

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**THEODORE TUCKER
909 BELLE ST
WATERLOO IA 50702**

**J GEORGE SKARLIS & SONS INC
COMMUNITY BUILDERS SUPPLY CO
1127 JEFFERSON
WATERLOO IA 50702**

**ATTORNEY JAY ROBERTS
321 E 4TH ST
WATERLOO IA 50704**

**Appeal Number: 05A-UI-08669-BT
OC: 07/24/05 R: 03
Claimant: Appellant (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.4-3 - Able and Available for Work

STATEMENT OF THE CASE:

Theodore Tucker (claimant) appealed an unemployment insurance decision dated August 19, 2005, reference 01, which held that he was not eligible for unemployment insurance benefits because he was not able and available to work as of July 24, 2005. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 8, 2005. The claimant participated in the hearing with Attorney Jay Roberts. The employer participated through owner J. George Skarlis.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant most recently had surgery on his shoulder on April 7, 2005. He was released to return to work with restrictions as of July 27, 2005. The claimant cannot do any lifting with his right arm and cannot do any repetitive reaching with his right arm. He is able to work and can operate equipment if it does not involve lifting, can drive a forklift or even work with paperwork.

REASONING AND CONCLUSIONS OF LAW:

The issue to be determined in this case is whether the claimant is able and available for 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".

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.

The claimant has the burden of proof in establishing his ability and availability for work. Davoren v. Iowa Employment Security Commission, 277 N.W.2d 602 (Iowa 1979). While the claimant is not able to work for the employer in his previous position, he has established that he is capable of working in some type of gainful employment. The claimant is able and available to work and qualifies for unemployment insurance benefits.

DECISION:

The unemployment insurance decision dated August 19, 2005, reference 01, is reversed. The claimant qualifies for unemployment insurance benefits, provided he is otherwise eligible.

sdb/kjw