IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANGELO P MARCANO
Claimant

L A LEASING INC
SEDONA STAFFING
Employer

APPEAL NO. 08A-UI-06455-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/08/08 R: 03
Claimant: Appellant (5)

Iowa Code § 96.5(1)d – Voluntary Leaving/Illness or Injury
Iowa Code § 96.4(3) – Able and Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 2, 2008, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on July 29, 2008. Claimant participated. Employer participated through Sara Schneck and Anna Nielsen. The parties waived fact-finding on the issue of claimant's ability to work.

ISSUE:

The issue is whether claimant quit the employment without good cause attributable to the employer and if he is able to and available for work effective June 5, 2008.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed in a temporary assignment at Medicoat Manufacturing spraying John Deere parts until November 18, 2007. He advised Nielsen he was leaving because his disability would be approved and he could no longer work full time but might be willing to work part time occasionally in the future. He did not mention back pain, being injured at Medicoat or that his doctor had advised him to quit. He aggravated a pre-existing back injury (from IBP) in October 2007 while lifting using a heavy part while using a trolley and it slipped and he twisted his back when he tried to catch it. Did not file a first report of injury but reported it to his boss Don, a Medicoat supervisor, formerly a Sedona Staffing temporary employee hired by Medicoat in August 2006. Don moved him to another area but denied light duty. Evansdale Family Practice Dr. Kettman told him to quit his job because of the back pain. There were no Sedona supervisors on site but Nielsen went there twice per week at shift change to speak with employees. He did not mention an injury to her. Claimant states he is unable to work due to back pain, diabetes, high blood pressure, sleep apnea and morbid obesity. He is awaiting weight loss surgery and is not able to return to work in the foreseeable future.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily left his employment for no disqualifying reason.

Iowa Code § 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.

871 IAC 24.25(35) 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 § 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 § 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:
>
> (35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:
>
> (a) Obtain the advice of a licensed and practicing physician;
>
> (b) Obtain certification of release for work from a licensed and practicing physician;
>
> (c) Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or
>
> (d) Fully recover so that the claimant could perform all of the duties of the job.

The claimant has not established that the injury was caused by this employment but did establish that the pre-existing injury would be aggravated by these work duties. Furthermore, his treating physician specifically advised him not to return to work.

While a claimant must generally return to offer services upon recovery, subparagraph (d) of Iowa Code § 96.5(1) is not applicable where it is impossible to return to the former employment because of medical restrictions connected with the work. See *White v. EAB*, 487 N.W.2d 342 (Iowa 1992). Where disability is caused or aggravated by the employment, a resultant

separation is with good cause attributable to the employer. *Shontz v. IESC*, 248 N.W.2d 88 (Iowa 1976). Where illness or disease directly connected to the employment make it impossible for an individual to continue in employment because of serious danger to health, termination of employment for that reason is involuntary and for good cause attributable to the employer even if the employer is free from all negligence or wrongdoing. *Raffety v. IESC*, 76 N.W.2d 787 (Iowa 1956).

Because claimant's back injury was aggravated by the working conditions, his decision not to return to the employment according to his physician's advice was not a disqualifying reason for the separation.

The administrative law judge further concludes that the claimant is not able to work and available for work.

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 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.

871 IAC 24.23(35) provides:

> Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
>
> (35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

Inasmuch as the injury is aggravated at least partially by the employment, the treating physician has not released the claimant to return to work with or without restriction, he is considered totally medically disabled and has been approved for Social Security Disability (SSD), the claimant has not established his ability to work. Benefits are withheld until such time as the claimant obtains a medical release to return to work which he is capable of performing given his education, training, and work experience.

DECISION:

The July 2, 2008, reference 01, decision is modified without change in effect. The claimant voluntarily left his employment for no disqualifying reason. However, benefits are withheld because claimant is not medically able to work.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css