

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

MIGUEL A MARCELENO
Claimant

APPEAL NO. 19A-UI-04023-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TEAM STAFFING SOLUTIONS INC
Employer

OC: 03/31/19
Claimant: Respondent (4)

Iowa Code Section 96.5(1)(d) – Voluntary Quit
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 10, 2019, reference 02, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant contacted the temporary employment firm within three working days of completing a temporary work assignment. After due notice was issued, a hearing was held on June 11, 2019. Claimant Miguel Marceleno participated. Sarah Fiedler represented the employer. Exhibits 1 and 2 were received into evidence. Spanish English interpreters Sophia Vinnert and Roger Contin of CTS Language Link assisted with the hearing. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to Mr. Marceleno. The administrative law judge took official notice of the documentation submitted for and created in connection with the May 9, 2019 fact-finding interview for the limited purpose of ruling on whether the employer participated in the fact-finding interview.

ISSUES:

Whether Mr. Marceleno voluntarily quit the employment for good cause attributable to the employer.

Whether Mr. Marceleno was overpaid unemployment insurance benefits.

Whether Mr. Marceleno must repay overpaid benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Team Staffing Solutions, Inc. is a temporary employment firm. Miguel Marceleno began his employment with Team Staffing in July 2018 and performed work in a single, full-time, long-

term, forklift operator assignment at Comprehensive Logistics. Mr. Marceleno began the assignment in July 2018 and last performed work in the assignment on March 8, 2019. Mr. Marceleno did not complete the assignment.

On Sunday, March 10, 2019, Mr. Marceleno injured his right foot at home. On March 11, 2019, Mr. Marceleno sought medical evaluation of his foot injury and was diagnosed with a torn or "broken" ligament. The medical provider placed an immobilizing plaster cast on Mr. Marceleno's leg, from the tip of his foot to his knee. The injury and cast rendered Mr. Marceleno unable to operate a forklift. On March 12, 2019, Mr. Marceleno notified Team Staffing Accounts Manager Jennifer Rose that he had injured his foot at home and that his doctor had taken him off work for a few weeks. In connection with the March 12 contact, Mr. Marceleno provided Ms. Rose with a medical note, dated March 11, that stated he was unable to return to work until further notice.

Mr. Marceleno established an original claim for unemployment insurance benefits that was effective March 31, 2019. Team Staffing Solutions is the sole base period employer in connection with the claim.

On April 4, 2019, Team Staffing Branch Manager Kelsey Speed contacted Mr. Marceleno to inquire about his ability to return to work. At that time, Mr. Marceleno told Ms. Speed that he thought he would need to be off work for another month or so.

Toward the end of April 2019, Mr. Marceleno's doctor removed the cast, had Mr. Marceleno fitted with an orthopedic boot, and referred Mr. Marceleno to physical therapy.

On May 7, 2019, Ms. Rose contacted Mr. Marceleno to see whether he had been released by his doctor to return to work. Ms. Rose's phone call to Mr. Marceleno was prompted by the Comprehensive Logistics supervisor's email message to Ms. Rose asking whether Mr. Marceleno was able to return to the assignment. Mr. Marceleno told Ms. Rose at that time that he had been referred to therapy and was not yet able to return to work. Ms. Rose asked Mr. Marceleno to contact her once he completed therapy.

On May 9, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Marceleno's separation from the employment. Mr. Marceleno appeared and provided a verbal statement. The employer representative, Sarah Fiedler, missed the deputy's initial phone call at 9:14 a.m. due to her participation in another unemployment insurance proceeding. The deputy left a voicemail message and provided a 9:44 a.m. deadline for the employer to make a return phone call. With that allowed time-frame, Ms. Fiedler returned the call, was not able to speak with the deputy, but left a voicemail message in which she set forth in basic terms the employer's perspective on the separation.

On May 13, 2019, Mr. Marceleno spoke with Ms. Rose to let her know that he had completed his therapy. Mr. Marceleno provided Ms. Rose with a medical note from his doctor that stated he was able to return to work without restrictions. Mr. Marceleno did not explicitly request to be return to work. The employer did not provide Mr. Marceleno with work at that time.

Iowa Workforce Development set Mr. Marceleno's weekly benefit amount at \$347.00. Iowa Workforce Development disbursed \$2,082.00 in benefits to Mr. Marceleno for the six weeks between March 31, 2019 and May 11, 2019. Iowa Workforce Development approved an additional \$1,388.00 in benefits for the four weeks between May 12, 2019 and June 8, 2019, but held back those benefits to recover a prior overpayment of benefits for first four of the earlier weeks.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(1)d provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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.

Iowa Administrative Code rule 817-24.26(6) provides as follows:

Separation because of illness, injury, or pregnancy.

a. Nonemployment related separation. The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was available. Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.

b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with the employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.

In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

The evidence in the record establishes a voluntary quit for non-work related medical conditions that was effective March 12, 2019. Mr. Marceleno went off work upon the advice of a licensed and practicing physician. By May 13, 2019, Mr. Marceleno had been released by his doctor to return to work without restrictions. On May 13, 2019, Mr. Marceleno contacted Ms. Rose and provided her with medical documentation indicating that he had been released to return to work without restrictions. The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to rebut Mr. Marceleno's testimony regarding the contact he testified he had with Ms. Rose on May 13, 2019. In the context of the conversation that took place between Ms. Rose and Mr. Marceleno on May 7, 2019, Ms. Marceleno and Ms. Rose understood at the time of the May 13, 2019 contact that the contact itself was a follow up to the May 7 conversation and that the contact itself was a request to return to work. The employer did not and has not provided Mr. Marceleno with additional work. Prior to the week that started May 12, 2019, Mr. Marceleno's separation was without good cause attributable to the employer and Mr. Marceleno was not eligible for unemployment insurance benefits. Effective the week that started May 12, 2019, Mr. Marceleno's separation from the employment became for good cause attributable to the employer. Mr. Marceleno is eligible for benefits effective May 12, 2019 provided he meets all other eligibility requirements. The employer's account may be charged for benefits for the period beginning May 12, 2019.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Marceleno received \$2,082.00 in unemployment insurance benefits for the six weeks between March 31, 2019 and May 11, 2019, but was not eligible for those benefits. Accordingly, those benefits constitute an overpayment of benefits. Because the employer participated in the fact-finding interview within the meaning of the law, Mr. Marceleno must repay the overpaid benefits. Because the employer participated in the fact-finding interview within the meaning of the law, the employer's account shall be relieved of charges for the overpaid benefits paid to Marceleno for the six weeks between March 31, 2019 and May 11, 2019. However, the employer's account may be charged for benefits paid to Mr. Marceleno for the period beginning May 12, 2019, as referenced above.

The overpayment period and amount referenced in the present decision is the same overpayment period and amount referenced in the May 16, 2019, reference 05, decision that was based on the able and available determination. Agency records reflect that four weeks of the six-week overpayment have been recovered through an off-set of benefits.

DECISION:

The May 10, 2019, reference 02, decision is modified as follows. The claimant voluntarily quit the employment effective March 12, 2019 due to a non-work related injury and upon the advice of a licensed and practicing physician. Prior to the week that began May 12, 2019, the claimant's quit was without good cause attributable to the employer and the claimant was not eligible for benefits. Effective the week that began May 12, 2019, the claimant's separation from the employment became for good cause attributable to the employer. Effective the week that began May 12, 2019, the claimant is eligible for benefits provided he meets all other eligibility requirements. The claimant is overpaid \$2,082.00 in unemployment insurance benefits for the six weeks between March 31, 2019 and May 11, 2019. The claimant must repay that amount. The employer's account shall not be charged for \$2,082.00 in overpaid unemployment insurance benefits paid to the claimant for the six weeks between March 31, 2019 and May 11, 2019. However, the employer's account may be charged for benefits for the period beginning May 12, 2019.

The overpayment period and amount referenced in the present decision is the same overpayment period and amount referenced in the May 16, 2019, reference 05, decision that was based on the able and available determination.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs