

BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319

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THOMAS L CARRIZALES

Claimant

and

TRADESMEN INTERNATIONAL LLC

Employer

HEARING NUMBER: 19BUI-12380

EMPLOYMENT APPEAL BOARD  
DECISION

**NOTICE**

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

**A REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION:** 96.4-3

**DECISION**

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. With the following modification, the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

The Board makes the additional findings of fact: Iowa Workforce issued a decision on January 2, 2019 allowing benefits as of December 30, 2018 on the basis that the work release provided was sufficient. No appeal of this decision was filed.

The Board strikes the last two paragraphs in the Reasoning and Conclusions of Law, with the exception of the final sentence of the last paragraph.

The Board makes the following additions to the Administrative Law Judge's 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:

The individual is able to work, is available for work, and is earnestly and actively seeking work....

871 IAC 24.22 expounds on this:

871—24.22 Benefit 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.

24.22(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.

The reasons that can render an individual no longer available to work include:

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.

871 IAC 24.23(34)-(35).

"An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 723 (Iowa 1993). Generally the worker must be "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." 871 IAC 24.22(2).

Iowa Administrative Code 871 IAC 24.22(2) states:

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

Similarly, rule 871 IAC 24.23(10) states:

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

...

(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.

As an initial matter we cannot award benefits for a period before the initial claim was filed, and here the initial claim was not filed until sometime during the week beginning on November 11, 2018. The layoff for the prior week is therefore irrelevant.

This is an able and availability case. There are two issues: able and available. First, for how long did the illness in question prevent the Claimant from being genuinely attached to the labor market – the able issue. Second, for how long did the voluntary period of unemployment caused by the leave of absence last – the availability issue. In order to be eligible for benefits for work the Claimant must be both off the leave of absence *and* genuinely attached to the labor market, *at the same time*.

On ability we concur with Iowa Workforce, and the Administrative Law Judge, that the Claimant was unavailable through December 28, 2018. As of December 30, 2018 the Claimant is medically *able* to work in jobs in the relevant labor market.

On availability, we find that the Claimant was unavailable so long as his leave of absence lasted. Normally a leave will terminate once the purpose contemplated by the agreed leave no longer exist. Thus a leave to undergo surgery, and recover from the surgery, would normally terminate once the Claimant notifies the Employer of the recovery and asks to come to work. (Normally a medical release verifying this would be expected). If the Employer disagrees and says the Claimant cannot come back, then normally the Claimant would once again be *available* and the issue would be *ability*. But first the Claimant must notify the Employer of the desire to return. Here the Claimant says he sent the release on the 12/28, but the Employer denies receipt. The Claimant did not follow up to verify receipt. We find that the Claimant did not return at that time, and that his leave of absence,

and hence his period of unavailability, thus continued even after the December 28<sup>th</sup>. But the release was an exhibit in the hearing, and was faxed to the Employer during the course of the hearing. Thus clearly by January 14, 2019 the Claimant had indicated he is prepared to return to work, and that any continuing leave of absence is no longer a voluntary period of unemployment. Since the agency has already ruled he is able as of 12/30/18, the Claimant is able *and* available as of the week commencing on January 13, 2019. 871 IAC 24.22(2)(h) ("Generally, if the individual is available for the major portion of the workweek, the individual is considered to be available for work."). He thus is allowed benefits from the week beginning January 13, 2019 forward if he is otherwise eligible.

**DECISION:**

The decision of the Administrative Law Judge is **AFFIRMED AS MODIFIED**. The Claimant is denied benefits from November 11, 2018 through January 12, 2019 but **ALLOWED BENEFITS FROM THE WEEK BEGINNING JANUARY 13, 2019** and thereafter if he is otherwise eligible. This ruling holds notwithstanding any contrary language in the Administrative Law Judge's decision in case 18A-UI-12359. Any overpayments are modified accordingly.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv