

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GERALD D REED
Claimant

ALLIED VALVE INC
Employer

APPEAL 17A-UI-10309-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/17/17
Claimant: Appellant (1R)**

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.23(10) – Availability Disqualifications – Leave of Absence

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 5, 2017, (reference 01) unemployment insurance decision that denied benefits as of September 17, 2017. The parties were properly notified about the hearing. A telephone hearing was held on October 25, 2017. Claimant participated. Employer participated through general manager Bill Morgan. Shop superintendent Mark Zinger, human resources director Greg Canner, and human resources assistant Amy Delabruere appeared on behalf of the employer. Official notice was taken of the administrative record, including claimant's wage history, benefit payment history, and weekly continued claims filing history, with no objection.

ISSUES:

Is the claimant able to work and available for work effective September 17, 2017?

Is the claimant on an approved leave of absence?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a machinist starting August 1, 2000. One of claimant's basic duties as a machinist was to run a steel lathe.

On June 9, 2017, claimant came to the employer with a walker. The employer felt claimant was unstable due to a non-work related medical condition. Mr. Morgan testified claimant was unable to make it into the building from his car in the parking lot without a walker and the employer was uncomfortable with claimant running a steel lathe due to the safety concerns. The employer believed that OSHA would not be ok with claimant running a steel lathe given his medical condition. On June 9, 2017, Mr. Morgan told claimant he could not work for the employer due to his non-work related medical condition. The employer told claimant he could not return to work until he had a doctor's note stating that he was medically cleared to use a steel lathe. The employer told claimant it would keep his job open for him and allowed him to use his available PTO during his absence. Claimant did not request to take a leave of absence.

On September 7, 2017, claimant came to the employer and requested to return to work, but he was still unstable. Mr. Morgan testified claimant almost fell in the employer's lobby, but was stabilized by another employee. Mr. Morgan told claimant that he could not return to work until he had a doctor's release clearing him to use a steel lathe.

On October 17, 2017, the employer sent claimant a certified letter that he was separated from employment. The employer separated claimant because it could not hold his job open for him any longer and he had not provided the employer with a doctor's note releasing him to return to work and use a steel lathe. Claimant has not obtained a doctor's note releasing him to use a steel lathe. Claimant testified he has worked as a machinist for approximately sixty years.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that claimant is not able to work and available for work effective September 17, 2017.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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(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.

Iowa Admin. Code r. 871-24.23(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 medical practitioner and has not been released as being able to work.

Iowa Admin. Code r. 871-24.23(1) provides:

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.

To be able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "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* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

Subsection d of Iowa Code section 96.5(1) provides an exception where:

The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or

pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and ... the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

The statute specifically requires that the employee has recovered from the illness or injury, and this recovery has been certified by a physician. The exception in section 96.5(1)(d) only applies when an employee is *fully* recovered and the employer has not held open the employee's position. *White*, 487 N.W.2d at 346; *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa Ct. App. 1985); see also *Geiken v. Lutheran Home for the Aged Ass'n.*, 468 N.W.2d 223, 226 (Iowa 1991) (noting the full recovery standard of section 96.5(1)(d)).

Mr. Morgan credibly testified that as of June 9, 2017, claimant was unable to operate a steel lathe given his non-work related medical condition. The employer held his job open until October 17, 2017 and would have allowed claimant to return to work if he had a doctor's note releasing him to return to work using a steel lathe. Claimant has not obtained a doctor's note releasing him to work with a steel lathe.

Inasmuch as claimant's medical condition is not work-related and he has not been released to return to work using a steel lathe, he has not established his ability to work while he was still an employee of ALLIED VALVE INC. Since claimant's employment ended as of October 17, 2017, claimant is no longer obligated to return to employer upon his medical release to offer his services. At that point, claimant's ability to work is not measured by the job he held most recently, but by standards of his education, training, and work history. Since claimant testified he has been a machinist for approximately sixty years, he not is considered able to work. Benefits are withheld until such time as claimant obtains a medical release to return to some type of work of which he is capable of performing given any medical restrictions.

DECISION:

The October 5, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant is not able to work and available for work effective September 17, 2017. Benefits are withheld until such time as claimant obtains a release to return to some type of work of which he is capable of performing given any medical restrictions.

REMAND: The separation issue delineated in the findings of fact is remanded to the Benefits Bureau of Iowa Workforce Development for a fact-finding interview and unemployment insurance decision.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs