

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LOREN L REED

Claimant

APPEAL NO. 07A-UI-08813-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

**OC: 08/19/07 R: 01
Claimant: Appellant (4)**

Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Loren Reed filed a timely appeal from the September 14, 2007, reference 02, decision that denied benefits effective August 19, 2007 and that concluded he was unable to perform work. After due notice was issued, a hearing was held on October 1, 2007. Mr. Reed participated personally and was represented by Attorney Frank Tenuta. Exhibits A, B, C and Department Exhibit D-1 were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, as well as the Agency's record of information provided by the claimant via the weekly automated telephone reporting system. The hearing in this matter was consolidated with the hearing in Appeal Number 07A-UI-08814-JTT.

ISSUE:

Whether the claimant has been able to work and available for work since establishing his claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Loren Reed established a claim for benefits that was effective August 19, 2007. Mr. Reed received benefits totaling \$720.00 for the two-week period that ended September 1, 2007. Mr. Reed's claim for unemployment insurance benefits was prompted by Mr. Reed's most recent employer, GroundFX, Inc., laying Mr. Reed off due to a business closing. The layoff was effective August 17, 2007.

On or about June 16, 2007, Mr. Reed was injured in an off-duty motorcycle accident. Mr. Reed suffered injury to his right ankle and was diagnosed with right pilon fracture. The injury required surgical intervention and the first surgical procedure took place on June 16. The surgery included insertion of a metal plate, screws, and pins that were connected to an external "ring fixator apparatus." The post-operative diagnosis was "comminuted fracture distal tibia right side." Mr. Reed was discharged from the hospital on June 18, with instructions to follow up in two weeks.

On June 28, Mr. Reed returned to Orthopaedic Surgeon Steven Stokesbary, M.D., for post-operative follow up. Dr. Stokesbary noted the following:

RIGHT FOOT/ANKLE: EXAM. He has external fixator around his ankle. Pin sites look very good. He has some mild to moderate swelling of his foot, nothing extraordinary. Calf is soft and supple. He is able to wiggle his toes. He can move his ankle a little bit. Sensation is intact.

XRAY FINDINGS: AP, lateral, and mortise views of the right ankle were done. These show a comminuted pilon fracture with significant articular surface injury. It is fixed with a hybrid fixator. There is a fibular shaft fracture fixed with plate and screws with satisfactory alignment. No other injuries or complications seen.

In connection with the visit, Dr. Stokesbary refilled Mr. Reed's prescription for the painkiller Percocet and instructed him to return for follow up in four weeks.

Mr. Reed returned to Dr. Stokesbary on July 11. However, the documents available for the hearing provide no more information about this visit.

On August 2, 2007, Mr. Reed returned to Dr. Stokesbary. Mr. Reed reported to the doctor that he had "had a fair amount of pain and paresthesias in foot but these are starting to resolve now." Mr. Reed reported improvement during the previous week. Dr. Stokesbary had changed Mr. Reed's pain medication to Lortab, and Mr. Reed reported that the new medication was working fine. Dr. Stokesbary noted the following:

RIGHT FOOT/ANKLE: EXAM. His external fixator is in good position. Pin sites look clear. He has a moderate amount of swelling in the foot. He is able to wiggle his toes. He can extend his ankle to neutral. He can plantar flex about 20 degrees. Sensation is grossly intact throughout.

Dr. Stokesbary noted the Treatment Plan as follows:

He is doing okay. I am going to schedule him for removal of the external fixator and application of a cast in two weeks. I refilled his pain medication. I will see him back in a few weeks.

On August 15, Mr. Reed underwent surgery to remove the pins from his ankle and the external fixation apparatus. Dr. Stokesbary noted: "The pins were ... removed by hand, deep from the bone without complications. The wounds were dressed. A short leg cast was then applied."

On August 30, Mr. Reed returned to Dr. Stokesbary for post-operative follow up. Mr. Reed reported that he had been "putting a little bit of weight" on his foot. Dr. Stokesbary noted the following:

RIGHT FOOT/ANKLE: EXAM. The cast is off today, skin is intact. Actually has very good range of motion of his ankle. Some stiffness in the subtalar joint. Diffusely tender, some mild swelling, grossly neurovascularly intact.

Dr. Stokesbary noted that the x-rays indicated: "a severely comminuted distal tibia fracture with intra-articular extension. Some interval fracture healing noted, but not complete union yet. There is severe irregularity of the joint surface of the distal tibia."

Dr. Stokesbary indicated a Treatment Plan as follows:

We will switch him to a Cam walker at this point so he can continue working on his range of motion. He can do light touch weightbearing and progress over the next few weeks very slowly. We will check him back in a few weeks.

Mr. Reed concedes that he was not able to work prior to September 6, 2007. On September 6, Dr. Stokesbary released Mr. Reed to return to work with the following restrictions: "no lifting > 10 pounds, minimal walking or standing and must use CAM walker."

On September 17, Dr. Stokesbary amended the medical restrictions to only require that Mr. Reed wear the CAM walker while walking.

Mr. Reed discussed his injury with a Workforce Development representative at the time he established his claim for benefits. Mr. Reed was advised that due to the injury, he would need to indicate he was not able to work and available for work when he made his weekly report to the Agency via the automated telephonic reporting system. For the benefit weeks that ended August 25, September 1, and September 8, Mr. Reed reported that he was not able to work and/or available for work. Mr. Reed had commenced his job search during the week that ended September 1. Mr. Reed made two employer contacts during that week and the next three weeks. During the weeks that ended September 15 and 22, Mr. Reed reported that he was able to work and available for work. The week ending September 22 is the most recent week reflected in the Agency's records. Mr. Reed is a group class "6" claimant and has applied for jobs via submission of résumé, in-person contacts, and other means.

Mr. Reed had been in his most recent employment for several years, in the position of general manager of mowing crews for a lawn care and landscape business. Mr. Reed believes he could have performed his prior duties despite the medical restrictions that were effective September 6.

REASONING AND CONCLUSIONS OF LAW:

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.

Workforce Development rule 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(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

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.

The greater weight of the evidence indicates that Mr. Reed was not able to work and available for work prior to September 17, 2007. The evidence indicates that Mr. Reed had suffered significant injury to his ankle requiring surgery and that Mr. Reed's ankle continued to be medically fragile until the change in restrictions on September 17, 2007. The greater weight of the evidence indicates that Mr. Reed's medical condition prevented him from being able to

perform gainful employment and prevented him from being available for such employment prior to September 17, 2007. The greater weight of the evidence indicates that, effective September 17, 2007, Mr. Reed's medical condition had sufficiently improved to the point where he was again able to perform gainful work and available for such work.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Reed was ineligible for benefits for the four-week period of August 19, 2007 through September 15, 2007. Mr. Reed was eligible for benefits effective September 17, 2007, provided he was otherwise eligible.

DECISION:

The Agency representative's September 14, 2007, reference 02, decision is modified as follows. Regarding the period of August 19, 2007 through September 15, 2007, the claimant did not meet the able and available requirements of Iowa Code section 96.4(3) and was not eligible for benefits. Effective September 17, 2007, the claimant met the able and available requirements of Iowa Code section 96.4(3) and was eligible for benefits, provided he was otherwise eligible.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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