IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHANNON A POST
Claimant

MARSDEN BLDG MAINTENANCE LLC
Employer

APPEAL NO. 17A-UI-07457-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/25/17
Claimant: Respondent (2)

Iowa Code Section 96.5(1)(d) – Voluntary Quit
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 13, 2017, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that Mr. Post had left work on April 21, 2017 due to illness or injury, had recovered and offered to return to work, but no work was available. After due notice was issued, a hearing was held on August 10, 2017. Claimant Shannon Post participated. Lesley Buhler of Equifax represented the employer and presented additional testimony through Kathleen Bernadino. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant and of the documents submitted for and generated in connection with the fact-finding interview.

ISSUES:

Whether the claimant separated from the employment for a reason that disqualifies him for benefits.

Whether the claimant was overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Shannon Post began his full-time employment with Marsden Building Maintenance, L.L.C. in February 2017 and last performed work for the employer on April 21, 2017. Mr. Post worked as a Special Services janitor. Scott Herman, Area Manager, was Mr. Post's immediate supervisor. The duties of the Special Services staff could vary from day to day and included window cleaning, carpet extractions, dusting and general cleaning. Mr. Post was not assigned to a particular facility. The work hours were 7:00 a.m. until 3:00 to 3:30 p.m., Monday through Friday. The nature of the work required that Mr. Post be able to lift up to 50 pounds.

On Sunday, April 23, 2017, Mr. Post suffered serious injury to his back in a non-work related auto accident. On that day, Mr. Post underwent surgery on his back. The surgeon implanted rods and screws in Mr. Post's spine as part of the surgical procedure. On Monday, April 24, Mr. Post telephoned Mr. Herman to tell Mr. Herman about his injury. Mr. Post told Mr. Herman

that he would be in the hospital for a week and did not know when he would be released to return to work. Mr. Herman told Mr. Post to take care and to give Mr. Herman a call when Mr. Post got better and was able to return to work. Mr. Post did not state anything about quitting the employment. At the time of the conversation, Mr. Post was being treated with morphine and other pain medication.

On or about April 28, Mr. Post's wife took medical documentation to the employer to support Mr. Post's need to be away from work. During the following week, Mr. Post's wife returned Mr. Post's work uniform and work keys to the employer. Mr. Post's wife told Mr. Post that the employer had terminated his employment.

Mr. Post remained in the hospital until he was discharged to go home on May 6, 2017. Mr. Post was not at that point released by a doctor to return to work.

On June 23, 2017, a doctor released Mr. Post to return to work with a 20-pound lifting restriction. The doctor did not refer Mr. Post to physical therapy or occupational therapy. The doctor advised Mr. Post to walk four times a day as part of his recovery.

On June 25, 2017, Mr. Post telephoned Mr. Herman. Mr. Post told Mr. Herman that he had been released to return to work with a lifting restriction. Mr. Herman told Mr. Post to contact Margarita Bernadino, the employer's Human Resources Business Partner.

On June 27 or 28, Mr. Post called Ms. Bernadino. Mr. Post told Ms. Bernadino that he had been released to return to work with a 20-pound lifting restriction. Ms. Bernadino directed Mr. Post to reapply for employment. The employer's application process was Internet-based. Mr. Post did not provide the employer with a medical release. Ms. Bernadino did not request a medical release. While Mr. Post did not explicitly request re-employment, it was clear during the conversation that was his purpose in speaking with Ms. Bernadino. Mr. Post concedes that he could not have performed all of his previous duties, but asserts he could have performed about 80 percent of the duties. Mr. Post concedes he could no longer lift buckets of water or handle large extension poles.

On July 6, 2017, Mr. Post accessed the employer's website. At that point, the employer did not have a janitor position posted on the website. On July 10, 2017, Mr. Post called Ms. Bernadino. Mr. Post told Ms. Bernadino that he could not find an open position on the employer's website. Ms. Bernadino told Mr. Post to submit a generic online application. On July 13, Mr. Post accessed the employer's website with the intention of submitting a generic application, but did not see a means to do that.

On August 3, 2017, Mr. Post applied for a full-time janitorial position at Marsden Building Maintenance. Mr. Post found the opening on Monster.com and applied for the opening through Monster.com. Mr. Post did not contact Ms. Bernadino regarding the opening he applied for through Monster.com.

On August 9, Ms. Bernadino contacted Mr. Post and offered him a part-time janitorial/cleaning position. Mr. Post declined the position because he was interested in full-time work.

Mr. Post's next medical appointment is set for September 22, 2017. Mr. Post hopes that the doctor will at that point amend the 20-pound lifting restriction so that Mr. Post can lift greater weight.

Mr. Post established a claim for unemployment insurance benefits that was effective June 25, 2017. Workforce Development set Mr. Post's weekly benefit amount at $253.00. Mr. Post has received $1,771.00 in benefits for the seven-week period of June 25, 2017 through August 12, 2017. Marsden Building Maintenance is not a base period employer for purposes of the claim.

That employer's account has not been charged for benefits and will not be charged for benefits in connection the claim year that began for Mr. Post on June 25, 2017 and that will end on or about June 23, 2018.

On July 12, 2017, a Workforce Development claims deputy held a fact-finding interview to address Mr. Post's separation from the employment. Mr. Post participated and provided a candid, truthful statement consistent with his testimony at the appeal hearing. Margarita Bernadino represented the employer and provided an oral statement to the claims deputy. The claims deputy's notes reflect that Ms. Bernadino made the following statement:

> He is technically considered a voluntary quit due to not being eligible for FMLA. I am not sure if he requested a leave of absence after the FMLA was denied. I have the last of work as 4/21/17. He had an accident and was not able to work. I have that the benefits department was working with him in order to get doctor's notes and the time frame he worked was not eligible for FMLA. Benefits sent him a letter stating that he was not eligible to work and he could reapply when full released to work. I spoke with him this week and told him to go ahead and reapply. I believe there were not any restrictions; he would not be able to perform any of the work we do. He was completely not able to work.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory–taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
> d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

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.

Iowa Code section 96.5(1)d provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 a separation initiated by Mr. Post on April 24, 2017 due to his non-work related injury. The separation was upon the advice of a licensed and practicing physician. As of the August 10, 2017, Mr. Post had not recovered his injury within the meaning of the law, because he was not able to perform all of the work duties he had performed prior to the injury and separation from the employment. Because Mr. Post has not recovered from his injury within the meaning of the law, his separation cannot be deemed for good cause attributable to the employer. Accordingly, Mr. Post is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Post must meet all other eligibility requirements. Mr. Post may also requalify for benefits by recovering to the point where he is released by a doctor to perform all of his previous duties, returning to the employer with medical proof that he has been released to

perform his previous duties and to offer to return to the employment. If at that point, the employer does not have available full-time work, then Mr. Post's separation may be deemed for good cause attributable to the employer and Mr. Post would be eligible for benefits, provided he meets all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b). This employer is not a base period employer. Accordingly, this employer's account has not been charged for benefits and will not be charged for benefits in connection with the current claim year.

Mr. Post received $1,771.00 in benefits for the seven-week period of June 25, 2017 through August 12, 2017. This decision disqualifies him for those benefits. Accordingly, the benefits Mr. Post received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Mr. Post is required to repay the overpaid benefits. The employer's account is relieved of liability for benefits.

DECISION:

The July 13, 2017, reference 01, decision is reversed. The claimant voluntarily quit the employment without good cause attributable to the employer effective April 24, 2017 due to a non-work related medical condition. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant may also requalify for benefits by recovering to the point where he is released by a doctor to perform all of his previous duties, returning to the employer with medical proof that he has been released to perform his previous duties and to offer to return to the employment. If at that point, the employer does not have available full-time work, then the claimant's separation may be deemed for good cause attributable to the employer and the claimant would be eligible for benefits, provided he meets all other eligibility requirements. The claimant is overpaid $1,771.00 in benefits for the seven-week period of June 25, 2017 through August 12, 2017. The claimant is required to repay the overpaid benefits. The employer's account is relieved of liability for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs