

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD HARSH
Claimant

APPEAL NO. 08A-UI-07597-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIDLAND MANUFACTURING INC
Employer

**OC: 04/13/08 R: 02
Claimant: Appellant (2)**

Section 96.4-3 - Able and Available for Work

STATEMENT OF THE CASE:

Richard Harsh (claimant) appealed an unemployment insurance decision dated August 15, 2008, reference 01, which held that he was not eligible for unemployment insurance benefits because he is not willing to work in his usual capacity with Midland Manufacturing, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 8, 2008. The claimant participated in the hearing with Attorney Richard Schmidt. The employer participated through Joyce Vriezelaar, Comptroller. Employer's Exhibits One and Two were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant is able and available to work?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant sustained a work-related injury and had bilateral cubital, carpal and ulnar tunnel releases performed by surgeon, Eugene Cherny, M.D. He was placed at maximum medical improvement on July 10, 2007 with no permanent restrictions. The claimant sought a second opinion with Ian Lin, M.D. on June 9, 2008 and Dr. Lin had the claimant get repeat bilateral EMG nerve conduction velocity tests on June 12, 2008. Dr. Lin issued permanent restrictions on June 23, 2008 of no lifting more than 50 pounds and no repetitive motions with his hands. The employer sent the claimant's recent EMG tests to Dr. Cherny who reviewed them on June 24, 2008. Dr. Cherny does not agree with permanent restrictions being issued to Mr. Harsh based upon his current electrodiagnostic studies and current clinical exam. The employer returned the claimant to work on July 9, 2008 but the claimant did not work due to arm and back pain. He returned the following day but has missed a lot of work due to continued pain complaints. The employer has restricted the claimant to certain machines that do not aggravate his medical condition.

REASONING AND CONCLUSIONS OF LAW:

The issue to be determined is whether the claimant is able and available for work. In order for an individual to be eligible to receive unemployment insurance benefits, the evidence in the record must establish that he is able to work, available for work, and earnestly and actively seeking work. See Iowa Code § 96.4(3) and 871 IAC 24.22.

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".

871 IAC 24.23(1) provides:

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

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

The claimant has the burden of proof in establishing his ability and availability for work. Davoren v. Iowa Employment Security Commission, 277 N.W.2d 602 (Iowa 1979). The evidence demonstrates the claimant is medically able to work both with and without restrictions. He is somewhat limiting his availability to work due to pain complaints but is able to work the majority of the time. The claimant currently meets the availability requirements of the law and benefits are allowed, provided he is otherwise eligible.

DECISION:

The unemployment insurance decision dated August 15, 2008, reference 01, is reversed. The claimant qualifies for unemployment insurance benefits, provided he is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css