employment. This matter will need to be remanded to a claims representative for determination of whether there has been a separation from the employment, the nature of the separation, the impact on the claimant's eligibility for benefits, and the impact on the employer's liability for benefits. See Iowa Code section 96.5(1) and 96.5(2)(a).

The evidence in the record indicates that the claimant has received worker's compensation benefits since establishing his claim for benefits. Worker's compensation benefits for temporary disability are deductible from unemployment insurance benefits, while worker's compensation benefits for permanent disability are not. See Iowa Code section 96.5(5)(b). The claimant indicates he was advised at the October 3, 2007 fact-finding interview by the Workforce Development representative that he had to report his worker's compensation benefits to the Agency. This may or may not have been sound advice, depending on whether the benefits were for temporary disability or permanent disability. See Iowa Code section 96.5(5)(b). Beginning with the benefit week that ended October 6, 2007, the claimant has reported the \$535.00 weekly worker's compensation benefits as "vacation." The benefits are clearly not vacation pay. This matter will need to be remanded for determination of whether the worker's compensation benefits the claimant has received since establishing his claim for unemployment insurance benefits have been for temporary or permanent disability.

DECISION:

The Agency representative's October 4, 2007, reference 01, decision is reversed. The claimant has been able to work and available for work since establishing his claim for benefits. Accordingly, the claimant has been eligible for unemployment insurance benefits since the effective date of his claim, provided he is otherwise eligible.

REMAND:

This matter is remanded to a claims representative for determination of whether there has been a separation from the employment, the nature of the separation, the impact on the claimant's eligibility for benefits, and the impact on the employer's liability for benefits. This matter is remanded to a claims representative for determination of whether the worker's compensation benefits the claimant has received since establishing his claim for unemployment insurance benefits have been for temporary or permanent disability.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css