IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MCCALEB, QUENNEL, L
Claimant

C & S PRODUCTS CO INC
Employer

APPEAL NO. 13A-UI-00517-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/09/12
Claimant: Appellant (1-R)

Iowa Code Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Quennel McCaleb filed a timely appeal from the January 9, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 11, 2013. Claimant Quennel McCaleb participated personally and was represented by attorney Jerry Schnurr. Attorney Stewart Cochran represented the employer and presented testimony through Kelly Thiele and Chris Brock. Exhibits One through Four and A through M were received into evidence.

ISSUE:

Whether Mr. McCaleb separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Quennel McCaleb was employed by C & S Products Company, Inc., as a full-time production worker from August 2011 and last performed work for the employer on July 17, 2012. Mr. McCaleb's work duties involved constant lifting 10-pound bags of bird seed, three bags at a time, for 10 hours. The job did not require Mr. McCaleb to lift over 50 pounds.

On January 30, 2012, Mr. McCaleb suffered a workplace injury. The employer treated the matter as a worker's compensation matter and the employer's worker's compensation carrier facilitated Mr. McCaleb's medical evaluation and treatment. Kelly Thiele, Human Resources Coordinator, was the person from C & S Products Company charged with responsibility for dealing with Mr. McCaleb on behalf of the employer while Mr. McCaleb continued off work in connection with his worker's compensation injury. After each medical appointment, Mr. McCaleb would telephone Mr. Thiele to update him regarding the appointment or would bring to Mr. Thiele documentation concerning the appointment. Mr. McCaleb remained off work from January 2012 until he returned to work for one day on July 18, 2012.

On February 13, 2012, Mr. McCaleb's was evaluated by Dr. Phuong Nguyen, M.D., at Trinity Corporate Health Services in Fort Dodge. At that time, the doctor noted that the initial

diagnoses had been cervical spine strain, thoracic spine sprain, and lumbar spine sprain. The doctor noted that the condition was work-related. The doctor noted that the treatment plan was for Mr. McCaleb to start physical therapy the next day. Concerning the treatment plan, the provider further noted: "Flexeril 10mg TID. PT 3X2. Heating pad to the area 3-4x/day. HEP as directed. RTC in 10 days." Dr. Nguyen released Mr. McCaleb to perform modified duty with a five-pound lifting restriction and "no standing/walking/sitting longer than 1 hour. Breaks (5 min) every 2-3 hours." The provider noted a follow-up appointment was scheduled with Dr. Phuong Nguyen, M.D., on February 21, 2012.

On February 21, 2012, Mr. McCaleb appeared for his follow-up appointment with Dr. Nguyen. At that time, Dr. Nguyen released Mr. McCaleb to return to modified duty with the only medical restriction being a 30-pound lifting restriction. Concerning the treatment plan, Dr. Nguyen noted: "PT2X2 for work hardening. Continue Zanaflex 6mg TID (#30) as needed. Cont HEP. RTC in 2 weeks." Despite the reference to returning to the clinic (RTC) in two weeks, the provider noted that the next follow-up appointment was set for March 21, 2012.

On March 21, 2012, Mr. McCaleb appeared for his follow-up appointment with Dr. Nguyen. Dr. Nguyen continued the 30-pound lifting restriction as the only work restriction. Concerning the treatment plan, Dr. Nguyen noted: "Renew Zanaflex 6mg TID (#30) as needed. Cont HEP. Will not make any appointment at this time pending NCM decision on referral to spine specialist and possible MRI."

On April 17, 2012, Mr. McCaleb was evaluated by Dr. Charles Mooney, M.D., of the McFarland Clinic, P.C., Occupational Medicine Department. Dr. Mooney noted a diagnosis of low back pain (LBP). Dr. Mooney released Mr. McCaleb to return to modified work that day with two medical restrictions: no lifting/pushing pulling over 25 pounds and no repeated bending/twisting of the back. Concerning the treatment plan, Dr. Mooney noted that Mr. McCaleb was to undergo x-rays and an MRI of his lower spine and that he had prescribed the anti-inflammatory drug naproxen, 500mg. two times per day. Dr. Mooney noted that Mr. McCaleb was to return after the x-rays and MRI of his lower spine were taken.

On May 16, 2012, Mr. McCaleb returned for a follow-up appointment with Dr. Mooney. At that time, Dr. Mooney released Mr. McCaleb to return to modified work with the following restrictions: no lifting/pushing pulling over 20 pounds and no repeated bending/twisting of the back. Concerning the treatment plan, Dr. Mooney ordered physical therapy two to three times per week for four weeks. Dr. Mooney prescribed the anti-inflammatory drug daypro, and the anti-depressant drug nortriptyline. Dr. Mooney noted that Mr. McCaleb was to return for a follow-up appointment in one month.

Dr. Mooney subsequently provided a written response, dated May 30, 2012, to an inquiry from the worker's compensation carrier about Mr. McCaleb's medical condition. Only the first page of the multi-page letter was presented as evidence at the hearing. Dr. Mooney wrote as follows:

> I am in receipt of your faxed transmission dated 05/21/12 regarding Mr. Quennel McCaleb. As you are aware he was evaluated in Occupational Medicine after failing to improve symptoms of low back pain despite treatment by previous providers due to injury occurring on 01/30/12.
>
> In my last evaluation, it is evident that he has persistent findings of myofascial dysfunction, sacral pain, and tightening of the hamstrings perpetuating his complaints of low back pain. For that reason I have recommended treatment including a course of physical therapy for specific intervention regarding these issues.

> Despite his normal MRI it is my opinion that he does require restrictions in activities until such time that he has completed functional rehabilitation[.] I have requested that he be returned to work with no lifting greater than 25 pounds and not do repetitive bending. Repetitive is defined as bending from the waist performed no more than 1/3 of his work day. Further this implies that he is not required to lift from the floor to waist on anything more than a rare basis[.]
>
> I expect that he will rapidly progress in therapy and return to full unrestricted duty on my next evaluation which is scheduled for approximately 06/16/12 however, at the time of this dictation I note that Mr[.] McCaleb has not been evaluated in physical therapy and so his functional return to work may be somewhat more delayed.

Dr. Mooney subsequently released Mr. McCaleb to return to work without restrictions, to his regular duties, on July 10, 2012. Mr. McCaleb returned to the employment on July 18, 2012 and performed work for the employer for only that day. Mr. McCaleb spent the day lifting one-pound cakes. The work required bending. On July 19, 2012, Mr. McCaleb called in sick. On that day, Mr. McCaleb went to the emergency room. The emergency room doctor took Mr. McCaleb back off work until Mr. McCaleb was seen by a doctor for a follow-up appointment. Mr. McCaleb made no additional trips to the emergency room after July 19, 2012.

On October 3, 2012, Mr. McCaleb finally had the medical appointment in follow-up to the July emergency room visit. The appointment was with Dr. David Boarini, M.D., a neurologist and neurosurgeon affiliated with The Iowa Clinic. The worker's compensation carrier arranged the appointment. At the time of the October 3, 2013 appointment with Dr. Boarini, the doctor did not give Mr. McCaleb anything to take back to the employer. Dr. Boarini indicated instead that he would make certain that Mr. Thiele and the worker's compensation case manager got a copy of his report. Dr. Boarini prepared the following memo in connection with the appointment:

> Quennel McCaleb was seen in the office on October 3, 2012. He is a 32-year-old gentleman with complaints of back pain with some radiation to the right leg since doing some lifting at work in January. He tells me he has diffuse back pain from his shoulder blades down to his lower back but little in the way of radicular and certainly no neurological complaints.
>
> Upon examination, he is neurologically intact. He has a slightly diminished range of motion in the back but normal strength, negative straight leg raising, and symmetrical reflexes.
>
> I reviewed his MRI scan, and it is entirely normal.
>
> This patient complains of diffuse back pain with no sign of any significant spinal problems. There is certainly nothing to suggest there is a surgical lesion. I really have nothing more to offer him. He could be referred to the University of Iowa chronic pain clinic, but I find no cause for his ongoing pain.

Dr. Boarini did not impose any medical restrictions or continue any previous medical restrictions. Dr. Boarini's memo was directed to the University of Iowa Pain Medicine Clinic and to the employer's worker's compensation insurance carrier. The employer received the memo on November 26, 2012 and subsequently forwarded it to Mr. McCaleb. Mr. McCaleb did not see Dr. Boarini after October 3, 2012. Mr. McCaleb did not contact the employer in the days

following this appointment to let the employer know he no longer had any medical restrictions. Mr. McCaleb did not return to work.

At Mr. McCaleb's request, the worker's compensation carrier made an appointment for Mr. McCaleb to be evaluated by the UIHC Pain Medicine Clinic after consulting with Dr. Boarini immediately following the October 3, 2012 appointment with Dr. Boarini,

There was no direct contact between Mr. McCaleb and the employer between October 3 and December 5, 2012.

On December 5, 2012, Kelly Thiele sent Mr. McCaleb a letter. The letter stated as follows:

> We received a statement from the offices of Dr. Boarini stating that in his opinion there is no sign of any significant problem and he can find no cause for any ongoing pain and can offer no treatment. We cannot find any medical explanation why you should not be returned to work. If you are aware of some medical finding or report that contradicts Dr. Boarini and supports a need for you to be off work please let me know at once.
>
> Based on Dr. Boarini's findings, we must require you to return to work. Please give me a call regarding your intent to return to work. I will expect a reply to his letter no later than the end of the work day on 12/10/2012. Thank you.

Mr. McCaleb received the employer's letter by certified mail on or about December 6, 2012. Mr. McCaleb attempted to contact Mr. Thiele on Thursday or Friday, December 6 or 7, but Mr. Thiele had left work early that day.

On December 7, 2012, the University of Iowa Hospitals & Clinics mailed notice to Mr. McCaleb that an appointment had been set with Dr. Esther Benedetti, M.D., of the UIHC Pain Medicine Clinic on December 21, 2012. Mr. McCaleb received the appointment notice within a day or two of its mailing. Mr. McCaleb canceled the December 21 appointment due to inclement weather.

On Monday, December 10, 2012, McCaleb telephoned Mr. Thiele, but had to leave a message. Mr. Thiele called Mr. McCaleb back that same day. Chris Brock, South Plant Superintendent, was also on the call. Mr. Thiele asked Mr. McCaleb whether he was going to come to work. Mr. McCaleb told Mr. Thiele that he could not return to work. Mr. McCaleb mentioned that he had been referred to the pain center. Mr. Thiele believed the statement at the time. Mr. McCaleb did not mention having an actual scheduled appointment set up with the pain clinic. During the conversation, Mr. McCaleb made no mention of any medical restrictions, including no mention of a 50-pound lifting restriction. In any event, the work at the south plant did not involve lifting more than 50-pounds. Mr. Thiele told Mr. McCaleb that Dr. Boarini had released Mr. McCaleb to return to work *without* restrictions. Mr. Thiele referred to the October 3, 2012 memo from Dr. Boarini. Mr. Thiele read Dr. Boarini's memo to Mr. McCaleb. Mr. Thiele told Mr. McCaleb that according to that documentation, there was no sign of any spinal problem, nothing to suggest there was a surgical lesion, no reason for Mr. McCaleb's ongoing pain complaint, and nothing that Dr. Boarini had to offer Mr. McCaleb other than a statement that Mr. McCaleb could be referred to the UIHC pain clinic Mr. Thiele told Mr. McCaleb that the employer had decided to move forward with replacing Mr. McCaleb's position and that Mr. McCaleb's employment was terminated. Mr. McCaleb said that he would contact Dr. Boarini's office to obtain additional paperwork and would then be in contact with his attorney. Mr. Thiele said he would review any additional paperwork regarding work restrictions if and when he received it, but that the employer already had documentation of the most recent findings. Mr. Thiele told Mr. McCaleb that if Mr. McCaleb obtained documentation of work

restrictions, he should provide it to Mr. Thiele as soon as possible. Mr. McCaleb did not provide any additional documentation of medical restrictions.

Mr. McCaleb had no further contact with Mr. Thiele after the telephone conversation of December 10, 2012. Mr. McCaleb did not provide the employer with additional documentation regarding work restrictions. Mr. McCaleb contacted Dr. Boarini's office and the UIHC Pain Medicine Clinic to request medical restrictions. Neither physician would impose medical restrictions.

On December 10, 2012, Mr. Thiele completed paperwork to document Mr. McCaleb's separation from the employment. Mr. Thiele documented that McCaleb had not left the employment on his own accord and had not left for other employment. Mr. Thiele documented that Mr. McCaleb's work performance had been satisfactory. Mr. Thiele documented that Mr. McCaleb was not eligible for re-hire. In a comments section, Mr. Thiele documented, "Could not return to work after Work Comp Injury."

On December 10, 2012, Mr. Thiele sent another letter to Mr. McCaleb to memorialize the telephone call on that day. Mr. McCaleb received the letter by certified mail on December 10, 2012. Mr. Thiele wrote:

> This letter is to confirm the phone conversation that took place on 12/10/2012 between you, Chris Brock, and me. It is our understanding that you are unable to return to work. Due to the findings of Dr. David Boarini that he could not find any physical reason for your ongoing issues, we feel we need to move forward and replace your position within C&S Products. Effective immediately your employment with C&S Products Co. Inc. is terminated. If you have any further questions, please feel free to contact me at the number provided below. Best wishes in your future endeavors.

On January 3, 2013, the University of Iowa Hospitals & Clinics mailed notice to Mr. McCaleb of a follow-up appointment with Dr. Benedetti at the UIHC Pain Medicine Clinic on January 17, 2013.

At the time of the March 11, 2013 appeal hearing, Mr. McCaleb testified that he was still receiving treatment in connection with the January 30, 2012 work-related injury. Mr. McCaleb testified that he was going to physical therapy three times per week. Mr. McCaleb testified he had been receiving treatment at the UIHC that included a series of six shots in his lower back. Mr. McCaleb testified that he had a follow-up appointment set for April 22 to commence receiving a new series of six shots and that he waiting to see what the plan was after that.

At the time of the March 11, 2013 appeal hearing, Mr. McCaleb testified that he was currently receiving worker's compensation benefits for permanent partial disability (PPD).

At the time of the March 11, 2013 appeal hearing, Mr. McCaleb testified that he could not sit down, could not bend down to tie his shoes, could not lift his 47-pound daughter. Mr. McCaleb testified that all of these same issues had been in place since his January 30, 2012 injury. Mr. McCaleb testified that any physical activity makes his back tighten up, causes him severe pain, and causes him to vomit.

As of the March 11, 2013 appeal hearing, the employer had received no medical documentation concerning Mr. McCaleb's treatment at the UIHC Pain Medicine Clinic.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory–taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
> d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

Iowa Code section 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.

Workforce Development rule 817 IAC 24.26(6) provides as follows:

> 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.
> 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.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

Mr. McCaleb's testimony on multiple material issues was not credible. The evidence indicates that Dr. Mooney, an Occupational Health specialist, released Mr. McCaleb to return to work without restrictions effective July 10, 2012. Dr. Mooney was fully aware of Mr. McCaleb's medical condition up to that point, found no basis to continue Mr. McCaleb off work and released Mr. McCaleb to return to work without restrictions. Mr. McCaleb argues unpersuasively that the restrictions that were imposed *prior to* the July release were somehow still applicable as of October 3, December 10 or beyond. That clearly was not the case.

Mr. McCaleb argues unpersuasively that the medical restriction put in place at the time of the July 19, 2012 emergency room visit continued in place after October 3, as of December 10, and beyond. The directive from the emergency room physician was that Mr. McCaleb continue off work until he had a follow-up appointment with another doctor. Mr. McCaleb had that follow-up appointment on October 3, 2012, at which time Dr. Boarini determined that no medical restrictions were necessary. The weight of the evidence indicates that Mr. McCaleb made no trips to the emergency room after July 19, 2012 and that his testimony that there were additional trips was a fabrication.

Mr. McCaleb provided four differing and contradictory statements regarding what Dr. Boarini told him during the October 3 appointment. At one point in the hearing, as he was providing the fourth version of what Dr. Boarini allegedly said on October 3, Mr. McCaleb stated that he could remember the appointment like it was yesterday. Mr. McCaleb initially testified that Dr. Boarini declined to put in place any medical restrictions and said that the Iowa City pain clinic would decide on any appropriate restrictions. Later in the hearing, Mr. McCaleb testified that Dr. Boarini told him not to return to work until he was seen at the pain clinic. At another point in the hearing, Mr. McCaleb testified that Dr. Boarini released him to return to work with a 50-pound lifting restriction. At yet another point in the hearing, Mr. McCaleb testified that Dr. Boarini did not say one way or another whether he should return or not return. In short, Mr. McCaleb was all over the board with regard to what Dr. Boarini said. The hearing record will reflect that Mr. McCaleb's testimony in response to questions about what Dr. Boarini said during the October 3 appointment was frequently preceded by long pauses. Mr. McCaleb's testimony concerning the October 3, 2012 appointment with Dr. Boarini is simply not credible. The more reliable evidence concerning what Dr. Boarini said during the October 3 appointment comes from the medical documentation Dr. Boarini prepared in connection with the October 3 appointment. Dr. Boarini could find no basis for Mr. McCaleb's pain complaint. Dr. Boarini neither imposed nor continued any medical restrictions. Dr. Boarini made a somewhat

equivocal referral to the UIHC Pain Medicine Clinic, choosing to write, "He could be referred to the University of Iowa chronic pain clinic, but I find no cause for his ongoing pain." The weight of the evidence does not support Mr. McCaleb's assertion that his appointment with Dr. Boarini, a neurologist and neurosurgeon, was nothing more than a surgical consult or that medical opinion documented by Dr. Boarini was narrow, meaning merely that there was no need for surgical intervention. The weight of the evidence establishes that Mr. McCaleb had *no* medical restrictions as of the October 3, 2012 appointment with Dr. Boarini. It is rather telling that Mr. McCaleb elected not to make any contact with the employer in the days that followed the October 3 appointment. The weight of the evidence actually establishes a voluntary separation from the employment effective October 3, 2012, when Mr. McCaleb elected not to return to work despite the fact that he no longer had any medical restrictions to justify continuing off work.

Mr. McCaleb provided additional testimony on material issues that was not credible. The weight of the evidence indicates that Mr. McCaleb made no mention of a 50-pound lifting restriction, or any other extant medical restrictions, during the December 10, 2012 telephone call with Mr. Thiele. That explains, in part, why Mr. Thiele offered to receive subsequent information regarding medical restrictions if and when Mr. McCaleb provided such information. Mr. McCaleb never provided any such information or documentation to the employer. Neither Dr. Boarini nor Dr. Benedetti of the UIHC Pain Medicine Clinic deemed medical restrictions necessary. The mere fact that Mr. McCaleb was approved for and underwent treatment for chronic pain does not prove that he had a medical condition that prevented him from returning to work.

Mr. McCaleb continued off work without any medical restrictions for more than a month and a half before the employer got notice, on November 26, 2012, that there were no medical restrictions as of October 3, 2012. This led to the December 5, 2012 correspondence and the December 10, 2012 telephone call. The employer made it clear to Mr. McCaleb that the employer had work for him and expected him to return to the employment. Even if Mr. McCaleb had had a 50-pound lifting restriction as of October 3 or December 10, he knew all along that the work the employer had for him did not exceed that. During the December 10, 2012 telephone call, Mr. McCaleb refused to return to the employment. Only after Mr. McCaleb refused to return to work in the absence of medical restrictions, did Mr. Thiele tell Mr. McCaleb that the employer was nonetheless calling the employment done. Despite the parties' erroneous characterization of the separation as involuntary, the weight of the evidence establishes a voluntary quit. During the December 10, 2012 conversation, Mr. McCaleb's refusal to return to work in the absence of medical restrictions merely reaffirmed his voluntary separation from the employment.

The weight of the evidence establishes a voluntary quit for personal reasons and without good cause attributable to the employer. Accordingly, Mr. McCaleb is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. McCaleb.

The evidence is sufficient to cast doubt on Mr. McCaleb's availability for work since he established his claim for benefits. This matter will be remanded to the Claims Division for determination of whether Mr. McCaleb has been available for work since he established his claim for unemployment insurance benefits. That determination should include consideration of the above referenced findings of fact and appropriate medical documentation.

DECISION:

The agency representatives January 9, 2013, reference 01 decision is affirmed. The claimant voluntarily quit the employment without good cause attributable to the employer. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged.

This matter will be remanded to the Claims Division for determination of whether the claimant has been available for work since he established his claim for unemployment insurance benefits. That determination should include consideration of the above referenced findings of fact and appropriate medical documentation.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/pjs