

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICK J GAU
Claimant

APPEAL NO. 12A-UI-00533-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

YRC INC
Employer

**OC: 11/20/11
Claimant: Appellant (5)**

871 IAC 24.1(113) – Other Separations
Iowa Code § 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Nick Gau filed a timely appeal from the January 6, 2012, reference 03, decision that denied benefits effective November 20, 2011 based on an Agency conclusion that Mr. Gau was not able and available for work. After due notice was issued, a hearing was held on March 20, 2012. Mr. Gau participated. Tom Rusk, Service Center Manager, represented the employer and presented additional testimony through Gretta Fisher, Workers' Compensation Adjuster with Gallagher Bassett. Exhibits One, Two, A and B were received into evidence.

ISSUES:

Whether the claimant separated from the employment for a reason that makes him ineligible for unemployment insurance benefits.

Whether the claimant has been able to work and available for work since establishing his claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer hauls freight that are less than a full freight load. Nick Gau began working for the employer in 1993 and last performed work for the employer on September 9, 2009. Mr. Gau worked as a driver/dock worker. The work included loading and unloading freight by hand, with a forklift or with a pallet jack. On August 27, 2009, Mr. Gau suffered an injury at work when he was exposed to a powdered chemical substance, trimellitic anhydride. Mr. Gau returned to work for several days after the exposure, but then requested to be seen by a doctor. The employer arranged for a medical evaluation and Mr. Gau was ultimately diagnosed with Chronic Lung Disease with bilateral lower lobe scarring and fibrosis, Atelectasis, and Occupational Environmental Lung Disease with recurring bronchitis and recurring infections. A doctor secured by the employer has permanently restricted Mr. Gau from working around chemicals, extreme dust, in increased temperatures, or humidity. A doctor secured by the employer had restricted Mr. Gau from lifting "extreme weight."

Since the doctor took Mr. Gau off work in September 2009, Mr. Gau has never been released to return to work his previous duties. The employer has never notified Mr. Gau that he is discharged from the employment. Mr. Gau has never notified the employer that he intended to quit. Nonetheless, it is clear that Mr. Gau had separated from the employment and will never be released to return to the employment. Since Mr. Gau went off work in 2009, he has received workers' compensation benefits. Mr. Gau continues to receive such benefits. Mr. Gau's unemployment insurance case is still pending. There has been no settlement agreement or adjudication. The matter is expected to proceed to a contested case hearing in 2012 until it is resolved before such hearing.

Mr. Gau established a claim for unemployment insurance benefits that was effective November 20, 2011. Mr. Gau established the claim upon the advice of his attorney. Mr. Gau's medical restrictions have remained as indicated above.

Mr. Gau's medical status was most recently reviewed by Pulmonologist Patrick Hartley, M.D., from the University of Iowa Hospitals and Clinics. That evaluation occurred on February 1, 2012 as an independent medical evaluation requested by the employer's workers' compensation attorney. Dr. Hartley concluded that Mr. Gau was at maximum medical improvement (MMI) with respect to the lung injury. With regard to applicable work restrictions, Dr. Hartley states as follows:

With regards to his work status, while we have no definitive evidence of sensitization to trimellitic anhydride and presume that his airway disease is due to an irritant effect, I would recommend against returning him to an environment where there is any risk of further exposure to this chemical. Unfortunately, like many patients with asthma, Mr. Gau has developed nonspecific airway hyperreactivity, now responding to exposures other than the original chemical which induced his symptoms. Consequently, I would agree with his treating pulmonologist that he should not work in an environment where he is exposed to extremes of temperatures, considerable dust, fumes, mists, or other irritant smoke or chemicals.

During the evaluation with Dr. Hartley, Mr. Gau told the doctor that he continued to have shortness of breath on walking half a block and has to stop and sit. Mr. Gau reported that he has shortness of breath if he walks up multiple flights of stairs. Mr. Gau reported that if he carried something in his arms, he has shortness of breath after walking 20 feet. Mr. Gau reported that when he is supine, it feels like there is a strap around his chest. Mr. Gau reported that his breathing problems get worse if he is exposed to dust, including ordinary house dust. Mr. Gau reported that pumping gas at the gas station caused him shortness of breath and coughing. Mr. Gau reported that he could not tolerate hairspray, perfumes, or colognes. Mr. Gau reported that extremes of heat or cold increase his symptoms. Mr. Gau reported that he was on a bronchodilator treatment with albuterol one or twice a day, that he uses another breathing treatment twice a day, and that he has been on an oral steroid for over a year.

REASONING AND CONCLUSIONS OF LAW:

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

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.

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.

The evidence in the record establishes that there has been a separation from the employment. Mr. Gau neither voluntarily quit nor was discharged from the employment. Mr. Gau's separation from the employment was based on a permanent disability that causes him to no longer meet the physical standards required by the employment. Mr. Gau's separation falls within the category known as other separations. Because the separation was neither based on a voluntary quit without good cause attributable to the employer nor a discharge for misconduct, the separation from the employment would not disqualify Mr. Gau for unemployment insurance benefits. Mr. Gau would still need to meet all other eligibility requirements.

Iowa Code § 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, (2) 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.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Administrative Code rule 871 IAC 24.23 provides, in relevant part, as follows:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

24.23(1) An individual who is ill and presently not able to perform work due to illness.

24.23(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

The weight of the evidence in the record simply fails to establish that Mr. Gau is able to perform any type of work on a full-time or available for any type of work on a full-time basis. Mr. Gau's permanent injury, as indicated by the medical documentation, is substantial. The nature of Mr. Gau's permanent lung injury is such that it precludes him from performing all of the types of work he has looked for since filing his claim. It precludes him from working in most, if all, work environments. Mr. Gau has not met the able and available requirements since he established claim for benefits and, for that reason is not eligible for benefits. Benefits are denied effective November 11, 2011.

DECISION:

The Agency representative's January 6, 2012, reference 03, decision is modified as follows. The claimant neither quit nor was discharged from the employment. The claimant's separation falls into the category of "other separations" and was due to permanent disability and inability to meet the physical requirements of the employment. The separation would not disqualify the

claimant for benefits. In the event benefits are paid to the claimant at some point, the employer's account may be charged. The claimant has not been able to work and available for work, as required by Iowa Code § 96.4(3), since establishing his claim for benefits. For this reason, the claimant is not eligible for benefits effective November 20, 2011. The claimant's ineligibility continues as of the entry of this decision. The claimant will continued to be ineligible for benefits until he proves by appropriate evidence the ability and availability to perform some specific type of work on a full-time basis.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs