

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

TANYA R OLAWUMI
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DAVENPORT IA 52806-3808

ALUMINUM CO OF AMERICA
DAVENPORT WORKS
c/o TALX UCM SERVICES
PO BOX 283
ST LOUIS MO 63166

Appeal Number: 06A-UI-07092-JTT
OC: 06/11/06 R: 04
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.4-3 – Able to and Available for Work
Section 96.5-2-a – Non-disqualifying Separation from Work

STATEMENT OF THE CASE:

Tanya Olawumi filed a timely appeal from the July 6, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 1, 2006. Ms. Olawumi participated and presented additional testimony through union president Charles McGill. The claimant waived formal notice on the issue of whether she had been able and available for work since establishing her claim for benefits. The administrative law judge took official notice of the Agency's administrative file. The administrative law judge left the hearing open to allow the claimant to submit a medical release dated July 17, 2006, which was subsequently received into evidence as Exhibit A.

The employer did not provide a telephone number for the hearing. Before the record of the hearing on August 1 closed, the employer contacted the Appeals Section to participate in the

hearing. However, the administrative law judge did not receive the message that the employer was available for the hearing until after the record had closed. The administrative law judge concluded good cause existed to reopen the record to allow the employer an opportunity to participate. The administrative law judge entered an order reopening the record and directed the parties to comply with the instructions set forth in the hearing notice. Further proceedings were scheduled for August 29, 2006, and the parties were provided due notice. Ms. Olawumi was represented by union president Charles McGill. The employer again failed to respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On January 12, 2004, Tanya Olawumi commenced employment with the Aluminum Company of America as a full-time Flat Sheet Servicer. On Friday, December 9, 2005, Ms. Olawumi suffered a workplace injury to her shoulder. The employer initially sent Ms. Olawumi to its medical department, where the staff applied heat to the shoulder. Ms. Olawumi then returned to the production floor, but continued to experience pain in her shoulder. The employer transported Ms. Olawumi to the emergency room. The emergency room staff x-rayed the shoulder. The x-ray did not reveal any broken bones. Ms. Olawumi returned to work on Monday, December 12, with her arm in a sling, and was assigned to light-duty work in an office. On December 13, Ms. Olawumi continued with the light-duty work. On Wednesday, December 14, the employer told Ms. Olawumi to go home and that her manager, Mark Geigous, would contact her with further information.

On December 15, Mr. Geigous placed a conference call to Ms. Olawumi. Mr. Geigous told Ms. Olawumi that the employer's medical department had conducted an investigation and had concluded that Ms. Olawumi's shoulder condition was not work-related. In April 2005, Ms. Olawumi had been diagnosed with osteoarthritis, had undergone physical therapy, and had returned to her normal duties. Mr. Geigous told Ms. Olawumi that she would not be allowed to return to work until she provided a medical release from her doctor. The employer instructed Ms. Olawumi to apply for short-term disability benefits through the employer's third-party short-term disability provider. The following week, Ms. Olawumi applied for short-term disability benefits and was approved. Ms. Olawumi continued to receive short-term disability benefits for 26 weeks until those benefits were exhausted. Ms. Olawumi's short-term disability benefits expired before Ms. Olawumi established her claim for unemployment insurance benefits.

Ms. Olawumi was evaluated by her doctor, who referred Ms. Olawumi to an orthopedist. On January 5, 2006, Ms. Olawumi was evaluated by the orthopedist, who ordered magnetic resonance imaging (MRI). The MRI took place a week or two later. The MRI revealed a torn rotator cuff. After further testing, the orthopedist advised Ms. Olawumi that she would need surgery. On February 10, Ms. Olawumi underwent surgery to repair the torn rotator cuff. Complications occurred during the surgery and Ms. Olawumi required a more invasive surgery than originally planned. After the surgery, Ms. Olawumi's shoulder and arm were in an immobilizer until March 24, 2006. On March 27, Ms. Olawumi commenced physical therapy three times per week to improve her arm and shoulder strength and range of motion. After two weeks of physical therapy, Ms. Olawumi noted improvement in her range of motion, as well as reduction in her pain, and was able to reduce her pain medications.

On May 17, 2006, Ms. Olawumi had an appointment with the orthopedic surgeon. The doctor indicated that Ms. Olawumi could be released to work, effective May 18, with the following

medical restrictions: "No overhead use of right upper extremity, no lifting greater than 10 lbs. RUE [right upper extremity], no pushing or pulling with ® arm." The doctor scheduled a follow up visit for June 14, 2006. Later that day, Ms. Olawumi contacted the employer's "return to work coordinator," Judy Stengel. Ms. Stengel indicated she would have to contact Mr. Geigous and would get back to Ms. Olawumi. Ms. Stengel soon called Ms. Olawumi to indicate the employer could not accommodate her work restrictions. Ms. Olawumi requested that the employer reduce its decision to writing and, on May 18, Ms. Stengel provided the requested documentation.

On June 14, Ms. Olawumi again met with the orthopedic surgeon. The doctor indicated that Ms. Olawumi could be released to work, effective June 15, with the following medical restrictions: "No lifting more than 15 lbs with Rt upper extremity, limit overhead use of Rt upper extremity, limit pushing + puling of Rt upper extremity to (ten) 10 pds." They scheduled a follow-up visit for July 12, 2006. Ms. Olawumi contacted Ms. Stengel the same day and provided the updated medical restrictions. The employer again denied Ms. Olawumi's request to return to work.

Ms. Olawumi established a claim for unemployment insurance benefits that was effective June 11, 2006.

At the end of June, Ms. Olawumi again spoke with Ms. Stengel. At that time, Ms. Stengel indicated that the employer would ordinarily allow an employee to return to work with a 25-pound lifting restriction.

Ms. Olawumi next saw the orthopedic surgeon on July 17. At that time, the doctor released Ms. Olawumi to work, effective July 18, with the following restrictions: "No lifting greater than 30 lbs; limit overhead use of Rt upper extremity." Ms. Olawumi contacted Ms. Stengel with the new information. Ms. Stengel told Ms. Olawumi she would schedule a "return to work" appointment with the company's doctor. That appointment occurred on July 20. Ms. Olawumi returned to work on July 20.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant voluntarily quit employment without good cause attributable to the employer, was discharged for work-connected misconduct, or experienced some other type of separation from the employment. The unemployment insurance law provides for a disqualification for claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code sections 96.5(1) and 96.5(2)(a). All separations from or terminations of employment are generally classifiable as layoffs, quits, discharges, or "other separations." See 871 IAC 24.1(113). The "other separations" classification includes separations based on permanent disability or the claimant-employee's failure to meet the physical standards required for the work. See 871 IAC 24.1(113)(d).

There is no evidence the claimant quit her job or was discharged for work-connected misconduct. Iowa Code section 96.5(1) provides a disqualification for individuals who voluntarily quit employment and Iowa Code 96.5(1)(d) operates as an exception to that rule for individuals who voluntarily leave employment due to certain medical circumstances. To voluntarily quit, however, means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship and chooses to leave employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. Wills

v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989); Peck v. Employment Appeal Board, 492 N.W.2d 438, 440 (Iowa App. 1992). In this case, the claimant never quit employment or intended to leave her job. She desired to continue to work but the employer would not allow her to work. The evidence in the record indicates that Ms. Olawumi's separation from the employment was based on her inability to meet the physical standards required for the work. See 871 IAC 24.1(113)(d). Such a separation would not disqualify Ms. Olawumi for benefits. Ms. Olawumi would be eligible for benefits, provided she was otherwise eligible.

The next issue is whether Ms. Olawumi was able to and available for work as required by Iowa Code section 96-4-3. The unemployment insurance rules provide that a person must be physically able to work, not necessarily in the individual's customary occupation, but in some reasonably suitable, comparable, gainful, full-time endeavor that is generally available in the labor market. 871 IAC 24.22(1)b. The evidence establishes that Ms. Olawumi was able to perform gainful work effective May 17, 2006, so long as the work did not involve lifting greater than 10 pounds. There would be gainful work available in the labor market that would comply with such a restriction.

Iowa Workforce Development rules provide that a claimant is considered unavailable for work if the claimant requested and was granted a leave of absence, since the period is deemed a period of voluntary unemployment. 871 IAC 23(10). In this case, however, the claimant did not request the leave of absence, so she cannot be considered to have been voluntarily unemployed.

DECISION:

The unemployment insurance decision dated July 6, 2006, reference 01, is reversed. The claimant is eligible for unemployment insurance benefits, provided she is otherwise eligible. The claimant's separation from work was not disqualifying. The claimant has been able and available for work since establishing her claim for benefits.

jt/pjs