

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DERRICK HOLMAN
Claimant

APPEAL NO. 10A-UI-04786-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NEHRING CONSTRUCTION INC
Employer

OC: 02/28/10
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated March 24, 2010, reference 01, that concluded he voluntarily quit employment with good cause attributable to the employer. A telephone hearing was held on May 11, 2010. The parties were properly notified about the hearing. The claimant participated in the hearing with his representative, Jim Hamilton. Bret Nehring participated in the hearing on behalf of the employer with a witness, Scott Johnson. Exhibits A and B were admitted into evidence at the hearing.

ISSUES:

Did the claimant voluntarily quit employment without good cause attributable to the employer?

Was the claimant overpaid unemployment insurance benefits?

FINDINGS OF FACT:

The claimant worked for the employer from March 16, 2009, to March 1, 2010. After a couple of months, he became a foreman with a salary of \$45,000 per year. The employer is a concrete construction company.

In September 2009, the claimant sustained an injury to his back while he was working. He was off work due to this injury until the end of January 2010. He received physical therapy and work hardening treatment, and then he was released to return to full-time work with a 70-pound lifting restriction.

The claimant returned to work at the end of January 2010, but experienced some low back and neck pain after performing his job that caused him to go back to his doctor on February 11. The doctor again released him to return to work with a 70-pound lifting restriction and referred him for a functional capacity evaluation. The doctor advised him that construction work might not be feasible in the future.

The claimant had a functional capacity evaluation on February 23. The physical therapist conducting the evaluation determination concluded he demonstrated the physical capacity and tolerances to function at the medium to medium-heavy categories of work, which would allow him to occasionally lift 70 pounds from 8 inches to waist level and frequently lift 33 pounds from 8 inches to waist level. He was determined to be employable as long as his restrictions were followed.

In February 2010, the claimant learned that his landlord had sold the house and he and his wife were going to have to move and find other housing. After seeing the doctor and going through the functional capacity evaluation, he was still concerned about reinjuring himself at work.

On about March 3, the claimant turned in his credit card and keys to the office project manager, Scott Johnson, and informed him that he was quitting because he had moved and believed the foreman job was too physical for him. He said he planned to move out of state to work as a hired hand on a relative's farm. Johnson reported this to the owner of the business, Bret Nehring. Nehring met with the claimant a couple days later. He told the claimant the employer wanted to keep him employed and would accommodate his restrictions by allowing him to work as a supervisor and hiring some additional laborers to perform any physical work he was not able to work. The claimant responded that he was not wired to simply supervise workers without working with them. When the claimant also asserted that the employer probably would not pay him as much for supervising, Nehring said not to worry about that and asked him to consider continuing in employment. The claimant declined to continue in employment.

The claimant filed a new claim for unemployment insurance benefits with an effective date of February 28, 2010. The claimant filed for and received a total of \$4,421.00 in unemployment insurance benefits for the weeks between February 28 and May 22, 2010.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer. Iowa Code § 96.5-1.

The unemployment insurance rules provide that a claimant is qualified to receive benefits if compelled to leave employment due to a medical condition attributable to the employment. The rules require a claimant: (1) to present competent evidence that conditions at work caused or aggravated the medical condition and made it impossible for the claimant to continue in employment due to a serious health danger and (2) to inform the employer before quitting of the work-related medical condition and that the claimant intends to quit unless the problem is corrected or condition is reasonably accommodated. 871 IAC 24.26(6)b.

Although the evidence is clear the claimant suffered a work-related injury, there is no competent evidence that conditions at work made it impossible for the claimant to continue in employment due to a serious health danger. In fact, the evidence establishes the claimant was employable in medium to medium-heavy categories of work, as long as he did not lift over 70 pounds. Furthermore, I am convinced the employer genuinely wanted to continue to employ the claimant and was providing reasonable accommodation, which is what the law encourages. In fact, the employer was willing to go beyond accommodating his stated restrictions by allowing him to supervise without having to do even medium to medium-heavy work. The claimant's explanation that he "was not wired" to supervise without pitching in to work beyond his restrictions makes no sense. He testified that his primary job history has been in the concrete business, and it would seem that a job in that field that would not require heavy physical labor, but instead use his knowledge and experience would be the ideal job considering his back

problems. Finally, the doctor's advice that construction work might not be feasible in the future undoubtedly was not an opinion about the supervisor job offered the claimant. Finally, I believe the employer's testimony that there had been no decision made to reduce the claimant's pay and his refusal to consider returning to work stopped further discussions on this point.

The unemployment insurance law requires benefits to be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. But the overpayment will not be recovered when an initial determination to award benefits is reversed on appeal on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The unemployment insurance decision dated March 24, 2010, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css