

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

REBECCA L WORTHY

Claimant

APPEAL 17A-UI-06901-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL KITCHEN SOLUTIONS INC

Employer

OC: 06/04/17

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

Iowa Code § 96.4(3) – Able and Available

Iowa Admin. Code r. 871-24.23(10) – Availability Disqualifications – Leave of Absence

STATEMENT OF THE CASE:

The employer filed an appeal from the June 29, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 25, 2017. Claimant participated. Employer participated through operations supervisor Matt Schul. Carl Walters registered for the hearing on behalf of the employer, but he did not answer when contacted at the number provided and he did not participate. Official notice was taken of the administrative record, including claimant's benefit payment history and the fact-finding documents, with no objection.

ISSUES:

Is the claimant able to work and available for work effective June 4, 2017?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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: Claimant was employed full-time as a processing team member. Claimant was hired on October 3, 2016. In April 2017, claimant hurt her back at home while she was shoveling snow. Claimant went to the doctor due to the injury. On April 14, 2017, claimant provided the employer a doctor's note that she was unable to work due to a herniated disk.

Around May 3, 2017, claimant provided the employer with a doctor's note that allowed her to return to work under work restrictions. Claimant's work restrictions were: limited repetitive bending of the waist; standing and walking six to eight hours (eight to twelve hours was originally selected and had been crossed out); sitting six to eight hours (eight to twelve hours was originally selected and had been crossed out); driving six to eight hours (eight to twelve

hours was originally selected and had been crossed out); claimant may use hands, but the box for pushing and pulling was not selected; claimant may use her foot for operating foot controls; the option that claimant is not able to bend at all was selected; claimant may occasionally squat; claimant may climb frequently; claimant was able to perform light work (lift up to 20 pounds maximum and frequent lifting or carrying objects up to ten pounds). Claimant then worked for the employer on May 3, 2017 on light duty for seven hours at the inspection table.

On May 4, 2017, Mr. Schul, two safety directors, and claimant met to discuss her restrictions and how the employer may be able to accommodate them. They were meeting to fill out an ADAAA form that lists the job duties claimant would be performing at the employer. The employer found two areas, the inspection table (where claimant worked on May 3, 2017) and the wall side carriers, it thought claimant would be able to perform and would comply with her work restrictions. During this discussion, claimant mentioned to the employer that she felt pain while standing and performing the job duties at the inspection table. The employer then had claimant leave the meeting. Mr. Schul then met with the safety directors and they discussed claimant's restrictions, the job requirements, and that she felt pain after working at the inspection table. The employer decided it could not accommodate claimant's work restrictions based on all the information. Mr. Schul then told claimant that the employer could not accommodate her work restrictions. The employer could not accommodate claimant's work restrictions because she experienced pain after working on May 3, 2017 in one of the areas it thought could accommodate her work restrictions.

On June 28, 2017 and July 10, 2017, claimant's doctor provided more detailed work restrictions for claimant. Claimant was released to continually lift one to ten pounds, and frequent and occasional lifting up to 20 pounds. The work restrictions added an amount for carrying and push/pulling, which were the same restrictions as the lifting restrictions. The restrictions were modified to allow claimant to sit, stand, and walk up to twelve hours (from six to eight hours). Claimant was also restricted from bending at the waist repeatedly for more than 10% of the work day. Mr. Schul testified that the employer may be able to accommodate claimant's new work restrictions, but she has not returned to the employer to offer her services. The employer and claimant need to fill out an ADAAA form to list the duties that she can perform with her new restrictions before she can return. Claimant is on an approved leave of absence and is still employed by the employer. The employer is still holding claimant's job open for her.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,360.00, since filing a claim with an effective date of June 4, 2017, for the seven weeks ending July 22, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that claimant is not able to work and available for work. Benefits are denied.

Iowa Code section 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".

Iowa Admin. Code r. 871-24.22(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.

(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.

Although claimant was able to work on the inspection table on May 3, 2017, under her work restrictions, the employer was unable to continue to accommodate her work restrictions and allow her to continue to work on the inspection table after she informed the employer she felt pain after working her shift on May 3, 2017. Since May 3, 2017, claimant has not been released to return to work without restrictions. The employer is holding claimant's job open for her and she is still considered an employee.

Inasmuch as the medical condition is not work-related and the treating physician has not released claimant to return to work without restriction, she has not established her ability to work while still an employee of Cargill Kitchen Solutions Inc. effective May 4, 2017. While claimant may be able to perform some light work duties, the employer is not obligated to accommodate a non-work related medical condition, and since she has not been released to perform her full work duties, she is not considered able to or available for work. Benefits are denied as of June 4, 2017.

Iowa Code section 96.3(7)a-b, as amended in 2008, 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 section 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 section 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 section 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 she 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 they 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. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The June 29, 2017, (reference 02) decision is reversed. Claimant is not able to work and available for work effective June 4, 2017. Benefits are withheld until such time as the claimant obtains a full medical release to return to work, offers her services to the employer, and no suitable, comparable work is available considering reasonable accommodation; or if she is involuntarily separated before that time.

Claimant has been overpaid unemployment insurance benefits in the amount of \$3,360.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs