

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KENNETH W LEE**

Claimant

**APPEAL NO. 09A-UI-07560-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KALLIN-JOHNSON MONUMENT CO INC**

Employer

**OC: 04/19/09**

**Claimant: Respondent (2)**

Section 96.5-1-d – Voluntary Quit/Illness  
871 IAC 24.25(35) – Non Job Related Illness/Injury  
Section 96.3-7 – Recovery of Overpayment

**STATEMENT OF THE CASE:**

The employer appealed a department representative's decision dated May 13, 2009, reference 01, that held the claimant was discharged for no act of misconduct on December 12, 2008, and benefits are allowed.

A telephone hearing was scheduled and held on June 10, 2009. The claimant did not participate. Scott Johnson, president, and Al Little, plant supervisor, participated on behalf of the employer.

**ISSUES:**

Whether the claimant voluntarily left for good cause attributable to the employer.  
Whether the claimant is overpaid benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses, and having considered all of the evidence in the record, finds that: The claimant worked as a full-time laborer for the employer from August 23, 2001, to April 22, 2008. The claimant had a pre-existing knee injury that had required surgery. The claimant advised the employer that he needed to leave work April 22, 2008, for a further surgery on his knee.

The employer received a doctor's excuse on June 22, 2008, that the claimant would remain off work under his care until he was reevaluated. The employer never received a further doctor's release nor did the claimant contact the employer and ask to return to work.

The employer's insurance carrier provided the claimant with short-term disability benefits through July, 2008, and then long-term disability that ended November 21, 2008. The employer notified the claimant that his COBRA insurance would end December 1, 2008. When the

employer did not hear from the claimant in response to the COBRA letter, it considered him to have quit employment.

Although a notice of the date and time for the hearing was mailed to the claimant, to his address of record, on May 21, he failed to respond and call in for the hearing.

**REASONING AND CONCLUSIONS OF LAW:**

The administrative law judge concludes that the claimant was not discharged, but voluntarily left employment due to an illness on April 22, 2008, and then failed to obtain a doctor's release and return to work regarding further employment.

Iowa Code section 96.5-1-d provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:

d. 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.

871 IAC 24.25(35) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:

(a) Obtain the advice of a licensed and practicing physician;

(b) Obtain certification of release for work from a licensed and practicing physician;

(c) Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or

(d) Fully recover so that the claimant could perform all of the duties of the job.

The claimant voluntarily left work due to a non-job-related illness/injury due to a pre-existing knee injury. The last communication the employer received from the claimant's doctor was an excuse in June that stated he would not return to work until reevaluation. The employer never heard from the claimant and/or his doctor regarding a release to return to work, and the claimant did not return to his employer and ask for continuing employment.

The claimant knew that his long-term disability benefit was ending November 21 and his COBRA insurance coverage ending December 1, 2008, yet he failed to return to the employer in order to request continuing employment. Separation from employment is considered to be a voluntary quit without good cause attributable to the employer.

Since the claimant has now been disqualified by reason of this decision, he is overpaid in the amount of \$212.00 for the week ending April 25, 2009.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

**DECISION:**

The decision of the department representative dated May 13, 2009, reference 01, is reversed. Claimant voluntarily left without good cause attributable to the employer due an illness/surgery effective April 22, 2008. Claimant is overpaid benefits, \$212.00.

---

R. L. Stephenson  
Administrative Law Judge

---

Decision Dated and Mailed

srs/pjs