**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **BENJAMIN T COSGROVE**<br>Claimant<br><br>**OLD CAPITOL BUILDERS LLC**<br>Employer | **APPEAL 17A-UI-05433-JP-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 04/30/17**<br>**Claimant: Appellant (5)** |

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.4(3) – Ability to and Availability for Work

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the May 15, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 7, 2017. Claimant participated. Employer participated through Kathy Tholen.

**ISSUE:**

Did claimant voluntarily quit the employment with good cause attributable to employer?

Is the claimant able to work and available for work?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a carpenter apprentice from October 3, 2016, and was separated from employment on May 1, 2017, when he quit.

The weekend before October 11, 2016, claimant noticed that his hand was not feeling right and he had shooting pain and then his hand went numb. Claimant worked on October 10, 2016, but he did not say anything to the employer. The night of October 10, 2016, claimant's hand was still hurting and it affected his sleep. Clamant informed the employer about his hand on October 11, 2016, but he worked through October 14, 2016. On October 16, 2016, claimant went to a doctor due to the sharp pain. The doctor told claimant that it could be a carpal tunnel issue and work could be exacerbating the injury. The doctor placed claimant on work restrictions for the following week and claimant did not work. Claimant was informed that he was to contact the doctor if the pain did not subside. On October 24, 2016, claimant attempted to contact his boss but was not able to get a hold of him. Claimant then contacted Ms. Tholen and informed her that his injury was still present. On November 2, 2016, a doctor continued claimant's work restrictions (wear a hand splint; no gripping, pulling or lifting with his right hand) until further notice. On November 3, 2016, Ms. Tholen received a physician's report that claimant was on restrictive duty until further notice. Around November 4, 2016, claimant spoke

to Ms. Tholen. Ms. Tholen spoke to claimant about a light duty position involving going to the job site and performing cleanup. Claimant told Ms. Tholen that he did not think he could do that. The employer did not have any other light duty positions. Ms. Tholen told claimant to keep her posted. Claimant told the employer that his hand was not getting any better. The employer contacted the West Bend Insurance Company, which then worked with claimant regarding his doctor's appointment and injury. The West Bend Insurance Company handles the employer's work comp claims. Claimant did receive work comp benefits. The West Bend Insurance Company would update the employer about claimant's status after his doctor's visits.

On November 10, 2016, claimant had another doctor's appointment and claimant's work restrictions were not changed. On November 17, 2016, claimant was referred to a specialist and his work restrictions did not change. On December 1, 2016, claimant met with a specialist regarding his injury and his work restrictions did not change. On January 12, 2017, claimant's injury was reevaluated. Claimant still suffered from some numbness and shooting pain. The doctor determined that surgery was the best option and claimant's work restrictions did not change. Claimant had hand surgery on February 20, 2017 and he was still under work restrictions. Claimant last saw the specialist/surgeon on April 5, 2017, regarding his injury. The specialist modified claimant's work restrictions to allow lifting up to five pounds with his right hand. After April 5, 2017, claimant did not contact the employer and inquire about light duty.

On May 1, 2017, claimant was released to return to work with no restrictions, but he did not contact the employer. The employer did not hear from claimant after he was released to return to work with no restrictions. Claimant did not return to the employer to offer his services. The employer had work available for claimant on May 1, 2017 and after. As of May 1, 2017, claimant has been released to return to work with no work restrictions.

Prior to May 1, 2017, claimant tried to contact his direct supervisor (Duane) on November 14, 2016, December 5, 2016, and January 13, 2017, but he was unsuccessful in reaching Duane and he could not leave him a voicemail. Claimant did not try to contact Ms. Tholen. Claimant did not try to contact Ms. Tholen because he was frustrated by not being able to get a hold of Duane. November 3 or 4, 2016, was the last time Ms. Tholen heard from claimant. Duane is hard to get a hold of by phone. During the hiring process, Ms. Tholen told claimant that Duane was hard to get a hold of and he should communicate with the office.

Claimant is able and available for work as of May 1, 2017. Claimant does have some permanent damage. Claimant currently has no work restrictions. The specialist told claimant she would not recommend the type of work he had been doing. Claimant has been making a minimum of two job contacts per week.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant is separated from the employment without good cause attributable to employer. Benefits are denied.

Iowa Code section 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.

Iowa Admin. Code r. 871-24.25(35) provides:

**Voluntary quit without good cause.** 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

**(35)** The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:

*a.* Obtain the advice of a licensed and practicing physician;

*b.* Obtain certification of release for work from a licensed and practicing physician;

*c.* Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or

*d.* Fully recover so that the claimant could perform all of the duties of the job.

Iowa Admin. Code r. 871-24.26(6)*b* provides:

**Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits.** The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(6) Separation because of illness, injury, or pregnancy.

*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.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). In 1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement added to rule 871-24.26(6)(b), the provision addressing work-related health problems. *Hy-Vee, Inc. v. Emp't Appeal Bd.,* 710 N.W.2d 1 (Iowa 2005). 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 court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that:

> "Insofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

Subsection d of Iowa Code § 96.5(1) provides an exception where:

> 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.

The statute specifically requires that the employee has recovered from the illness or injury, and this recovery has been certified by a physician. The exception in section 96.5(1)(d) only applies when an employee is *fully* recovered and the employer has not held open the employee's position. *White*, 487 N.W.2d at 346; *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa Ct. App. 1985); see also *Geiken v. Lutheran Home for the Aged Ass'n.*, 468 N.W.2d 223, 226 (Iowa 1991) (noting the full recovery standard of section 96.5(1)(d)).

Although claimant testified that the specialist told him she would not recommend the type of work he has been doing, claimant did not present evidence in writing to employer that a physician suggested leaving the employment and he did not have any work restrictions that were in force as of May 1, 2017. Inasmuch as the medical condition was work-related and the treating physician has released the claimant to return to work with no restrictions effective May 1, 2017, he has established his ability to work. Even though claimant was released to return to work on May 1, 2017 and the employer had work available for him, he failed to return to the employer to offer his services. An employee's failure to return to the employer and offer services upon recovery from an injury "statutorily constitutes a voluntary quit and disqualifies an

individual from unemployment insurance benefits." *Brockway v. Emp't Appeal Bd.*, 469 N.W.2d 256 (Iowa Ct. App. 1991). Benefits are denied.

**DECISION:**

The May 15, 2017, (reference 01) unemployment insurance decision is modified with no change in effect. Claimant is separated from the employment without good cause attributable to employer. Benefits are withheld until such time as claimant works in and has been paid wages equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs