

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DUSTIN BRECOUNT**  
Claimant

**APPEAL NO. 06A-UI-09344-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WOLF PACKAGING INC**  
Employer

**OC: 08/13/06 R: 04**  
**Claimant: Appellant (4)**

Section 96.4-3 - Able and Available for Work

**STATEMENT OF THE CASE:**

Dustin Brecount (claimant) appealed an unemployment insurance decision dated September 13, 2006, reference 05, which held that he was not eligible for unemployment insurance benefits because he was not available to work with Wolf Packaging, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 4, 2006. The claimant participated in the hearing. The employer participated through Joyce Stimpson, Human Resources Safety Manager. 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 was found not medically able to perform work as of August 13, 2006 due to a non-work-related injury. He was released to return to work on October 3, 2006 but continues to have restrictions. The claimant cannot use his right arm at this time. He must avoid repetitive movements and cannot lift his right arm over his head. Since he cannot lift, push, or pull with his right arm, he is unable to perform the duties of a press operator, which was the job at which he was last employed. The claimant is able to perform light duty work and has previously worked as a telemarketer.

**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 section 96.4(3) and 871 IAC 24.22.

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.

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). Although the claimant is not able to perform the essential duties of his former position, he has established his ability to perform some types of gainful employment. Benefits are allowed as of October 3, 2006 when he was released to return to work with restrictions.

**DECISION:**

The unemployment insurance decision dated September 13, 2006, reference 05, is modified in favor of the appellant. The claimant meets the availability requirements of the law as of week ending October 7, 2006 and is qualified for benefits, provided he is otherwise eligible.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

sda/pjs