

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FRANCINE D BANES

Claimant

APPEAL NO. 08A-UI-05410-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BURGER CONCRETE AND
EXCAVATING INC**

Employer

**OC: 01/27/08 R: 03
Claimant: Respondent (2)**

Section 96.5-1 – Voluntary Quit
Section 96.3-7 – Overpayment
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Burger Concrete and Excavating (employer) appealed a representative's March 4, 2008 decision (reference 02) that allowed unemployment insurance benefits to Francine Banes (claimant) because it found the protest untimely. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 23, 2008. The claimant participated personally. The employer participated by Deborah Allen-Burger, Vice President. The employer offered and Exhibit One was received into evidence. Exhibit D-1 was admitted into evidence.

ISSUE:

The issue is whether the protest was filed in a timely manner and, if so, whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant and her husband owned a business that was sold to the employer on May 23, 2007. The claimant was hired on May 23, 2007, as a full-time assistant helping the employer get the business started. The claimant worked through May 25, 2007. At that point she decided there was nothing more for her to do and stopped appearing for work. Continued work was available had the claimant not resigned.

The claimant's notice of claim was mailed to the employer's address of record on January 31, 2008, and received by the employer within ten days. The notice of claim contains a warning that any protest must be postmarked, faxed or returned not later than ten days from the initial mailing date. The employer faxed a protest on February 4, 2008, which is within the ten-day period. The employer has a record that the fax was sent on that date. There is no record the protest was received.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the employer's protest is timely. The administrative law judge determines it is.

Iowa Code section 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The employer timely protested the notice of claim. Therefore, the protest shall be accepted as timely.

The next issue is whether the claimant voluntarily quit work without good cause attributable to the employer. The administrative law judge concludes she did.

Iowa Code section 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.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). The claimant's intention to voluntarily leave work was evidenced by the claimant's actions. The claimant stopped appearing for work because she felt there was nothing to do. There was no evidence presented at the hearing of

good cause attributable to the employer. The claimant voluntarily quit without good cause attributable to the employer. Benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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 claimant has received benefits since filing the claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

DECISION:

The March 4, 2008, reference 02, decision is reversed. Employer has filed a timely protest. The claimant voluntarily left work without good cause attributable to the employer. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant is overpaid benefits in the amount of \$6,940.00.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css