

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN E BANES
Claimant

APPEAL NO. 08A-UI-03728-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BURGER CONCRETE & EXCAVATING INC
Employer

**OC: 01/27/08 R: 03
Claimant: Respondent (2)**

Section 96.5-1 – Voluntary Quit
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Burger Concrete & Excavating, Inc. (employer) appealed a representative's April 9, 2008 decision (reference 04) that concluded John E. Banes (claimant) was qualified to receive benefits, and the employer's account was subject to charge because the claimant had been laid off from work. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 1, 2008. The claimant participated in the hearing with his attorney, Mark Siedel. Deborah Allen-Burger, the vice president, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Did the claimant voluntarily quit his employment for reasons that qualify him to receive benefits, or did the employer discharge him for work-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant owned 30 percent of Banes Construction, Inc. His wife owned 30 percent of the business and his son owned 40 percent. The claimant was not an officer of Banes Construction, Inc., but he received wages that were reported to the Department. Banes Construction, Inc. paid unemployment insurance tax contributions based on the claimant's reported wages.

The employer bought the assets of Banes Construction, Inc. The claimant and his family retained the corporations that initially held the assets. After the sale of the assets had been completed, the employer learned it was considered a successor employer and acquired Banes Construction, Inc. unemployment tax rate/account.

After the employer bought the assets of Banes Construction, Inc., the employer understood the claimant had no desire to continue his employment. When the employer bought the assets on

May 23, 2007, the claimant indicated he was retiring. After Banes Construction, Inc. sold its assets to the employer, the claimant performed no services for the employer.

The claimant established a claim for unemployment insurance benefits during the week of January 27, 2008. He filed claims for the weeks ending February 2, through April 26, 2008. The claimant received his maximum weekly benefit amount of \$184.00 for each of these weeks.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if he voluntarily quits employment without good cause attributable to the employer, or the employer discharges him for reasons constituting work-connected misconduct. Iowa Code §§ Section 96.5-1, 2-a.

Since the employer was deemed a successor employer, the fact the claimant no longer received wages from Banes Construction, Inc. cannot be construed as a layoff. Instead, the claimant's employment would be considered continuous if he had continued working for the employer. At the time of the sale, the claimant, as part owner of the assets, gave the employer the impression he was not interested in continuing his employment because he was going to retire. The claimant made no attempt to continue his employment when the assets were sold. The employer did not indicate the claimant no longer had a job. Instead, the claimant stopped working for the business entity when the employer acquired the Banes Construction, Inc. assets. The claimant's conduct and his verbal comment that he planned to retire and did continue working for the employer establish that he quit working for the on-going business entity. The law presumes a claimant voluntarily quits employment without good cause when he retires and could have continued working. 871 IAC 24.25(24).

A preponderance of the evidence establishes the claimant retired or at least informed the employer he planned to retire when he sold the assets of Banes Construction, Inc. Therefore, the employer did not lay off of the claimant. The claimant quit his employment for reasons that do not qualify him to receive unemployment insurance benefits. As of January 27, 2008, the claimant is not qualified to receive benefits.

If an individual receives benefits he is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code § 96.3-7. The claimant is not legally entitled to receive benefits for the weeks ending February 2 through April 26, 2008. He has been overpaid \$2,392.00 in benefits he received for these weeks.

DECISION:

The representatives' April 9, 2008 decision (reference 04) is reversed. The employer did not lay off the claimant. Instead, the claimant voluntarily quit his employment when he indicated he was going to retire in late May 2007. The claimant quit his employment for personal reasons that do not qualify him to receive benefits. The claimant is disqualified from receiving unemployment insurance benefits as of January 27, 2008. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise

eligible. The employer's account will not be charged. The claimant has been overpaid and must repay a total of \$2,392.00 in benefits he received for the weeks ending February 2 through April 26, 2008.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css