

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

STEPHEN L MCGRAW
Claimant

LAZARO ENTERPRISES INC
Employer

APPEAL 15R-UI-01269-GT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/26/14
Claimant: Respondent (1)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(1) – Able to Work - illness, injury or pregnancy
Iowa Admin. Code r. 871-24.23(35) – Availability Disqualifications

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated November 19, 2014, (reference 01) that held claimant able to and available for work. After due notice, a hearing was scheduled for and held on February 25, 2015. Claimant participated personally, and by attorney Thomas J. Berg. Employer participated by Javier Lazaro, President.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant suffered from a myocardial infarction on or about September 17, 2014. Claimant sought medical treatment, and was not able to work at all until October 6, 2014 when he received a release back to work with restrictions. Employer could not accommodate claimant's restrictions at that time, and claimant was not allowed to come back to work. Claimant was later given a release back to work without any restrictions on October 29, 2014.

Claimant was employed as a full-time truck driver. Once he was released by his physician to return to work claimant contacted his employer and provided that information to it on or about October 29, 2014, and asked to return back to work at that time.

Employer no longer had that same driving position available on that date. Employer offered to bring claimant back on as a tanker driver. Claimant had not been certified to drive trucks that hauled hazardous materials which is required for that driving position. Employer offered to provide training at its expense if claimant would agree to change jobs. Claimant was not willing to change jobs, and refused the offer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work effective October 29, 2014.

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 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.

Iowa Admin. Code r. 871-24.23(35) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(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 Court found no separation from employment and allowed partial benefits where claimant's work aggravated chronic lung disease prevented him from full-duty work but he reported daily for assignments as available. *FDL Foods v. Emp't Appeal Bd. and Lambers*, 460 N.W.2d 885 (Iowa Ct. App. 1990).

The Supreme Court ruled that a claimant with a non-work related injury was not able to and available for work and that section 96.5(1)d was not applicable when she returned to work with a restricted release, could not perform her prior job and could not establish any other type of work of which she was capable. *Geiken v. Luthern Home for the Aged*, 468 N.W.2d 223 (Iowa 1991).

Inasmuch as the medical condition was not work related but employer permanently filled the job before he was released to return to work; and when the treating physician had released him to return to work without restriction no suitable, comparable work was available, claimant has established his ability to and availability for work.

Claimant is on notice that he must conduct at least two work searches per week and file weekly claims in order to retain eligibility for benefits.

DECISION:

The representative's decision dated November 19, 2014, (reference 01) is affirmed. The claimant is able to work and available for work effective October 29, 2014. Benefits are allowed, provided he is otherwise eligible.

Duane L. Golden
Administrative Law Judge

Decision Dated and Mailed

dlg/pjs