

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENNETH J WEILAND
Claimant

APPEAL NO. 08A-UI-11735-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TEMP ASSOCIATES - MARSHALLTOWN
Employer

OC: 07-06-08 R: 02
Claimant: Appellant (4)

Section 96.4-3 - Able and Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 9, 2008, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on December 31, 2008. The claimant did participate. The employer did participate through Nancy Mullaney, Manager. Claimant's Exhibit A was received.

ISSUE:

Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: The claimant last worked on October 24, when he asked to be off work for three or four weeks because he was going to undergo prostate surgery. The claimant did not return to the employer to seek additional work until December 2, 2008, at which time he was told he needed to be released without work restrictions in order to be allowed to return to work. The claimant presented the employer with a full release to work on December 9, 2008. The claimant was not able to return to work without restriction until December 9, 2008.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work from October 27, 2008 through December 8, 2008.

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 24.23(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.

Inasmuch as the medical treatment was not work-related and the treating physician did not release the claimant to return to work without work restrictions until December 9, 2008, the claimant is not able to and available for work until December 9, 2008. The claimant did not return to the employer to ask for any additional assignments after his surgery until the beginning of December, 2008. The claimant did not make himself available to the employer until December 9, 2008. Benefits are withheld from October 27, 2008 through December 8, 2008.

DECISION:

The representative's decision dated December 9, 2008, reference 02, is modified in favor of the appellant. The claimant is not able to work and available for work effective from October 27, 2008 through December 8, 2008.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw