

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES F BURGIN
Claimant

APPEAL NO. 09A-UI-19619-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

TARGET CORPORATION
Employer

**Original Claim: 11/08/09
Claimant: Respondent (1)**

Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated December 23, 2009, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 10, 2010. The claimant participated. Although the employer responded to the hearing notice, the designated representative did not answer the phone when called. Voice mail picked up and a detailed message was left for the employer. No call was received prior to the end of the hearing and therefore the employer did not participate in the hearing. The record consists of the testimony of the claimant.

ISSUE:

Whether the claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer in this case is a distribution center located in Cedar Falls, Iowa. The claimant started working for the employer in June 2005 as a warehouse worker. He was responsible for loading semi-trucks with merchandise. In April 2007, the claimant sustained an injury to his wrist that was work-related. He developed chronic wrist pain in both wrists and underwent bilateral carpal tunnel surgery in October 2008. He was released to return to work in January 2009. He tried to work for one or two weeks. Pain in both elbows led to ulnar nerve surgery.

On December 10, 2009, the claimant returned to work for two weeks. He had light-duty restrictions. He was unable to tolerate the light duty and is now being evaluated by a physician for a possible nerve block. The claimant is not totally restricted from working. His present restrictions are no lifting more than 25 pounds occasionally and no repetitive work. He is still considered an employee, but the employer has not returned him to work. He is going to school in the morning and believes there are some jobs, such as a cashier, that he could do.

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 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.

Inasmuch as the injury was work-related and the treating physician has released the claimant to return to work, albeit with restrictions, the claimant has established ability to work. Because the employer had no work available or was not willing to accommodate the work restrictions, benefits are allowed.

DECISION:

The representative's decision dated December 23, 2009, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw