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

Appeal Number: 04A-UI-09600-RT
OC: 08-08-04 R: 01
Claimant: Appellant (1)

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.

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AL STURGEON
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_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Michael J. Mohr, filed a timely appeal from an unemployment insurance decision dated August 26, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on September 29, 2004, with the claimant participating. The claimant was represented by Al Sturgeon, attorney at law. John Anfinson, President, participated in the hearing for the employer, Anfinson Farm Store, Inc. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibits 1, 2, and 3 were

admitted into evidence. By telephone call on September 10, 2004 at 11:00 a.m., the employer requested that the hearing be rescheduled because the witness, John Anfinson, would be out of town. Because Mr. Anfinson would be available by cell phone and the claimant was not getting benefits, the administrative law judge denied the employer's request to reschedule the hearing. Mr. Anfinson participated in the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1, 2, and 3, the administrative law judge finds: The claimant was employed by the employer as a full-time general laborer from April 2000 until he separated from his employment on July 31, 2004 or August 2, 2004. The claimant had worked part-time for the employer beginning in 1989. On July 30 or 31, 2004, John Anfinson, President and the employer's witness, called the claimant and left a telephone message for him that he would be working erecting grain bins on August 2, 2004. The claimant called Mr. Anfinson on July 31, 2004 and August 1, 2004 and left messages as shown at Employer's Exhibit 1. The employer did not return the telephone calls because the claimant had an unlisted number and could not reach the claimant. Although the grain bin erection crew usually leaves for work at 7:30 a.m., the claimant showed up at the employer's location at 8:00 a.m. on August 2, 2004 and was told by the secretary, Mary Schneckloth that there was no work for him. Ms. Schneckloth had no authority to discharge the claimant or lay off the claimant and the claimant was aware of this. The claimant left and never returned to the employer.

In August 2003, the claimant was injured while at work. He was off work for a while and eventually was released to return to work with restrictions as shown at Employer's Exhibit 2. The main restrictions were occasional lifting of no more than 50 pounds and frequent lifting of no more than 25 pounds. The employer met these restrictions. Earlier in 2004, the claimant was assigned to drive a truck and did so. Although the truck driving could involve occasional lifting of pesticides in excess of 50 pounds, the employer provided the claimant help to lift the pesticides or provided smaller jugs or at least jugs that the claimant could pour less than 50 pounds of the product into requiring that he lift less than 50 pounds. Mr. Anfinson went so far as to accommodate the claimant by climbing up on the truck for the claimant when the claimant said he had a hard time doing so. However, as 2004 progressed, the truck driving ceased and the claimant was then expected to erect grain bins. On August 2, 2004, the claimant was expected to go to a job site near Arthur, Iowa, and finish erecting a grain bin. The concrete foundation had already been poured. The first thing the claimant and the crew would be expected to do was to remove the concrete forms by pulling out the stakes and then cleaning the forms and wiping them with oil. The claimant would not have been expected to pull out the stakes and cleaning the forms and wiping them with oil would have met the claimant's restrictions. The claimant was not expected to pour concrete that day because the foundation had already been poured. After that, the claimant would have been expected to assist in the erection of the grain bin which would necessitate assembling corrugated sheets of metal as shown at Employer's Exhibit 3 containing the various weights as shown with a black box written around the weights. Some of these weights did exceed the claimant's restrictions but it was customary to have two employees lift the sheets sharing the weight equally and, therefore, would meet the claimant's restrictions. Once the sheets were set in place, the sheets would be bolted together and this task would meet the claimant's restrictions. The claimant was also provided a cart to use to avoid carrying and lifting items. There would be five people working at the job site in Arthur, Iowa, including the claimant. The claimant's main function at the job site would have been taping the sheets, which again would meet his restrictions. The hearing was recessed briefly at 11:53 a.m. at the request of the claimant and reconvened at 11:57 a.m.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.

2. Whether the claimant is ineligible to receive unemployment insurance benefits because he is and was at relevant times not able, available, and earnestly and actively seeking work. The claimant is not ineligible to receive unemployment insurance benefits for this reason.

Iowa Code section 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.

871 IAC 24.25(1) 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:

871 IAC 24.25(21) 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:
>
> (21) The claimant left because of dissatisfaction with the work environment.

871 IAC 24.25(27) 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:

(27) The claimant left rather than perform the assigned work as instructed.

871 IAC 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:

(6) Separation because of illness, injury or pregnancy.

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 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.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit in his two telephone messages as set out at Employer's Exhibit 1 and when he showed up late for work on August 2, 2004 and never returned to work. The claimant maintains that he was laid off for a lack of work when he showed up on August 2, 2004 and was told by the secretary that there was no work for him. Although it is a close question, the administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant left his employment voluntarily. The resolution of this issue really depends upon the telephone messages left by Mr. Anfinson and the claimant. There is no written record of the telephone message by Mr. Anfinson but the evidence establishes that Mr. Anfinson called and left a message with the claimant's sister indicating that he would be erecting a grain bin on the next working day, August 2, 2004. This message was left on July 30 or 31, 2004. The claimant then called Mr. Anfinson and left two telephone messages for him as shown at Employer's Exhibit 1. A thorough reading of these messages indicates that the claimant really intended to quit by refusing to do the work as assigned. The evidence also establishes that the claimant showed up to the employer's on August 2, 2004 after the crew had already left and he was aware when he showed up that the crew would have already been gone. The claimant was then told by the secretary that there was no work. The administrative law judge does not believe that this was a layoff for a lack of work. The secretary simply told the claimant that there was no work because

the crew had left and there was nothing for the claimant to do at the site. The secretary had no authority to discharge or fire the claimant and did not do so. The claimant then left and never reported back to work. Under these circumstances, the administrative law judge concludes that the claimant effectively voluntarily quit on July 31, 2004 with the first of his telephone messages and that is confirmed by the second telephone message on August 1, 2004 and the claimant's actions on August 2, 2004. There is no evidence that the claimant was discharged. The administrative law judge does not believe that the claimant was laid off for a lack of work. Clearly there was work to do and as discussed below, work that would meet the claimant's restrictions. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily on July 31, 2004 with his first telephone message to Mr. Anfinson which was confirmed by the second telephone message on August 1, 2004 and then the claimant's conduct on August 2, 2004. The administrative law judge does not believe that the failure of Mr. Anfinson to return the claimant's phone calls demonstrates otherwise. Mr. Anfinson credibly testified that he did not call the claimant back because he did not have the claimant's unlisted number and he left the initial message with his sister. Mr. Anfinson called the claimant and left a message expecting him to be at work and Mr. Anfinson had a right to expect the claimant to be at work or that the claimant would quit. The administrative law judge concludes that the claimant quit. The issue then becomes whether the claimant left his employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that he has left his employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. As noted above, the evidence indicates that the claimant left his employment rather than perform the assigned work as instructed. This is not good cause attributable to the employer at least if the assigned work meets the claimant's restrictions, which is discussed below. There is also some evidence that the claimant was dissatisfied with his work environment but this is also not good cause attributable to the employer. The evidence does establish that the claimant was injured in a work-related injury in August 2003 and had restrictions on his ability to work as shown at Employer's Exhibit 2. If the claimant left work because of the job-related injuries, the claimant did not present competent evidence showing adequate health reasons to justify his termination. There is no evidence that his physicians required that the claimant quit. There is also no evidence that the claimant before quitting informed the employer of the problem and further informed the employer that he intended to quit unless the problem was corrected or reasonably accommodated. In fact, as discussed below, the employer reasonably accommodated the claimant. Accordingly, there is not a preponderance of the evidence that the claimant complied with the requirements for leaving his employment with good cause attributable to the employer due to an employment related separation. Finally, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental or that he was subjected to a substantial change in the contract of hire because the employer was trying to meet the claimant's restrictions on his ability to work and was meeting those restrictions and had made every effort to accommodate the claimant.

The real issue here is whether the employer accommodated the claimant to the extent that the work offered to the claimant by the employer would meet the claimant's physical restrictions. The administrative law judge concludes that the employer did accommodate the claimant and met his restrictions. Even the claimant concedes that the employer tried to meet his restrictions. The evidence establishes that the claimant for some time was driving a truck and

this met his restrictions. The claimant argued that sometimes he would have to lift over 50 pounds as a result of his truck driving but Mr. Anfinson credibly testified that the claimant did not have to lift chemicals weighing 50 pounds because Mr. Anfinson provided help for the claimant in lifting them and further, the claimant could pour the chemical into other jugs with a smaller amount of chemical, thus reducing the weight of the chemical. Mr. Anfinson also credibly testified that he tried to accommodate the claimant by climbing up on the truck for the claimant when the claimant expressed concerns about doing so. Mr. Anfinson even provided the claimant a cart so that he could push heavy objects around. When the claimant was assigned to erecting grain bins, Mr. Anfinson also accommodated the claimant and met his restrictions. The evidence establishes that the job assignment at the Arthur, Iowa site, which the claimant refused to perform, did not involve the pouring of concrete but rather removing the concrete forms, cleaning them and wiping them with oil. These tasks would meet the claimant's restrictions. Mr. Anfinson did say that the employees would have to pull out stakes but did not expect the claimant to do this. There were five people, including the claimant, working at that job site. After the cleaning of the concrete forms, the bin would be erected by lifting sheets of metal and bolting them together. Some of the sheets of metal would certainly weigh over 50 pounds as shown at Employer's Exhibit 3, however, the evidence establishes that it was customary for two people to participate in lifting a sheet. Therefore, the claimant would be sharing the weight equally and would not have to exceed his working restrictions. These sheets would be bolted together and this function or task would meet the claimant's working restrictions. In fact, at one point, the claimant stated his job would be taping the sheets and this also met his restrictions as even the claimant conceded. Finally, the claimant conceded that he did not "think" that erecting the grain bin would meet his restrictions but the administrative law judge concludes that the work would meet his restrictions, at least as accommodated by the employer. The administrative law judge understands the claimant's concerns about being re-injured but the claimant did not give the employer an opportunity to demonstrate that it would meet the claimant's restrictions erecting grain bins in such a fashion that the claimant would not risk re-injury. The claimant simply did not want to perform the work and, therefore, quit.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant left his employment voluntarily without good cause attributable to the employer and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

The administrative law judge concludes that the evidence does not indicate that the claimant was laid off for a lack of work because there was work remaining. Even assuming that the claimant was discharged, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct when the claimant categorically refused to do work that was offered to him. As noted above, the work that was offered met his restrictions. The claimant did not give the employer an opportunity to demonstrate that the work would meet his restrictions because the claimant simply refused to do the job. The administrative law judge would conclude that this was disqualifying misconduct and the claimant would still be disqualified to receive unemployment insurance benefits, even if he had been discharged.

Iowa Code section 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a provides:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> (1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.
>
> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

The administrative law judge concludes that the claimant has the burden to prove that he is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that he was able, available, and earnestly and actively seeking work. The claimant testified that he had placed no restrictions on his availability for work and was earnestly and actively seeking work primarily driving a truck. The only restrictions placed upon the claimant were those shown at Employer's Exhibit 2. The administrative law judge concludes that these restrictions are not really very restrictive and that there would be gainful employment, which the claimant could perform and which is engaged in by others. Accordingly, the administrative law judge concludes that the claimant is able, available, and earnestly and actively seeking work and would not be ineligible to receive unemployment insurance benefits. However, as noted above, the claimant is disqualified to receive unemployment insurance benefits because he voluntarily left his employment without good cause attributable to the employer.

DECISION:

The representative's decision of August 26, 2004, reference 01, is affirmed. The claimant, Michael J. Mohr, is not entitled to receive unemployment insurance benefits, until or unless he

requalifies for such benefits, because he left his employment voluntarily without good cause attributable to the employer. The claimant is able, available, and earnestly and actively seeking work and would not be ineligible for unemployment insurance benefits for that reason but he is disqualified to receive unemployment insurance benefits as noted above.

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