

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THEODORE H NIEMAN
Claimant

APPEAL NO. 11A-UI-04614-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CITY OF CEDAR RAPIDS
Employer

OC: 01/09/11
Claimant: Respondent (2)

Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 30, 2011 (reference 04) decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on April 20, 2011. Claimant participated. Employer participated through Personnel Specialist Colleen Sole, Building Maintenance Supervisor Matt Buck, Operation Maintenance Director Brian Heath, and was represented by City Attorney Susan Staudt. Employer's Exhibits 1 and 2 were admitted to the record.

ISSUE:

The issue is whether claimant is able to and available for work effective January 9, 2011.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: The appeal decision for 11A-UI-03975-LT, dated April 21, 2011, determined that claimant was not able to work effective January 9, 2011 after he had a medical restriction resulting from his December 10, 2010 personal injury surgery that prohibited him from using his right arm. On March 29, 2011, his doctor restricted him from working at all for six months. Those restrictions have not changed. The claimant has a GED and a history of working as an aluminum extruder in the 1990s. Since then he has worked as a custodian.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant is not able to or available for work effective January 9, 2011 through at least September 29, 2011.

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 24.22(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 24.23(35) provides:

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

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

Given his education, work history, and experience, and inasmuch as the claimant was restricted from working with one arm because of surgery for a non-work related medical condition and his treating physician has restricted him from working for six months, the claimant has not established his ability to work.

DECISION:

The March 30, 2011 (reference 04) decision is reversed. Claimant is not able to and available for work effective January 9, 2011. Benefits are withheld.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw