IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ANNA B CORTES Claimant **SWIFT PORK COMPANY** Employer	**APPEAL 18A-UI-02559-NM** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/21/18** **Claimant: Appellant (1)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 22, 2018, (reference 01) unemployment insurance decision that denied benefits based on her voluntary quit. The parties were properly notified of the hearing. An in-person hearing was held on March 20, 2018 in Des Moines, Iowa. The claimant participated with the assistance of Spanish language interpreter Dan Dular and was represented by attorney Phil Miller. The employer participated through Human Resource Director Nicholas Aguirre. Claimant's Exhibit A through H and employer's Exhibits 1 and 2 were received into evidence.

ISSUE:

Is the claimant's temporary separation from the employment with good cause attributable to the employer or for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a general laborer, most recently in the casing department, from December 8, 2003. The last day claimant worked was January 23, 2018.

On January 23, 2018, claimant experienced some pain in her right hand while working. Claimant had previously been diagnosed with carpel tunnel in her right hand and there is an ongoing dispute between her and the employer as to whether this condition is work-related. (Exhibit E). Claimant provided documentation from her medical provider, Dr. Ronald Bergman, dated November 6, 2017, stating it is his medical opinion the condition was caused by claimant's work. (Exhibit G). Claimant was aware it was the employer's policy that all work-related injuries or medical issues be reported to the employer right away, so when her hand began hurting, she went to see the nurse. Upon reporting her symptoms to the employer's nurse, claimant spoke with the employer's worker's compensation administrator, Toni Daters. Daters provided claimant with a document titled, "Physician's/Health Care Provider's Statement Concerning Non-Work-Related Injury or Condition." (Exhibit C). The document goes on to state:

> It has come to our attention the above-named employee, whose regular job is checked above, has a non-work-related injury or condition described as right hand carpel tunnel/locking clarification on personal issue. Continues to have pain. Please advise whether this injury or condition in any way limits, restricts or prevents _____ from safely performing the job described….

The next section of the document is headed, "TO BE FILLED OUT BY PHYSICIAN," and provides three boxes indicating whether the claimant is not able to perform her job, is able to return without restrictions, or is able to return with restrictions. At the time this document was given to claimant, there was an ongoing dispute as to whether claimant's carpel tunnel was caused by her work. Claimant took the document and left work. Claimant has not returned to work since that day, but continues to remain employed by this employer.

Claimant testified since January 23, 2018, she has seen her doctor twice and her doctor has indicated there are no restrictions on her ability to work. Claimant did not provide documentation of these appointments or her doctor's opinions regarding her ability to work without restrictions. According to claimant her doctor refused to sign the document marked as Exhibit C because it was his medical opinion that the injury was work-related and he was not comfortable signing documentation indicating otherwise. Claimant has not provided the employer with any alternative documentation certifying that she is able to return to work with or without restriction. Rather, claimant has not returned to work because she could not get the specific document provided by the employer signed. Claimant testified she was not aware that the employer would accept any documentation other than the form marked as Exhibit C.

The employer's representative, Nicholas Aguirre, testified claimant would be allowed to return to work upon submitting any documentation from her doctor releasing her to return without restriction, or outlining restrictions for the reasonable accommodation process. On February 8, 2018, another human resource representative, Stacy Santillian, spoke with the claimant. According to an email sent by Santillian on February 8, 2018, claimant indicated she was waiting on an appointment with a specialist that had been set up by her attorney and that she had not previously seen the doctor upon advice of her attorney. (Exhibit 1). In the email Santillian states claimant told her the injury was work related and Santillian explained she was not familiar with the details of the worker's compensation case, but was calling to check on her status since they had not received any paperwork from her. The email goes on to state that Santillian explained the employer just wanted to make sure claimant was working safely, so they needed to know if there were any restrictions on her work. The email closes by Santillian stating she explained to claimant that she is currently accumulating attendance points, as no doctor's note has been provided and instructed claimant to keep them updated. Santillian was not present for the hearing, as she is located in an office outside the State of Iowa. The last time claimant testified she spoke with the employer was March 2, 2018, when she spoke with her union representative and Daters, however, the employer was not provided with any medical documentation regarding claimant's condition or ability to work at that time and therefore claimant was not permitted to return to work.

REASONING AND CONCLUSIONS OF LAW:

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

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.

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.

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)). In the Gilmore case he was not fully recovered from his injury and was unable to show that he fell within the exception of section 96.5(1)(d). Therefore, because his injury was not connected to his employment and he had not fully recovered, he was considered to have voluntarily quit without good cause attributable to the employer and was not entitled to unemployment benefits. See *White*, 487 N.W.2d at 345; *Shontz*, 248 N.W.2d at 91. 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). 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).

Here, claimant had presented evidence, Exhibit G, that, for the purposes of unemployment insurance benefits only, the injury was work-related. The claimant also testified, however, that her doctor has released her to return to work without restriction, but that she has not yet returned to work, nor has she provided the employer with any documentation showing she has been released to return to work without restriction. Claimant testified she has not returned this paperwork because she was instructed specifically to have the document marked at Exhibit C filled out. Claimant further testified her doctor would not sign the form because he did not

believe the injury to be work-related. While this may be true, no alternative documentation had been presented to the employer as of the date of the hearing, nor was any evidence submitting showing any attempts on behalf of the claimant to obtain such documentation. This decision was made despite Santillian's conversation with claimant on February 8, 2018, where she explained to the claimant the employer just needed some documentation showing it was safe for her to return to work.

The employer has a duty to ensure the workplace is safe for its employees and its request that claimant produce medical documentation clearing her to return to work is not unreasonable under these circumstances. Though the employer's choice in documentation it provided to claimant for her doctor to fill out may show questionable motives, given the pending litigation, the claimant's refusal to or neglect in providing any medical documentation is not reasonable. It is noted that, while the document identified as Exhibit C clearly emphasizes the employer's belief that the injury was not work-related, nowhere does it require the claimant or her doctor to certify such. Accordingly, claimant's temporary separation from employment is not with good cause attributable to the employer. Benefits are withheld until such time as the claimant provides a medical release to return to some type of work of which she is capable of performing given any medical restrictions, offers services to the employer, and it has no comparable, suitable work available.

DECISION:

The February 22, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant is temporarily separated from the employment without good cause attributable to employer. Benefits are withheld until such time as she works in and has been paid wages equal to ten times her weekly benefit amount, provided she is otherwise eligible or until such time as she obtains a release to return to regular duties with or without restriction, offers services to the employer, and it has no comparable, suitable work available.

_____
Nicole Merrill
Administrative Law Judge

_____
Decision Dated and Mailed

nm/rvs