IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

FARRIS A BROTHERTON
Claimant

AMSTED INDUSTRIES
Employer

APPEAL NO: 06A-UI-08788-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/06/06 R: 12
Claimant: Respondent (2)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Amsted Industries filed a timely appeal from the August 25, 2006, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on September 28, 2006. Claimant Farris Brotherton participated. Ellen Hackbarth, Manager Human Resources & Safety represented the employer. The administrative law judge took official notice of the Agency's administrative file, marked Department Exhibit D-1 for identification purposes, and received Employer's Exhibits One through Six into the record.

The claims representative issued two identical decisions in this matter on August 25, 2006. The reference 01 decision involved Griffin Wheel Company, employer number 343705. The reference 03 decision involved Amsted Industries, employer number 003180. The claims representative was aware at the time of the fact-finding interview that Griffin Wheel was a subsidiary of Amsted Industries. The administrative file indicates that Iowa Workforce Development should deem the employer's appeal an appeal of both decisions. Accordingly, the administrative law judge has entered an identical decision in new appeal number 06A-UI-09561-JTT to address the employer's appeal of the reference 01 decision.

ISSUE:

Whether the claimant voluntarily separated from the employment or was discharged by the employer. The administrative law judge concludes the claimant voluntarily separated from the employment.

Whether the claimant's voluntary separation was for good cause attributable to the employer. The administrative law judge concludes it was not.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Farris Brotherton commenced employment with Griffin Wheel Company on June 27, 1978. Griffin Wheel Company is a subsidiary of Amsted Industries, Inc. Mr. Brotherton was a full-time utility melting worker when he commenced a medical leave of absence on February 16, 2006.

In January 2006, Mr. Brotherton and his wife purchased a marina/concession business and nearby residence in Peel, Arkansas. On February 3, Mr. Brotherton spoke with Michael Sinclair, Works Manager at Griffin Wheel Company, and requested a six-month leave of absence so that he could get his new Arkansas marina/concession business up and running. On the same day, Mr. Brotherton submitted to Griffin Wheel Company a written request for a leave of absence for the period of March 1, 2006 through September 1, 2006. The peak marina season runs from June through August. On February 5, Mr. Brotherton submitted a note to Mr. Sinclair, requesting that Mr. Sinclair take no further action on the leave request until further word from Mr. Brotherton.

In the middle of February, Mr. Brotherton had a business meeting to discuss financing for improvements to the marina/concession and residence. At that time, Mr. Brotherton made the decision to move forward with improvements to the marina/concession business.

On February 15, Mr. Brotherton met with Ellen Hackbarth, Manager Human Resources & Safety, and requested an application for "Accident & Sickness Insurance." On the same day, Mr. Brotherton met for the first time with Dr. Brigitte Cormier, D.O., of the Kahoka Medical Clinic in Kahoka, Missouri. Dr. Cormier is a general practitioner. Dr. Cormier prescribed a sleep aid, Ambien, and an antidepressant, Cymbalta. At the hearing, Mr. Brotherton indicated his dose of Cymbalta was 400 milligrams, an amount that would be several times the normal dosage. Mr. Brotherton took the application for "Accident & Sickness Insurance" to his appointment with Dr. Cormier. Dr. Cormier and Mr. Brotherton completed the application form. Dr. Cormier indicated that Mr. Brotherton was suffering from insomnia, stress, anxiety and depression. Dr. Cormier indicated that she had seen Mr. Brotherton as a new patient on February 15, that his diagnosis amounted to a disability, that the disability began on February 15, and that the disability necessitated a six month medical leave of absence to end August 16, 2006. Dr. Cormier did not refer Mr. Brotherton for further evaluation or counseling. Mr. Brotherton's mental health had been the same during the prior months, during which time Mr. Brotherton was able to report to work on a regular basis and able to perform his regular duties.

On February 16, Mr. Brotherton's wife delivered to Griffin Wheel Company the completed application for "Accident & Sickness Insurance" and Ms. Hackbarth approved Mr. Brotherton's application for "Accident & Sickness Insurance" benefits. Based on this approval for benefits, Mr. Brotherton commenced an approved leave of absence and commenced receiving weekly disability benefits of $310.00. The employer is self-insured and the disability benefits were disbursed by the employer's payroll department. Though Mr. Brotherton's benefits were to be direct deposited to his bank account, the employer mailed weekly check stubs to Mr. Brotherton's residence in Warsaw, Illinois. In connection with the application for "Accident & Sickness Insurance" benefits, Mr. Brotherton executed a release that allowed Dr. Cormier to share information with the employer regarding his medical evaluation and treatment.

On June 12, the United States Postal Service returned a check stub to the employer as undeliverable. The Postal Service indicated a new address of 159 Lake Front Point in Peel Arkansas. The employer investigated and learned that Mr. Brotherton has sold his home in Illinois. On June 16, the employer hired a professional investigator to investigate Mr. Brotherton's conduct since commencing the leave of absence. On June 20, the investigator learned from the Post Master for Peel, Arkansas that Mr. Brotherton had been receiving mail at the Arkansas address since January 2006. The investigator contacted government officials and confirmed that Mr. Brotherton and his wife had indeed purchased the marina/concession on January 25, 2006 and had signed a five to ten-year lease with the Army Corp of Engineers. The investigator interviewed the owner of a nearby business, who indicated that

Mr. and Mrs. Brotherton had been working hard to get the marina/concession up and running since taking over the business early in the year. The investigator went to the concession and spoke with Mrs. Brotherton without disclosing his purpose. Mrs. Brotherton indicated that the business had needed repairs and that she and her husband had been hard at work since the purchase. The investigator interviewed an official with the Army Corp of Engineers, who indicated that the Brothertons had been working very hard to get the business in shape and that repairs had included work on a boat dock roof and new sheathing on the residence. The investigator made a verbal report to Mr. Hackbarth and followed this with a written report.

On June 20, Ms. Hackbarth contacted Dr. Cormier's office and spoke with Dr. Cormier's nurse. The nurse reported that Dr. Cormier had not seen Mr. Brotherton since the first appointment on February 15. Dr. Cormier's nurse further indicated that Mr. Brotherton had not appeared for an appointment in March and that no subsequent appointments had been scheduled.

On June 29, Ms. Hackbarth drafted and mailed a letter to Mr. Brotherton. Ms. Hackbarth referenced the information received from Dr. Cormier's nurse. Ms. Hackbarth advised Mr. Brotherton that the employer was terminating his Accident & Sickness benefits. Ms. Hackbarth directed Mr. Brotherton to return to work within three days of receipt of the letter or to provide medical records substantiating the medical need for the leave of absence. Ms. Hackbarth further advised Mr. Brotherton that failure to take the required steps would result in termination of his employment. The employer sent the letter by certified mail and Mr. Brotherton did receive it.

On July 6, the employer received a fax from Dr. Cormier. The fax consisted of a handwritten note Dr. Cormier had drafted on four pages of a prescription pad. Dr. Cormier indicated that Mr. Brotherton was seen on July 6 for continued anxiety and depression and had last been seen on March 27, 2006. Dr. Cormier indicated that at the time of the March appointment, Mr. Brotherton had been planning a trip to visit relatives. Dr. Cormier indicated that Mr. Brotherton was not seen at the end of April because he had gone on his trip. Dr. Cormier indicated that Mr. Brotherton had since been living in southern Missouri with his wife, who had suffered an unexpected illness and was scheduled for surgery on July 13, 2006. Dr. Cormier indicated that Mr. Brotherton had been taking his medication and had been improving.

On July 6, Ms. Hackbarth drafted and faxed a letter to Dr. Cormier, in which she requested further information. Ms. Hackbarth asked what medication Mr. Brotherton was taking, whether Mr. Brotherton could return to work, what treatment was in place to prepare him for a return to work, and the date of the next appointment.

On July 7, Mr. Brotherton and a union representative met with Ms. Hackbarth. Ms. Hackbarth indicated that she was not going to take any further action until she heard back from Dr. Cormier. Mr. Brotherton continued to contact Ms. Hackbarth during July, but Ms. Hackbarth had not yet heard back from Dr. Cormier. Ms. Hackbarth did not receive Dr. Cormier's response until July 27. Dr. Cormier indicated she had received authorization from Mr. Brotherton to respond to the letter. Dr. Cormier provided no information regarding Mr. Brotherton's medications. Dr. Cormier indicated the next appointment was scheduled for August 11, at which time she and Mr. Brotherton would discuss a date for his return to work. Dr. Cormier indicated she could not discuss Mr. Brotherton's ability to work or the course of treatment because it would breach patient confidentiality. Dr. Cormier invited the employer to request a second opinion regarding Mr. Brotherton's mental health status.

On July 28, Ms. Hackbarth indicated that the employer was requesting a second opinion regarding Mr. Brotherton's need to be off work.

On July 26 and 27, the professional investigator had returned to Peel, Arkansas to conduct further surveillance of Mr. Brotherton. The investigator observed Mr. Brotherton actively assisting a boater with removing a boat from the water and loading it on a trailer. The investigator entered the concession store on both days and on each day observed Mr. Brotherton manning the counter. Mr. Brotherton's mother was at the business and spoke to the investigator about how hard Mr. Brotherton was working at operating the business, especially since Mrs. Brotherton's surgery. Mr. Brotherton spoke to the investigator about the remodeling work he had done on the interior of the concession store, the boat dock roof and the residence. The investigator made a verbal report to Ms. Hackbarth and followed with a written report.

On July 31, Ms. Hackbarth drafted and mailed a letter to Mr. Brotherton. Ms. Hackbarth indicated that the most recent update from Dr. Cormier had been inadequate. Ms. Hackbarth indicated that the employer was aware that Mr. Brotherton had been actively running the marina/concession since the January purchase. Ms. Hackbarth advised Mr. Brotherton that the employer was immediately terminating Mr. Brotherton's employment because he had abandoned the employment.

On August 7, Mr. Brotherton obtained a medical release from Dr. Cormier that indicated he was released to return to work without restrictions effective August 14, 2006.

Mr. Brotherton established a claim for benefits that was effective August 6, 2006 and has received benefits.

REASONING AND CONCLUSIONS OF LAW:

The first question for the administrative law judge is whether Mr. Brotherton quit or was discharged from the employment. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). 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.

Based on the weight of the evidence, the administrative law judge concludes that Mr. Brotherton perpetrated a fraud on the employer to secure the medical leave of absence. The evidence indicates that Dr. Cormier either intentionally or unintentionally assisted with the fraud upon the employer. The evidence in the record indicates that Mr. Brotherton was at all times able to work. Mr. Brotherton demonstrated this ability during the months leading up to the request for the leave of absence and further demonstrated this ability throughout the leave of absence. Mr. Brotherton may very well have been suffering from mild depression and/or anxiety before, during or after February, but this did not prevent him from being able to work. The proximity in time of Mr. Brotherton's aborted request for a leave to get his business up and running and his request for a medical leave was not merely coincidental and should have prompted the employer to more closely scrutinize the request for the medical leave. However, Mr. Brotherton was a long-term employee and the employer's decision at the time to give him the benefit of the doubt was reasonable. Because the evidence indicates that Mr. Brotherton obtained the medical leave of absence under false pretenses, it would be inappropriate for the administrative

law judge to analyze the leave as if it had been entered into in good faith. Likewise, it would be inappropriate for the administrative law judge to analyze this matter as a separation based on a bona fide medical condition pursuant to Iowa Code section 96.5(1)(d).

Based on the evidence in the record, the administrative law judge concludes that Mr. Brotherton initiated a separation from the employment that was effective February 16, 2006. The separation was based on Mr. Brotherton's desire to develop the business he had recently purchased, and was therefore not for good cause attributable to the employer.

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.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Brotherton voluntarily quit the employment, effective February 16, 2006, without good cause attributable to the employer. Accordingly, Mr. Brotherton is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Brotherton.

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.
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> 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.

Because Mr. Brotherton has received benefits for which he has been deemed ineligible, the benefits he has received constitute an overpayment he must repay to Iowa Workforce Development. Mr. Brotherton is overpaid $2,082.00.

DECISION:

The Agency representatives August 25, 2006, reference 03, decision is reversed. The claimant voluntarily quit the employment without good cause attributable to the employer. 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, provided he is otherwise eligible. The employer's account shall not be charged. The claimant is overpaid $2,082.00.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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