

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DENNIS L KINNIEBREW
Claimant

APPEAL 18A-UI-03120-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CONTRACT TRANSPORT INC
Employer

OC: 02/11/18
Claimant: Appellant (1R)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22 – Able & Available - Benefits Eligibility Conditions
Iowa Admin. Code r. 871-24.23(10) – Available – Leave of Absence

STATEMENT OF THE CASE:

Dennis L. Kinniebrew (claimant) filed an appeal from the February 28, 2018, reference 01, unemployment insurance decision that denied benefits based upon the determination he requested and was granted a leave of absence from Contract Transport, Inc. (employer) rendering him not able to and available for work effective February 11, 2018. After due notice was issued, a telephone hearing was held on April 4, 2018. The claimant participated. The employer participated through Corporate Treasurer Jeane Nible and Human Resources Director Allen Bergman. The Employer's Exhibit 1 was admitted without objection.

ISSUE:

Is the claimant able to work, available for work, and actively and earnestly seeking work effective February 11, 2018?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Truck Driver beginning on August 20, 2015, and his last day worked for the employer was November 26, 2017. The claimant has been a commercial truck driver for the last 25 years. The claimant is required to have a current DOT physical to maintain his license. He has experience driving other vehicles. The claimant's non-driving job experience includes call center work which he did in the early 1990's.

In mid-October 2017, the claimant notified Dispatcher Mike Peterson and Human Resources Director Allen Bergman that he had been in a motor vehicle accident in his personal vehicle, hurt his knee, and required a couple of days off work. On November 19, 2017, the claimant submitted a "Vacation or Time Off Request" asking for time off beginning November 29, 2017, due to knee replacement surgery. (Exhibit 1) He was given paperwork for job protected leave under the Family Medical Leave Act (FMLA) and to receive Short Term Disability (STD) payments during his absence. The claimant's doctor submitted the requests stating the claimant needed the time off and knee replacement due to osteoarthritis which was non-work

related. The claimant's requests were granted. The STD payments are only available for non-work related absences and would not be payable if the injury was work related. At the end of January 2018, the claimant reported to Corporate Treasurer Jeane Nible that he believed his injury was work related. The claimant, through his attorney, filed a Workers' Compensation claim at the end of February.

The claimant filed his claim for unemployment insurance benefits effective February 11, 2018. The claimant's base period includes October 1, 2016 through September 30, 2017, during which time he earned wages as a full-time employee. The claimant filed his weekly continued claim for benefits for the week ending February 17, 2018, and then his claim became inactive as he did not file a subsequent weekly continued claim.

The claimant's job protected leave under the FMLA expired on February 21, 2018, after which time the employer no longer considered him an employee. Whether the claimant's separation qualifies him for unemployment insurance benefits has not yet been investigated or adjudicated by the Benefits Bureau.

On March 13, 2018, the claimant's doctor released him to return to work part-time but has not yet released him to full-time work. The claimant contacted the employer, but could not be returned to work as he did not have his DOT recertification. The claimant still has not received his DOT recertification and cannot legally drive a commercial vehicle.

The week ending March 24, 2018, the claimant's job search has consisted of contacting people by phone about employment, but he did not fill out any applications. The claimant has considered jobs in home health care, but has no experience or education in that area. He did not make any job contacts for the week ending March 31, 2018.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work, available for work, and actively and earnestly seeking work effective February 11, 2018. Benefits are denied until such time as the claimant can show he is able to work, available for work, and actively and earnestly seeking work.

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".

Iowa Admin. Code r. 871-24.22 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.

b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides.

(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.

a. Shift restriction. The individual does not have to be available for a particular shift. If an individual is available for work on the same basis on which the individual's wage credits were earned and if after considering the restrictions as to hours of work, etc., imposed by the individual there exists a reasonable expectation of securing employment, then the individual meets the requirement of being available for work.

...

h. Available for part of week. Each case must be decided on its own merits. Generally, if the individual is available for the major portion of the workweek, the individual is considered eligible for work.

...

j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

(3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

...

m. Restrictions and reasonable expectations of securing employment. An individual may not be eligible for benefits if the individual has imposed restrictions which leave the individual no reasonable expectation of securing employment. Restrictions may relate to type of work, hours, wages, location of work, etc., or may be physical restrictions.

...

(3) Earnestly and actively seeking work. Mere registration at a workforce development center does not establish that the individual is earnestly and actively seeking work. It is essential that the individual personally and diligently search for work...Unreasonable limitations by an individual as to salary, hours or conditions of work can indicate that the individual is not earnestly seeking work. The department expects each individual claiming benefits to conduct themselves as would any normal, prudent individual who is out of work.

a. Basic requirements. An individual shall be ineligible for benefits for any period for which the department finds that the individual has failed to make an earnest and active search for work. The circumstances in each case are considered in determining whether an earnest and active work search has been made. Subject to the foregoing, applicable actions of the following kind are considered an earnest and active search for work if found by the department to constitute a reasonable means of securing work by the individual, under the facts and circumstances of the individual's particular situation:

(1) Making application with employers as may reasonably be expected to have openings suitable to the individual.

(2) Registering with a placement facility of a school, college, or university if one is available in the individual's occupation or profession.

(3) Making application or taking examination for openings in the civil service of a governmental entity with reasonable prospects of suitable work for the individual.

- (4) Responding to appropriate “want ads” for which work appears suitable to the individual if the response is made in writing or in person or electronically.
- (5) Any other action which the department finds to constitute an effective means of securing work suitable to the individual.

Iowa Admin. Code r. 871-24.23 provides, in relevant part:

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.

...

- (10) The claimant 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.

...

- (16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

...

- (27) Failure to report on a claim that a claimant made any effort to find employment will make a claimant ineligible for benefits during the period. Mere registration at the workforce development center does not establish that a claimant is able and available for suitable work. It is essential that such claimant must actively and earnestly seek work.

- (28) A claimant will be ineligible for benefits because of failure to make an adequate work search after having been previously warned and instructed to expand the search for work effort.

...

- (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.

An individual claiming benefits has the burden of proof that he is be able to work, available for work, and earnestly and actively seeking work. Iowa Admin. Code r. 871-24.22. The parties dispute whether the claimant’s injury was work related or non-work related. For purposes of unemployment insurance benefits only, the claimant’s injury is not work related. The claimant’s doctor notified the employer the injury was not work related, the claimant was approved for STD payments which are only provided for non-work related illness or injury, and the claimant has not furnished any reliable medical information to establish that the injury was work related.

The claimant was not released to return to work in any capacity by his doctor until March 13, 2018. The claimant was under the care of a medical professional and was not able to and available to work between February 11, 2018 and March 11, 2018.

While the claimant's doctor has released him to return to work with restrictions, the claimant is not able to work on the same basis that he earned the wage credits in his base period. The claimant earned the wage credits in his base period working full-time but is only released to work in a part-time capacity. Additionally, the claimant has not recertified with the DOT to return to commercial truck driving. While a claimant does not have to be able to and available for work in his customary profession, the claimant has not established that there is full-time, gainful employment outside his customary profession that he would be capable of performing based on his skills and experience. He has been a commercial truck driver for 25 years and has been seeking work in home health care for which he has no training or experience. The claimant is not able to and available for work effective March 11, 2018. Benefits are denied through the week ending April 7, 2018 and will continue to be denied until such time as the claimant can establish that he is able to and available to perform gainful, full-time employment based on his skills and experience.

The claimant also has not been making an active and earnest job search. He has made phone calls, but has not applied for any jobs during the weeks he has filed weekly continued claims. The Unemployment Insurance Handbook in effect when the claimant filed his claim for benefits, states, in relevant part, on page 18:

Work Search Requirements

...

In order to meet the work search requirements, individuals must make two job contacts between Sunday and Saturday of the week they are claiming benefits. Contacts may be made in person, online, by mail, email or faxing résumés or applications. Telephone calls are not acceptable. The work search must be a reasonable and honest effort to find work. (Emphasis added)

However, the claimant has not yet received a warning for failure to make a job search, so he cannot be considered ineligible on this basis alone. This is the claimant's warning that in order to be eligible for unemployment insurance benefits he must complete an active and earnest work search for each week that he claims benefits.

DECISION:

The February 28, 2018, reference 01, unemployment insurance decision is affirmed. The claimant is not able to work and available for work effective February 11, 2018. Benefits are denied through the week ending April 7, 2018, and will continue to be denied until such time as the claimant can establish that he is able to and available to perform gainful, full-time employment based on his skills and experience.

REMAND:

Whether the claimant's separation qualifies him for unemployment insurance benefits is remanded to the Benefits Bureau for an initial investigation and determination.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/scn