

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERRY L CUNEO
Claimant

APPEAL NO. 14A-UI-01555-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SCHUSTER GRAIN CO INC
Employer

OC: 01/19/14
Claimant: Appellant (4)

Section 96.5-2-a – Discharge
Section 96.4-3 – Able to and Available for Work

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated February 7, 2014, reference 01, that concluded he was not able to and available for work. A telephone hearing was held on March 4, 2014. The parties were properly notified about the hearing. The claimant participated in the hearing with his representative, Eric Looney. Keith Lamfers participated in the hearing on behalf of the employer. Claimant's Exhibits One through Four were admitted into evidence at the hearing. The parties agreed that the issue of whether the claimant was qualified for benefits based on the reasons for his separation from employment could be decided.

ISSUES:

Was the claimant discharged for work-connected misconduct?
Was the claimant able to and available for work?

FINDINGS OF FACT:

The claimant worked for the employer as an over-the-road truck driver from October 2012, to January 17, 2013. In January 2013, the claimant suffered a work-related injury to his back. He was excused by a doctor from working after January 17, 2013.

The injury to the claimant's back was treated as a work-related injury and he received temporary total disability benefits for his injury.

On November 18, 2013, the claimant was evaluated by a workers' compensation doctor. The doctor determined that he had reached maximum medical improvement, had an eight-percent impairment, and had permanent restrictions of lifting 20 pounds occasionally and 35 pounds rarely, and no prolonged sitting. He was cleared for driving short-haul routes involving two hours of driving. The claimant continued to receive temporary total disability benefits even after the doctor's report regarding his permanent impairment and reaching maximum medical recovery.

The claimant telephoned and left messages for human resource employers sometime before Christmas asking if there was any work within his restrictions. The calls were not returned. The claimant's attorney also sent letters to the employer's workers' compensation attorney asking if there was work available within the claimant's restrictions. The claimant's attorney received no response.

The claimant filed a claim for unemployment insurance benefits effective January 19, 2014. At the time he filed for unemployment insurance benefits up until the present time, the claimant's work restrictions have not changed from the restrictions in the doctor's letter in November 2013.

When the claimant applied for unemployment insurance benefits, he had not been discharged by the employer and had not voluntarily quit employment. The employer considered the claimant as an employee on medical leave due to a work-related injury. The claimant considered himself to be off work due to the employer's lack of work meeting his restrictions.

The claimant's primary employment history has been as a truck driver. He was able to and willing to work full time as a short-haul driver. He has contacted at least two employers every week, including jobs working as a cashier or clerk, which would be within his restrictions.

On February 10, 2014, the employer's director of safety sent him a letter stating that he was terminated effective February 11, 2014, because the employer did not have any positions to accommodate his restrictions.

On February 13, 2013, the employer's workers' compensation insurer wrote a letter to the claimant explaining that the temporary total disability benefits he received rule after November 18, 2013, would be credited against the permanent partial disability benefits due him.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code § 96.5-1 and 96.5-2-a.

There is no evidence the claimant quit his job or was discharged for work-connected misconduct. I recognize that Iowa Code § 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 injury under certain 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 his job. After he reached maximum medical recovery, he contacted the employer requesting work within his restrictions but the employer did not offer him any work.

This is like Wills v. Employment Appeal Board, 447 N.W.2d 137 (Iowa 1989), in which the Supreme Court considered the case of a pregnant CNA who went to her employer with a physician's release that limited her to lifting no more than 25 pounds. Wills filed a claim for benefits after the employer did not let her return to work because of its policy of never providing light-duty work. The Supreme Court ruled that Wills became unemployed involuntarily and was

able to work because the weight restriction did not preclude her from performing other jobs available in the labor market.

In regard to the separation from work issue, the claimant was qualified to receive unemployment insurance benefits effective January 19, 2014, since he had not quit his employment and was not discharged for work-connected misconduct. Also, on February 11, 2014, the employer officially terminated the claimant's employment because it did not have any work within the claimant's restrictions. This official separation was also qualifying since the claimant was terminated for being unable to perform his over-the-road truck driving job, not for misconduct.

The next issue is whether the claimant was able to and available for work as required by Iowa Code § 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 the claimant was able to perform gainful work, just not work that requires regular lifting of over 20 pounds. There is unquestionably work available in the labor market meeting such restrictions, and the claimant has shown he was able to and available for work as a short-haul driver or as a clerk or cashier.

The rules further 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 a leave of absence as of the date of his unemployment application, so he cannot be considered to have been voluntarily unemployed.

Under the law, temporary total disability benefits are deductible from unemployment insurance benefits. Permanent partial benefits are not deductible. Iowa Code § 96.5-5-b. In this case, the employer's insurance company has credited any temporary total disability benefits paid to the claimant after November 18, 2013, against the permanent partial benefits due him. Consequently, there is no issue regarding the claimant receiving deductible workers' compensation after he applied for unemployment benefits.

As mentioned during the hearing, the claimant's claim for unemployment insurance benefits is inactive because he has not filed any weekly claims. He is required to reopen his claim for benefits if he wishes to receive benefits.

DECISION:

The unemployment insurance decision dated February 7, 2014, reference 01, is modified in favor of the claimant. The claimant is qualified to receive unemployment insurance benefits based on his separation from work and his ability to work, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs