

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JEFFREY D KEWER**  
Claimant

**APPEAL NO. 12A-UI-10487-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DIRECTV, INC**  
Employer

**OC: 07/22/12**  
**Claimant: Respondent (2-R)**

871 IAC 24.23(10) – Leave of Absence

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the August 20, 2012, reference 01, decision that allowed benefits effective July 22, 2012 based on an agency conclusion that Jeffrey Kewer was on a short-term layoff. After due notice was issued, a hearing was held on September 26, 2012. Mr. Kewer participated. Steven Zaks of Barnett Associates represented the employer and presented testimony through Andrea Strater, Leave of Absence Specialist. Exhibits One, Two and Three were received into evidence. The parties waived formal notice on the issue of whether Mr. Kewer had been able to work and available for work since he established his claim for benefits.

**ISSUES:**

Whether Mr. Kewer has been temporarily laid-off from DirecTV.

Whether Mr. Kewer is on a medical leave of absence from the employment.

Whether Mr. Kewer has been able to work and available for work since he established his claim for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Jeffrey Kewer commenced working for DirecTV in Urbandale on August 8, 2011 and last performed work for the employer on November 4, 2011. Mr. Kewer worked as a full-time equipment installer. Mr. Kewer's work day would start sometime between 6:15 and 8:00 a.m. and would end when the day's work was done, which could be 5:00 or 6:00 p.m. or as late as 10:00 to 11:00 p.m. Mr. Kewer's immediate supervisor was Darren Yoder. Ed Seuferer was the Site Supervisor in Urbandale. Mike Haas was another supervisor who worked out of the Urbandale site. Both Mr. Seuferer and Mr. Haas had authority over Mr. Kewer's employment.

During the early evening hours of November 3, 2011, Mr. Kewer was pouring concrete at his last installation jobsite of the day when his back started hurting. Mr. Kewer had a history of back problems. Mr. Kewer went home that night, went to bed, and felt better in the morning.

On the morning of November 4, 2011, Mr. Kewer went to his first jobsite in Boone. As Mr. Kewer stood up from a customer's kitchen table, where he had been completing paperwork, he felt a snap in his back. Mr. Kewer had difficulty walking, but drove himself to the Boone County Hospital Emergency Room. While he was there, his back was x-rayed and the x-ray indicated that nothing was broken. Mr. Kewer received a shot of Demerol. Since that time, Mr. Kewer has continued off work.

A few days after the trip to the Boone County Hospital, Mr. Kewer went to see his primary care physician, Brian Milhouse, M.D. Dr. Milhouse took Mr. Kewer off work for a month effective November 7, 2011. While Mr. Kewer's primary care physician released him to return to work with restrictions, Mr. Kewer was subsequently evaluated at Des Moines Orthopedics and the orthopedist kept Mr. Kewer off work. The orthopedist has not released Mr. Kewer to return to work. Mr. Kewer has arranged his medical care thus far. Mr. Kewer has insurance through Wellmark Blue Cross Blue Shield.

Mr. Kewer did not initially report the November 4 incident to the employer as a worker's compensation injury, but did so two weeks later, after he saw an advertisement that suggested a person could file a worker's compensation claim due to aggravation of an earlier injury. On November 18, 2011, Mr. Kewer and Mr. Haas each completed a report of injury document and forwarded the same to the employer's worker's compensation carrier. In connection with that process, Mr. Kewer first spoke to the employer's human resources staff.

The employer's third-party short-term disability administrator authorized short-term disability benefits for the period of November 12, 2011 through May 4, 2012. There is a six-month cap on the short-term disability benefits.

In December 2011, the employer's worker's compensation insurance carrier denied Mr. Kewer's worker's compensation claim.

On December 7, 2011, Andrea Strater, Leave of Absence Specialist, contacted Mr. Kewer to get more information and documentation concerning his back condition. On January 9, 2012, Ms. Strater received medical documentation from Mr. Kewer's health care provider. The documentation indicated that Mr. Kewer had been evaluated, had received epidural shots for lower back pain, had been directed to perform therapeutic exercises to include walking 30 minutes twice a day, and had been directed to return for re-evaluation. Ms. Strater also received medical documentation that indicated Mr. Kewer needed to remain off work until he had been cleared by an orthopedist to return to work. On January 27, 2012, Ms. Strater received documentation from Des Moines Orthopedics, indicating that Mr. Kewer was to return for an appointment to discuss spinal fusion surgery. On January 30, 2012, Ms. Strater received documentation from Des Moines Orthopedics, indicating that Mr. Kewer was to undergo surgery on March 13, 2012 and would need four to six months to recover. On March 9, 2012, Ms. Strater received documentation from Des Moines Orthopedics indicating that Mr. Kewer would need to remain off work pending further evaluation and pending surgery.

Mr. Kewer's insurance company denied authorization for the back surgery based on a conclusion that it was not medically necessary. On August 3, 2012, Ms. Strater received documentation indicating that the second level appeal of the authorization denial was still pending.

On September 7, 2012, Mr. Kewer's worker's compensation was reopened.

Since Mr. Kewer went off work in November 2011, the employer has not received medical documentation releasing him to return to work. Both the employer and Mr. Kewer continued to consider him an employee of DirecTV.

Since November 2011, Mr. Kewer's condition has worsened. Mr. Kewer has chronic pain that is treated through morphine and a muscle relaxant. The pain increases significantly if Mr. Kewer forgets to take his medication. Mr. Kewer describes the pain as feeling like he is being stabbed with an ice pick. Mr. Kewer reports pain in both legs and compromised leg muscle strength. Mr. Kewer reports difficulty sleeping.

### **REASONING AND CONCLUSIONS OF LAW:**

A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations. See Iowa Administrative Code rule 871 IAC 24.1(113)(a).

On the other hand, where an employee requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period. See Iowa Administrative Code rule 871 IAC 24.23(10).

The weight of the evidence in the record fails to establish that the employer laid Mr. Kewer off. Instead, the evidence indicates that Mr. Kewer requested and was approved for a leave of absence based on his primary care doctor's decision to take him off work in November 2011. The record further indicates that Mr. Kewer has continued off work per orders from the treating orthopedist since December 2011. There is sufficient evidence in the record to indicate that the work on November 3 contributed to the back condition that manifested on that day and the next. The weight of the evidence indicates that Mr. Kewer has never since been released to return to work and has continued on a leave of absence pending resolution of his back issue.

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.

871 IAC 24.22(2) 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.

(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.

Iowa Administrative Code section 871 IAC 24.23 provides, in relevant part, as follows:

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

24.23(1) An individual who is ill and presently not able to perform work due to illness.

24.23(6) If an individual has a medical report on file submitted by a physician, stating such individual is not presently able to work.

24.23(34) Where the claimant is not able to work due to personal injury.

24.23(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

Mr. Kewer's medical status, which includes, among other things, chronic pain and a pending insurance appeal to get insurance approval for spinal fusion surgery, prevents Mr. Kewer from meeting either the work ability or availability requirements to be eligible for unemployment insurance benefits.

Benefits are denied effective July 27, 2012. The disqualification continued as of the September 26, 2012 appeal hearing.

This matter will be remanded for entry of an overpayment decision concerning benefits disbursed to Mr. Kewer.

**DECISION:**

The Agency representative's August 20, 2012, reference 01, decision is reversed. The claimant has been on an approved leave of absence since November 2011. The claimant has not been able or available for work since he established his claim for benefits. The disqualification remained as of the September 26, 2012 appeal hearing. In the event the claimant provides proof that he had been released to return to work on or after September 27, 2012 with or without restrictions, and if the employer fails to accommodate those restrictions, the claimant may contact Workforce Development with that documentation to initiate further adjudication of the eligibility for benefits.

This matter will be remanded for entry of an overpayment decision concerning benefits disbursed to the claimant thus far.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs