IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

PAMELA S MCKENZIE
Claimant

CRST FLATBED REGIONAL INC
Employer

APPEAL NO. 17A-UI-13208-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/26/17
Claimant: Appellant (2)

Iowa Administrative Code rule 87-24.1(113)(a) – Layoff
Iowa Administrative Code rule 871-24.22(2)(j) – Failure to Employ at End of Leave of Absence

STATEMENT OF THE CASE:

Pamela McKenzie filed a timely appeal from the December 11, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. McKenzie had voluntarily quit on August 8, 2017 without good cause attributable to the employer. After due notice was issued, a hearing was held on January 8, 2018. Ms. McKenzie participated. Stephanie Winters represented the employer. Exhibits A through H were received into evidence.

ISSUE:

Whether Ms. McKenzie separated from the employment for a reason that disqualifies her for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Pamela McKenzie was employed by CRST Flatbed Regional, Inc. as a full-time, over-the-road, dedicated-route, commercial truck driver during two distinct periods. The most recent period of employment began in July 2015. Ms. McKenzie last performed work for the employer on August 9, 2017. From the start of the employment until that last day of work, Ms. McKenzie performed her work as part of a two-driver team. Ms. McKenzie's husband, David McKenzie, was the other member of the team. Fleet Manager David Campbell was their immediate supervisor. The couple would run its dedicated route three times per week. The couple would start its work week on Monday evening by picking up UPS freight in Eagan, Minnesota. The couple would deliver that freight to Louisville, Kentucky and pick up a new load of freight before heading back to Eagan, Minnesota. The couple would repeat this circuit two more times during the week before finishing the work week back in Minnesota. The couple would then have Sunday and most of Monday off. The couple resided in Winona, Minnesota.

On Wednesday, August 9, 2017, Ms. McKenzie and her husband were working in Indiana when it became medically necessary for Mr. McKenzie to be transported by ambulance to a hospital emergency room to address an hours-long nose bleed. Ms. McKenzie made appropriate

contact with the CRST dispatch department before, during and after the trip to the emergency room. The employer arranged to have another driving team collect the freight so that Ms. and Mr. McKenzie could head home following the trip to the emergency room. While they were on their way back home, Fleet Manager David Campbell communicated in writing via the Qualcomm system that Mr. McKenzie would have to meet with his primary care physician and be released to return to work by that physician before he would be allowed to return to work. Mr. Campbell said nothing about Ms. McKenzie needing to report for work without Mr. McKenzie. Mr. Campbell subsequently communicated that Mr. McKenzie would have to undergo and pass a D.O.T. physical before he would be allowed to return to work. CRST facilitated a D.O.T. physical on Monday, August 14, 2017.

Over the course of a number of months in 2017, Ms. McKenzie underwent oral surgery to extract her teeth. On July 7, 2017, Ms. McKenzie notified Mr. Campbell that her next, and presumably last, oral surgery was set for Wednesday, August 16, 2017. Ms. McKenzie told Mr. Campbell that she would be placed under general anesthesia as part of the surgery. Ms. McKenzie told Mr. Campbell that a nurse had advised her that she would be able to return to work on Friday, August 18, 2017, so long as she was not taking pain medication as part of her recovery from the oral surgery. Mr. Campbell approved the request for time off so that Ms. McKenzie could undergo and recover from oral surgery. On Saturday, August 12, 2017, Ms. McKenzie sent an email message to Mr. Campbell to remind him of her need to be off work in connection with her oral surgery. Ms. McKenzie wrote, “Just a reminder that we are off part of this week for my oral surgery. Just wanted to remind you.”

Ms. McKenzie has suffered from bilateral knee pain for an extended period. Ms. McKenzie and her doctor have concluded that Ms. McKenzie will eventually need to undergo bilateral knee replacement. In the meantime, Ms. McKenzie’s knee pain necessitates twice-yearly cortisone injections. Receiving the cortisone shots would result in an increase of Ms. McKenzie’s knee pain and necessitate time off work while Ms. McKenzie recovered from the shots. While Ms. McKenzie was off work in connection with Mr. McKenzie’s health scare and the employer’s requirement that he undergo and pass a D.O.T. physical, Ms. McKenzie assumed, in light of her August 16, 2017 oral surgery, that the employer would keep her and Mr. McKenzie off work until after she recovered from the oral surgery. Ms. McKenzie decided to take the opportunity to schedule cortisone shots in knees while she was off work. Ms. McKenzie did not notify the employer in advance that she would be undergoing the cortisone shots on August 14 and did not request time off for that purpose. Ms. McKenzie received the cortisone shots in her knees at 8:00 a.m. on Monday, August 14, 2017. At that time, Ms. McKenzie obtained a note from her health care provider that included a diagnosis of knee osteoarthritis and that indicated Ms. McKenzie was unable to work on August 14, 2017 through August 16, 2017.

On August 14, 2017, Mr. Campbell contacted Mr. and Ms. McKenzie to give notice that the employer expected them to return to work on the evening of August 14, 2017, following Mr. McKenzie’s D.O.T. physical. During that correspondence, Ms. McKenzie notified Mr. Campbell that she had undergone cortisone injections in her knees on that day and, therefore, could not drive that evening. Mr. Campbell reluctantly approved Ms. McKenzie’s need to be off work in connection with her cortisone injections.

Ms. McKenzie next had contact with Mr. Campbell via email on the afternoon of Friday, August 18, 2017. That contact followed contact between Mr. Campbell and Mr. McKenzie that same day. Mr. Campbell told Mr. McKenzie that Ms. McKenzie was not allowed to return to work at that time, but that Mr. Campbell had found another driving partner for Mr. McKenzie and expected Mr. McKenzie to report for work for that weekend. Ms. McKenzie wrote:

> David called me this morning and said that you would be emailing me about my oral surgery and the meds I was given. Since I haven't heard from you today, thought I'd write before the end of your day. I have no idea what med they used to put me under: whatever doctors use to put people under. I was given hydrocodone to take home. David also said that I would need another physical before returning. I guess I'll figure I'm not returning on Monday until I hear otherwise.

Mr. Campbell forwarded Ms. McKenzie's email message to the CRST medical department. On the morning of August 21, 2017, the medical department responded by asking, "When did she last take the pain medication?" and added, "She doesn't need to take a new physical she needs to update her medical card with the DMV." At 11:01 a.m. Mr. Campbell forwarded the medical department's emailed response to Ms. McKenzie. Mr. Campbell added: "If you want the week off, that's fine. If you want to run, see below. You will need to update your medcard with DMV and CR Med will make a determination based on the last time you took your pain meds." At 1:50 p.m. the same day, Ms. McKenzie sent an email response in which she asked, "What do you mean they'll make a determination?" Mr. Campbell did not respond to Ms. McKenzie's email. Ms. McKenzie updated her D.O.T. medical card. Mr. McKenzie continued to work with the other co-driver so that the employer could fulfill its contract with UPS. On August 25, 2017, when the employer had still not allowed Ms. McKenzie to return to the employment, Mr. McKenzie notified the employer that *he* was quitting the employment. Mr. McKenzie returned the employer's truck to CRST on August 26, 2017.

REASONING AND CONCLUSIONS OF LAW:

Iowa Administrative Code rule 87-24.1(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 means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See Iowa Administrative Code rule 871-24.25.

Iowa Admin. Code r. 871-24.22(2)j(1), (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.

(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.

j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

The administrative law judge notes that Ms. McKenzie was the only hearing witness who testified from personal knowledge. The employer's sole witness for the hearing lacked personal knowledge and did not have any contact with Ms. McKenzie during the employment. The employer had the ability to present testimony through Mr. Campbell, but elected not to present such testimony. When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence in the record establishes that Ms. McKenzie's separation from the employment occurred in the context of a short-term approved leave of absence. As of August 14, 2017 and until the oral surgery set for August 16, 2017, Ms. McKenzie was off work with approval so that she could recover from medically necessary cortisone injections in her knees. On August 16, 2017, the basis for Ms. McKenzie's approved absence became her need to undergo and recover from surgery. At the time Ms. McKenzie made contact with Mr. Campbell on August 18, 2017, she reasonably concluded that she would continue on an approved leave of absence until August 21, 2017. By that time, Ms. McKenzie had recovered from her oral surgery and was ready to return to work. On August 21, 2017, Mr. Campbell notified Ms. McKenzie that she would need to update her D.O.T medical card and that the CRST medical department would thereafter make a determination of whether and when she could return to work. Ms. McKenzie updated the D.O.T. medical card, but thereafter was not allowed to return to the employment. Pursuant to the above-referenced administrative rules, the administrative law judge concludes that the employer failed to employ Ms. McKenzie at the end of an approved leave of absence and thereby laid off Ms. McKenzie from the employment. Because the separation involved neither a voluntary quit nor a discharge for misconduct, the

separation does not disqualify Ms. McKenzie for unemployment insurance benefits. Contrast Iowa Code section 96.5(1) (regarding voluntary quit) and Iowa Code section 96.5(2)(a) (regarding discharge for misconduct). Ms. McKenzie is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The December 11, 2017, reference 01, decision is reversed. The employer laid off the claimant effective August 21, 2017 by failing to reemploy the claimant at the end of an approved medical leave of absence. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs