IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MICHAEL L MINTER Claimant **HIGBEE WEST MAIN LP** Employer	**APPEAL 16A-UI-09194-LJ-T** **ADMINISTRATIVE LAW JUDGE AMENDED DECISION** **OC: 07/31/16** **Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Admin. Code r. 871-24.25(27) – Quit Rather Than Perform Assigned Work

STATEMENT OF THE CASE:

The employer filed an appeal from the August 16, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant quit his employment due to detrimental working conditions. The parties were properly notified of the hearing. A telephone hearing was held on Friday, September 9, 2016. The claimant, Michael L. Minter, participated. The employer, Higbee West Main, L.P., participated through Roni Ward, assistant store manager; and witness Cheryl Newton. Employer's Exhibits 1 through 4 were received and admitted into the record without objection.

This amended decision reflects that claimant does not have to repay the benefits paid to him. This amended decision does not make any other substantive revisions to the decision issued on September 12, 2016.

ISSUES:

Did claimant voluntarily quit the employment with good cause attributable to employer?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a dock manager, from July 7, 2004; until July 30, 2016, when he quit.

Claimant was working on July 27, and one of his tasks was to help unload a fixture off a truck. Claimant and two other employees were working on this assignment. Claimant communicated with Ward to come up with a way to get the fixture off the truck, and Ward helped claimant find

additional employees to help with the task. Claimant testified that performing this task violated his permanent work restriction that prohibits him from reaching overhead. Ward testified that the restriction she has on file for claimant only states he cannot perform repetitive overhead reaching, and this was not a task that would require repetitive overhead reaching.

Claimant and the other employees successfully got the fixture off the truck and were working on getting it moved from the upper level of the store to the lower level. Claimant decided he needed more assistance to complete this job, and he decided the work should be postponed until the following day. Claimant headed to the office and ran into Alex Leon, the store manager. When claimant told Leon what was happening, Leon insisted that the fixture be moved that day. Claimant did not tell Leon that he believed moving the fixture violated his work restriction, because he believed this should have been obvious. Claimant already felt that he had strained himself, but he completed the task as Leon instructed. Once claimant left for the day, he thought about what had happened at work and decided he wanted to quit his job.

Claimant testified that he repeatedly violated his work restriction in performing his job. When he and his team had to unload and process a truck, claimant would have to reach overhead. He believes that he told Leon about this issue. Claimant was also frequently asked to jump in and help his team with tasks that could violate his restriction. Claimant did not mention this issue to the employer. During one meeting, one of the district managers were concerned about the amount of work that claimant and his team were completing. This district manager said that if claimant could not get the job done, the employer would find someone who could.

Claimant came into Ward's office on July 30 and left his keys and his work card on her desk. She was on the phone at the time, but when she got off her call she went out and found claimant. She asked if he wanted to speak to her, and he said he did not. She then asked if he wanted to complete the end-of-employment paperwork, and he agreed to do this. Ward testified that had claimant reported that he was being asked to violate his work restrictions, the employer would have looked into the issue.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1931.00, since filing a claim with an effective date of July 31, 2016. Claimant received gross benefits of $444.00 each week for four weeks and gross benefits of $155.00 for one week. Claimant's most recent payment was received for the benefit week ending September 3, 2016. The administrative record also establishes that the employer did not participate in the fact-finding interview. Cheryl Newton, an employee in the employer's corporate office in Little Rock, Arkansas, faxed in the Notice of Unemployment Insurance Fact-Finding Interview on August 11, 2016, at 10:21 a.m., instructing the fact-finder to contact the employer's local store at 515-440-2277. Newton listed the witnesses as Alex Leon and Roni Ward. According to the fact-finder's handwritten notes, the fact-finder attempted to contact Leon and Ward at 501-440-2277. This is not the telephone number that the employer provided for the fact-finding interview. Ward testified that she and Leon were available at the time of the interview and waited for the call, but they never received the call.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's separation from employment was without good cause attributable to the employer. Benefits are withheld.
Iowa Code §96.5(1) 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.

Iowa Admin. Code r. 871-24.26(6)b provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
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> (6) Separation because of illness, injury, or pregnancy.
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> 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.
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> 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.

Iowa Admin. Code r. 871-24.25 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:
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> (27) The claimant left rather than perform the assigned work as instructed.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). Here, claimant testified that he had a work-related injury. The employer was on notice of the injury and the restriction claimant's doctor requested. However, the record contains conflicting statements about the substance of the work restriction. While claimant contends he was not permitted to reach overhead at all, Ward testified that the doctor only prohibited repetitive overhead reaching. Claimant did not provide a copy of the restriction, and it is unclear whether performing the work on July 27 actually violated it. Under either scenario, claimant did not tell Ward or anyone else that he was being forced to violate his

restriction and that he intended to quit unless the employer remedied this issue. While claimant believes the employer already knew that he was performing work that violated his restriction, he admits that he did not tell them this or give them an opportunity to correct the issue. The claimant's decision to quit was not for a good cause reason attributable to the employer. Benefits are withheld.

The next issue is whether claimant has been overpaid benefits. Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
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> 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.
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> b. (1) (a) 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. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.
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> (b) 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.
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> (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.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
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> (1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6,

subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits 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 benefits were not received due to any fraud or willful misrepresentation by claimant. Additionally, the employer did not participate in the fact-finding interview. Thus, claimant is not obligated to repay to the agency the benefits he received.

The law also states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. . ." Iowa Code § 96.3(7)(b)(1)(a). Here, the employer responded to the notice of a fact-finding interview by faxing a document identifying the phone number at which the proper representatives could be reached for the fact-finding interview. Benefits were not paid because the employer failed to respond timely or adequately to the agency's request for information relating to the payment of benefits. Instead, benefits were paid because employer did not receive a call from the agency. Employer thus cannot be charged. Since neither party is to be charged then the overpayment is absorbed by the fund.

DECISION:

The August 16, 2016, (reference 01) unemployment insurance decision is reversed. Claimant separated from employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of $1931.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview through no fault of its own and its account shall not be charged. The overpayment must be charged to the fund.

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Elizabeth A. Johnson
Administrative Law Judge

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Decision Dated and Mailed

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