

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**RICHARD T SCHIRMER**  
Claimant

**Z LINE LTD**  
Employer

**APPEAL 16A-UI-00147-JCT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 12/06/15**  
**Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the December 29, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on January 27, 2016. The claimant participated personally and through Siobahn M. Schneider, attorney at law. The employer participated through Randy Zimmerman, president. Employer Exhibits 1 and 2 were admitted into evidence. Claimant Exhibits A, B, C<sup>1</sup>, D, E, F, G, H, and I were admitted into evidence. The administrative law judge also took official notice of the administrative record, including fact-finding documents.

**ISSUES:**

Did the claimant voluntarily quit the employment with good cause attributable to the employer?  
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can any charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a regional over-the-road driver and was separated from employment on December 10, 2015, when he voluntarily quit the employment. Continuing work was available.

The claimant last performed work on December 10, 2014 when he made the employer aware that he would be seeing a physician in response to a right shoulder injury that occurred at the workplace on November 4, 2014. In response to a medical evaluation, on December 24, 2014, Dr. Scott Meyer discussed with the claimant having surgery for a torn rotator cuff (Claimant Exhibit A), which was ultimately performed on February 3, 2015 (Claimant Exhibit B). On

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<sup>1</sup> The copy of Exhibit C was admitted though partially illegible. Claimant's counsel requested without objection from employer to resend Exhibit C to the Appeals Bureau. However, no additional copy was received by the Appeals Bureau.

November 3, 2015, after rehabilitation and recovery, the claimant was issued permanent restrictions associated with the shoulder injury. The claimant was provided a functional capacity evaluation (FCE) that identified the claimant would be unable to do some of his prior job functions related to lifting and carrying (Claimant Exhibit I). When the claimant presented the employer his permanent restrictions in a meeting with Mr. Zimmerman on November 5, 2015, the employer wanted to confirm with his worker's compensation carrier before he offered the claimant a position that accommodated his restrictions. The employer did not immediately offer work at that time, and the claimant did not elect to file for unemployment insurance benefits at that time.

A December 7, 2015 letter from physician, Dr. Scott A. Meyer, in response to the claimant's physical restrictions, stated that "it was thought that he could work at his job as a truck driver." (Employer Exhibit 2, page 3). On December 7, 2015, the employer sent the claimant a letter, to offer the claimant back his job as a truck driver (Claimant Exhibit F), and acknowledged the claimant's restrictions and that he would clear the claimant to drive, with the restrictions in place. Traditionally, the employer's job description as a truck driver (Claimant Exhibit H) would have included work outside of the imposed restrictions, but the employer was aware of the claimant's permanent restrictions and could allow him to return to the same position but still meet the restrictions associated with lifting/pulling/weight. Mr. Zimmerman asserted at the hearing that he intended to allow the claimant to continue driving but would have placed him on a "no touch freight" route, which meant, he would drive only, and not be allowed or required to help with the unloading of freight transported. This would allow the claimant to work within his restrictions. In its offer to the claimant, the employer indicated the claimant's position would be held open until December 15, 2015 (Claimant Exhibit H). The claimant did not make any attempt to return to work or contact Mr. Zimmerman to inquire about his plans to accommodate his restrictions; but rather he elected to file for unemployment benefits.

Subsequent correspondence has ensued between the parties and their counsel, (Claimant Exhibit G) and at the time of hearing, the employer maintained the claimant's job offer remained open to him, with accommodation to his restrictions, if he wanted to accept the employment.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3448.00, since filing a claim with an effective date of December 6, 2015, through the week ending January 30, 2016. The administrative record also establishes that the employer did participate in the December 28, 2015, fact-finding interview by way of Randy Zimmerman.

## **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant's separation from the employment was without good cause attributable to the employer.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.25(27) provides:

Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(27) The claimant left rather than perform the assigned work as instructed.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the claimant voluntarily quit the employment without good cause, when he refused to return to work after the employer offered him a position and agreed to work within the claimant's permanent restrictions.

Under some circumstances, a quit for medical or health reasons is attributable to the employer. Iowa Code § 96.5-1. Where factors and circumstances directly connected with the employment caused or aggravated an employee's illness, injury, allergy, or disease can be good cause for quitting attributable to the employer. Rule 871 IAC 24.26(6)b. However, in order for this good cause to be found, prior to quitting the employee must present competent evidence showing adequate health reasons to justify ending the employment, and before quitting must have informed the employer of the work-related health problem and inform the employer that the employee intends to quit unless the problem is corrected or the employee is reasonably accommodated. Rule 871 IAC 24.26(6)b.

Inasmuch as the injury is considered work-related for the purposes of unemployment insurance benefits only and the treating physician has released the claimant to return to work, even with restrictions, the claimant has established the ability to work. The employer was made aware of the restrictions on November 5, 2015, and on December 7, 2015, the employer offered the claimant a position as an over-the-road driver on and agreed to work within the restrictions. The evidence presented shows the employer acknowledged the claimant had restrictions and intended to comply with the restrictions, in order to retain the claimant's employment (Claimant exhibit F). The administrative law judge is not persuaded that the employer was required to identify with specificity acceptable to the claimant in his offer, every detail as to how he planned

to accommodate the claimant's restrictions. Rather, the employer made a good faith effort to extend a job to the claimant, who balked in response. The claimant did not try to appear for work to determine how the employer intended to place the claimant in a no-touch freight route. The claimant instead elected to file for unemployment benefits.

The claimant's rejection of the position was without competent evidence showing adequate health reasons to justify ending the employment. The claimant did not present evidence in writing to employer that his treating physician suggested the employer's offer to the claimant was inconsistent with the restrictions in place. However, the medical evidence presented by Dr. Scott A. Meyer, in response to the claimant's physical restrictions, stated that "it was thought that he could work at his job as a truck driver." (Employer Exhibit 2, page 3). Based on the evidence presented, the employer reasonably accommodated the claimant's restrictions when offering him the job as a truck driver on December 7, 2015. Because the employer had work available and was willing to accommodate the work restrictions, the claimant has not demonstrated good cause to leave the employment under Iowa law. Benefits are denied.

Iowa Code § 96.3(7)a-b provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to § 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to § 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that it did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. The employer satisfactorily participated in the fact-finding interview by way of Randy Zimmerman. Since the employer did participate in the fact-finding interview the claimant is obligated to repay the benefits he received and the employer's account shall not be charged.

**DECISION:**

The December 29, 2015, (reference 01) unemployment insurance decision is reversed. The claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as 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 claimant has been overpaid benefits in the amount of \$3448 and is obligated to repay the benefits. The employer's account shall be relieved of charges associated with this claim.

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Jennifer L. Coe  
Administrative Law Judge

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Decision Dated and Mailed

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