IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DAVID L COCHRAN
Claimant

KELLY SERVICES INC
Employer

APPEAL NO. 08A-UI-02937-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/10/08 R: 04
Claimant: Appellant (2)

Iowa Code § 96.5(1)d – Voluntary Leaving/Illness or Injury

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 18, 2008, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on April 9, 2008. Claimant participated. Employer participated through Laurie Martin. Claimant's Exhibit A consisting of five sub-parts was received.

ISSUE:

The issue is whether claimant quit the employment assignment without good cause attributable to the employer.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant injured his knee on April 14, 2007 while working for Kelly Services assigned to Schenker Logistics. Claimant was employed full time working indoors at Mycogen Seed beginning August 29, 2007. On September 21, 2007, his duties at the assignment changed and he was directed to work in a corn field walking on uneven ground surface causing him to have to lift his knee to pick his foot up over the clots of dirt. The same day he called Martin at Kelly and told her he did not think he would be able to continue in that assignment because it was causing increased pain to his knee. Martin told him he had to make the choice [to either continue working or quit the assignment]. Claimant asked her if there were any other assignments available and she replied in the negative. He attempted to return to the assignment on September 24 and the pain worsened so he called Martin again and told her he could not continue in the assignment because of the increased knee pain. Again he asked for another assignment and again Martin told him there were none. Claimant kept in contact with employer seeking new assignments but was unsuccessful each time. He had outpatient knee surgery on January 8, 2008 and only took prescription pain medication at night so he could drive to look for work during the day.

Company clinic physician Camilla Frederick, M.D. noted as early as May 22, 2007 that most of the knee pain occurred when he moved the knee, picking it up off the ground and found a "mass near the insert of the MCL ligament." (Claimant's Exhibit A, p. 24) During the period from April 19 through May 22, Dr. Frederick varied between opinions the injury was and was not work

related and assigned and removed work restrictions of lifting no more than 20 pounds. (Claimant's Exhibit A, pp. 21 – 24) On June 21, claimant was examined by orthopedist Richard Kreiter, M.D. and was instructed to "limit climbing, no kneeling" and on July 5 to limit kneeling and climbing" and in the notes directed to "limit kneeling and climbing and pivoting on the right side." (Claimant's Exhibit A, pp. 31 - 33) On July 13, Dr. Frederick instructed claimant not to kneel on his left knee for six months and noted the injury was work related. (Claimant's Exhibit A, p. 25) On July 24 she referred claimant back to Dr. Kreiter for possible cortisone "reinjection" and instructed him to follow up with Dr. Kreiter after another two weeks. (Claimant's Exhibit A, p. 26) She released him from her care on August 23, 2007 without restrictions and again on September 21, 2007 but then referred him to Dr. Kreiter for "possible bursectomy." (Claimant's Exhibit A, pp. 27 and 28) In November 2007, claimant saw Tuvi Mendel, M.D. orthopedic trauma specialist for an independent medical examination and was ultimately referred to orthopedic surgeon Walter Virkus, M.D. for surgery to excise the mass in the left knee.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily left the employment with good cause attributable to the employer.

Iowa Code § 96.5-1-d 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. 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.

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 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.

871 IAC 24.26(2) and (4) provide:

> 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:
>
> (2) The claimant left due to unsafe working conditions.
>
> (4) The claimant left due to intolerable or detrimental working conditions.

Where disability is caused or aggravated by the employment, a resultant separation is with good cause attributable to the employer. *Shontz v. IESC*, 248 N.W.2d 88 (Iowa 1976). Where illness or disease directly connected to the employment make it impossible for an individual to continue in employment because of serious danger to health, termination of employment for that reason is involuntary and for good cause attributable to the employer even if the employer is free from all negligence or wrongdoing. *Raffety v. IESC*, 76 N.W.2d 787 (Iowa 1956). Claimant was not required to give notice of his intention to quit due to an intolerable, detrimental or unsafe working environment if employer had or should have had reasonable knowledge of the condition. *Hy-Vee, Inc. v. Employment Appeal Bd.*, 710 N.W.2d 1 (Iowa 2005)

A physician cannot anticipate every movement made in a job, especially when the duties change in mid-assignment. The known restrictions from his treating physician and orthopedic specialist Dr. Kreiter, limited climbing, which would mimic the movement of lifting the knee to raise the foot to climb a step, climb into a van or climb over uneven ground surfaces; and limited pivoting, reasonably required for walking on uneven surfaces such as a cornfield, prevented claimant from being able to safely perform or continue to perform his job duties in spite of his best efforts. Even had the most recent medical release contained no restrictions, it would have been reasonable for employer to direct him to Dr. Frederick or Dr. Kreiter for reevaluation given the job duty change and the accompanying complaint of increased pain. Since employer did not do this, it cannot now complain that there was no specific medical restriction in the performance of that new job duty. Employer's failure to accommodate put claimant in the untenable position of either having to work in unsafe or physically intolerable conditions for his work injury or give up his job. The claimant met the requirements of *Suluki v. EAB*, 503 N.W.2d 401 (Iowa 1993) by notifying Martin of the increased pain due to the job duty change and also sought, in vain, another job assignment that would accommodate the condition. Benefits are allowed.

DECISION:

The March 18, 2008, reference 01, decision is reversed. The claimant voluntarily left his employment with good cause attributable to the employer. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css