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

MICHAEL W EVANS
1500 HIGHVIEW DR #8
MARION IA 52302

MCLEOD USA TELECOMMUNICATIONS SERVICES INC
c/o JON-JAY ASSOCIATES INC
PO BOX 182523
COLUMBUS OH 43218-2523

Appeal Number: 04A-UI-09404-RT
OC: 07-25-04 R: 03
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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-1 - Voluntary Quitting
Section 96.4-3 - Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Michael W. Evans, filed a timely appeal from an unemployment insurance decision dated August 25, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on September 23, 2004 with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the notice of appeal. Liz Maloney, Human Resources Representative, and Rebecca Jansen, Human Resources Benefits Coordinator, participated in the hearing for the employer, McLeod USA Telecommunications Services, Inc. The administrative law judge

takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time customer care coordinator-repair from December 17, 2001 until he voluntarily quit on June 25, 2004. In 2003 the claimant was injured in a car accident. It was unrelated to his employment. He was off work for a time and then returned to work. He then began having additional problems at work because of his injuries. The claimant was forced to take additional time off and applied for short-term disability and was approved on January 29, 2004 for short-term disability to begin December 22, 2003. The maximum number of weeks the claimant could draw short-term disability would be 26 weeks. He could have drawn short-term disability through June 18, 2004 but this short-term disability stopped on or about April 22, 2004. The short-term disability stopped because the claimant never provided the required medical documents to keep the short-term disability in play. The employer was in contact with the claimant. The claimant informed the employer's witness, Rebecca Jansen, Human Resources Benefits Coordinator, that he would provide the necessary medical documents for both the short-term disability and the long-term disability. Under the employer's rules, if the claimant is to obtain long-term disability he must terminate or quit his position. The claimant was aware of this and was treated as a termination as a voluntary quit on June 25, 2004. The claimant accepted this termination. The claimant has not offered to return to work since that time.

After having additional problems beginning in December 2003, the claimant has not been released by his physician to return to work without restrictions. The physician did place restrictions on the claimant of sitting for two hours, walking for two hours, sitting for two hours and walking for two hours. However, because of the claimant's position and the services provided by the employer, the employer cannot meet these restrictions. The employer has no positions available to the claimant that would meet these restrictions. The position the claimant held and all positions available at the employer require sitting for long periods. The claimant was aware of this. The claimant is still under these restrictions for his ability to work. The employer was unaware of any restrictions that the claimant has placed on his availability for work and is unaware whether the claimant is earnestly and actively seeking work.

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. He is.

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 24.26(6)a 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.
>
> 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.

The administrative law judge concludes that the claimant effectively voluntarily quit when he informed the employer that he wanted to go to long-term disability as a result of injuries arising out of an accident in 2002 unrelated to his employment. Under the employer's policy for such disability, the claimant must be terminated or separated from his employment. The claimant was aware of this and informed the employer that he wanted to apply for the long-term disability and promised the employer that he would provide the proper medical documents. Under these circumstances, the claimant had to quit and he was aware of this and did so. However, although the claimant informed the employer that he would provide the necessary documents for the long-term disability, as far as the employer knows, the claimant has not provided such necessary documents to the insurance carrier nor has he provided to the employer necessary documents to continue his short-term disability from April 22, 2004 when it ended, to June 18, 2004 which would have been the maximum period allowable for short-term disability. It appears to the administrative law judge that the claimant's failure to obtain the short-term disability and the long-term disability were due to problems on the part of the claimant and not to any fault of the employer. Accordingly, the administrative law judge must conclude here that the claimant left his employment voluntarily in order to take long-term disability. 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. The evidence establishes that the claimant was placed on such physical restrictions by his physician that the employer could not meet those restrictions. The restrictions included sitting for two hours then walking for two hours, then sitting for two hours and walking for two hours and so on. The employer was unable to meet those restrictions either in the claimant's position he had occupied or any other position that would be available to the claimant. the claimant was aware of this. Accordingly, the administrative law judge concludes that the claimant left because of an illness or injury unrelated to his employment. There is no evidence that the claimant has recovered and such recovery is certified by his physician and he has returned and offered to go back to work for the employer without such restrictions. In the absence of any evidence to the contrary, the administrative law judge is constrained to conclude that the claimant voluntarily left his employment for a nonemployment-related injury and has not met the requirements to entitle him to unemployment insurance benefits as a result. Therefore, 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 or demonstrates that he has returned to the employer and offered to go back to the employer without restrictions and this has been certified by a physician and there were no positions available to the claimant.

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:
>
> 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 vs. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). 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 is able for work. The claimant did not participate in the hearing and provide evidence that he is able to work. The employer's witnesses testified that the claimant has restrictions placed upon him by his physician requiring him to sit for two hours, walk for two hours, sit for two hours, walk for two hours, and so on. The employer offered the claimant a sedentary position and cannot meet those restrictions. In the absence of any evidence to the contrary, the administrative law judge does not believe that there are positions which the claimant could legitimately seek that would meet these restrictions. Accordingly, the administrative law judge concludes that the claimant is not able to work. The administrative law judge further concludes that there is not a preponderance of the evidence that the claimant is either temporarily unemployed or partially

unemployed under Iowa Code section 96.19(38)(b and c) so as to excuse him from requirements that he be able to work. The employer's witnesses testified that they were unaware as to whether the claimant was available for work and earnestly and actively seeking work. In the absence of any evidence to the contrary, the administrative law judge is constrained to conclude that the claimant is also not available for work and earnestly and actively seeking work. Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant is not able, available, and earnestly and actively seeking work and, as a consequence, he is ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits or returns to the employer and offers to return to work and certifies to the employer that he is recovered from his injuries and can perform work for the employer and no suitable work or comparable work is available and demonstrates that he is able, available, and earnestly and actively seeking work.

DECISION:

The representative's decision of August 25, 2004, reference 01, is affirmed. The claimant, Michael W. Evans, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits or returns to the employer and demonstrates with a certification by his physician that he has recovered from his injuries and is able to work and no comparable work is available by the employer. Further, the claimant must demonstrate that he is able, available, and earnestly and actively seeking work.

tjc/tjc