

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PAUL H NELSON**  
Claimant

**APPEAL NO. 14A-UI-08785-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MENARD INC**  
Employer

**OC: 08/03/14**  
**Claimant: Appellant (3)**

Iowa Code Section 96.5(1) – Voluntary Quit  
Iowa Code Section 96.4(3) – Able & Available

**STATEMENT OF THE CASE:**

Paul Nelson filed a timely appeal from the August 19, 2014, reference 01, decision that disqualified him for benefits based on an agency conclusion that he had voluntarily quit without good cause attributable to the employer due to a non-work related medical issue. After due notice was issued, a hearing was held on September 11, 2014. Mr. Nelson participated. Cory Strack represented the employer and presented additional testimony through Dan Gerovac and Tracey Nelson. Exhibits One, Two, A, B and C were received into evidence.

**ISSUE:**

Whether Mr. Nelson separated from the employment for a reason that disqualifies him for benefits or that relieves the employer of liability for benefits.

Whether Mr. Nelson had been able to work and available for work within the meaning of the law since he established the claim for benefits that was effective August 3, 2014.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Paul Nelson was employed by Menard, Inc., as a full-time general warehouse laborer from June 2012 and last performed work for the employer on June 20, 2014. At that time, Mr. Nelson went off work due to non-work related diverticulitis. On June 23, 2014, Mr. Nelson's primary care doctor provided Mr. Nelson with a note, written on a prescription pad, that indicated Mr. Nelson needed to be off work for three days. On June 25, 2014, Mr. Nelson met with a surgeon. The surgeon provided Mr. Nelson with a Progress Note that indicated as follows:

This patient is currently under my care and was seen in my office on 6/25/14. He/she may return to work, on 6/28/2014, with the following restrictions: no bending or twisting, not lifting greater than 20 pounds.

All of Mr. Nelson's work for Menard involved lifting greater than 20 pounds and/or bending and twisting. In other words, Mr. Nelson could not perform any aspect of his job with the medical

restrictions his doctor had imposed. Mr. Nelson provided both doctors' notes to the employer. In addition to the medical restrictions, Mr. Nelson was at the time also taking Percocet, a prescription pain medication, as needed and could not safely operate the employer's forklift. Mr. Nelson applied for a leave of absence, which the employer approved. Mr. Nelson's anticipated return-to-work date was September 13, 2014. On July 3, 2014, Mr. Nelson underwent surgery on his intestinal tract. On July 9, 2014, Mr. Nelson was released from the hospital. On July 11, 2014, Mr. Nelson was readmitted to the hospital due to complications. On July 19, 2014, Mr. Nelson underwent a second surgery on his intestinal tract. On July 22, 2014, Mr. Nelson contacted the employer and requested information regarding short-term disability benefits. Because Mr. Nelson had opted out of the employer's health insurance program, he was ineligible for short-term disability benefits through the employment. On July 27, 2014, Mr. Nelson was released from the hospital. Mr. Nelson had to utilize a colostomy bag. Mr. Nelson's doctor had advised Mr. Nelson that he would need to remain off work for at least four weeks while he recovered from the second surgery. Mr. Nelson contacted the employer and confirmed that September 2014 return-to-work date.

On August 1, 2014, Mr. Nelson voluntarily quit the employment due to his non-work related medical condition. On that day, Mr. Nelson contacted the workplace and spoke with Dan Gerovac, Assistant General Manager. Mr. Nelson told Mr. Gerovac that he could no longer work for the employer due to his health issues. At the time, Mr. Nelson was still fitted with a colostomy bag. Placement of the bag compromised Mr. Nelson's abdominal area. Mr. Nelson was concerned that the lifting, bending and twisting that were part of his job at Menard would place him at risk of injury to his abdomen. Mr. Nelson's doctor had expressed concern that continuing in the employment with Menard would inflame Mr. Nelson's abdominal area. Mr. Nelson's doctor was concerned that Mr. Nelson's job duties at Menard would put too much strain on Mr. Nelson's abdomen. Mr. Nelson asked the employer's assistance in applying for unemployment insurance benefits. Mr. Gerovac referred Mr. Nelson to the State of Iowa for assistance with his application for unemployment insurance benefits.

Mr. Nelson established a claim for unemployment insurance benefits that was effective August 3, 2014. At the time Mr. Nelson made his on-line application for benefits, he received instructions for making weekly claims for benefits. Mr. Nelson went through the necessary steps to attempt to claim benefits for the week of August 3-9, 2014. Mr. Nelson did not thereafter make a weekly claim on-line or via the voice response unit. On or about August 27, 2014, Mr. Nelson had a follow up visit with his surgeon and they discussed the possibility of Mr. Nelson returning to work. Mr. Nelson did not obtain a medical release from his surgeon and has not provided a medical release to Iowa Workforce Development.

Mr. Nelson started new, full-time employment on September 3, 2014. At the time of the September 11, 2014 appeal hearing, Mr. Nelson continued in the new employment.

Mr. Nelson is set to undergo an additional surgery on his intestines in October 2014. Mr. Nelson anticipates that he will have a four-week recovery period and a three-month additional period during which he will need to use the colostomy bag.

## REASONING AND CONCLUSIONS OF LAW:

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.

Workforce Development rule 817 IAC 24.26(6) provides as follows:

Separation because of illness, injury, or pregnancy.

a. Nonemployment related separation. The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was available. Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.

b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with the employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.

In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

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 weight of the evidence in the record establishes that Mr. Nelson voluntarily quit the employment effective August 1, 2014, due to a non-work related medical issue and upon the advice of a licensed and practicing physician. While Mr. Nelson's doctor may not have specifically directed Mr. Nelson to quit the employment, the evidence indicates that the doctor did indeed advise Mr. Nelson that returning to the employment would have an adverse impact on Mr. Nelson's health. Mr. Nelson's medical condition was not work-related. The employment had not caused the medical condition or aggravated it. The concern instead was that return to the employment after surgeries and placement of the colostomy bag would have an adverse impact on Mr. Nelson's health. Since quitting the employment, Mr. Nelson had never returned to the employer to offer his services after being released by the surgeon to return to the employment. Mr. Nelson has not presented sufficient proof to establish that he ever was released to return to work at Menard. Mr. Nelson has presented no documentation to the employer or to Workforce Development to establish that he was released to return to the work at Menard.

Mr. Nelson is subject to the provisions of Iowa Administrative Code rule 817-24.26(6)(a), as set forth above. The separation was a voluntary quit. For now, the voluntary quit is deemed to be without good cause attributable to the employer and Mr. Nelson is disqualified for unemployment insurance benefits. To requalify for benefits, Mr. Nelson must do one of two things. Either he must work in and be paid wages for insured work equal to 10 times his weekly benefit amount. Or Mr. Nelson must fully recover, such that he is able to return to his duties at Menard, must return to the employer with proof that he has been released to return to the employment, and must offer to return to the employment. Only if the employer then declines to return Mr. Nelson to the employment would the separation then be deemed for good cause attributable to the employment. In order to be eligible for unemployment insurance benefits, Mr. Nelson must meet all other eligibility requirements, including the able and available requirements discussed below.

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".

Iowa Admin. Code r. 871-24.22(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 Admin. Code r. 871-24.23(1) provides:

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

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

Iowa Admin. Code r. 871-24.23(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.

Mr. Nelson established his claim for benefits at a time when he was, by all accounts, unable to perform work. At the time Mr. Nelson established his claim, he had just been released from the hospital after undergoing a second surgery on his intestines. At the time Mr. Nelson established his claim for benefits, he was still recovering from the second surgery. During the one week for which Mr. Nelson made an actual claim for unemployment insurance benefits, he clearly was not able or available for work. The first suggestion that Mr. Nelson's situation may have changed came on or about August 27, 2014, when Mr. Nelson says his surgeon spoke with him about the possibility of Mr. Nelson returning to work, if he felt up to it. That discussion, absent a medical release document from the surgeon indicating that Mr. Nelson was indeed released to return to work, with some indication of what type of work Mr. Nelson might be released to perform, is insufficient to establish that Mr. Nelson met the work ability and work availability requirements of Iowa Code section 96.4(3) at any point prior to starting the new, full-time employment on September 3, 2014. Once Mr. Nelson started the new full-time employment, he could not be deemed "available" for other employment within the meaning of the law, and would

not be eligible for benefits. See Iowa Administrative Code rule 871-24.23(23). Based on the able and available requirements, and separate from the disqualification discussed above in connection with the separation from the employment, Mr. Nelson is ineligible for benefits effective August 3, 2014 and remained ineligible for benefits as of the September 11, 2014 appeal hearing.

**DECISION:**

The claims deputy's August 19, 2014, reference 01, decision is modified as follows. The claimant voluntarily quit due to a non-work related medical condition and without good cause attributable to the employer effective August 1, 2014. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount or until the claimant follows the alternative steps for requalification outlined above. The claimant must meet all other eligibility requirements. Because the separation is at present deemed without good cause attributable to the employer, the employer's account will not be charged for benefits. In the event the claimant follows the alternative route to requalification outlined above, the employer's account could become subject to charges for benefits paid to the claimant.

The claimant has not met the able and available requirements since establishing the claim for benefits. Benefits are denied effective August 3, 2014. The claimant's ineligibility on this basis continued as of the September 11, 2014 appeal hearing.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs