IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARGARET K WIRTH
Claimant

KEIM T S INC
Employer

APPEAL NO. 11A-UI-09054-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/18/10
Claimant: Appellant (1)

Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Margaret Wirth filed a timely appeal from the July 6, 2011, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on August 8, 2011. The hearing in this matter was consolidated with Appeal Number 11A-UI-09339-JTT, concerning claimant Michael Wirth. Attorney Benjamin Humphrey represented the claimants and presented testimony through Michael Wirth and Margaret Wirth. Stan Keim, owner and Chief Executive Officer, represented the employer and presented additional testimony through Randy Hoffman, Operations Manager, and Peggy Moore, Safety Director.

ISSUE:

Whether Mrs. Wirth's voluntary quit was for good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is an over-the-road trucking firm. Margaret Wirth was employed by Keim T S, Inc., as a full-time over-the-road flat-bed truck driver from 2006 until June 10, 2011, when she voluntarily quit the employment. Mrs. Wirth worked with her spouse, Michael Wirth, as a driving team. Both held a commercial driver's license and were qualified to operate semi tractor-trailer rigs.

On April 8, 2011, Mr. Wirth injured his right shoulder at work while pulling on a pry bar. Mr. Wirth reported the injury to the employer and the employer treated it as a worker's compensation matter. On April 19, Mr. Wirth saw a doctor chosen by the employer or its worker's compensation carrier. That doctor diagnosed tendonitis in Mr. Wirth's *left* shoulder and returned him to regular duty. On May 6, Mr. Wirth saw a different doctor at the same facility. That doctor was also chosen by the employer or the employer's insurance carrier. That doctor returned Mr. Wirth to work on "modified duty." The sole medical restriction imposed by the doctor was that Mr. Wirth not perform work that would require him to lift his right arm over his shoulder. Mr. Wirth had shared with the doctor that part of his work entailed throwing straps overhead to place or remove straps from loads of freight. Mr. Wirth's work duties also included tarping and untarping loads in addition to driving the rig.

After Mr. Wirth met with the doctor on May 6, he notified Peggy Moore, Safety Director, of the sole restriction the doctor had put in place. Mr. Wirth and Ms. Moore entered into an understanding that Margaret Wirth would compensate for Mr. Wirth's sole medical restriction by performing any necessary overhead throwing of straps. Mrs. Wirth was aware of this understanding between Mr. Wirth and Ms. Moore. Ms. Moore later learned from Mr. Wirth that he was continuing to perform the strapping duties, that he tried to throw the straps without raising his right arm above his shoulder, but when necessary, he would indeed throw the straps in a way that required him to raise his arm above his shoulder. Margaret Wirth had not been compensating for Mr. Wirth's medical condition and had acquiesced in Mr. Wirth working outside the medical restriction.

On June 10, Mr. Wirth appeared for a meeting with Stan Keim, owner and C.E.O. Ms. Moore and Mr. Keim had discussed the fact that Mr. Wirth's shoulder condition did not appear to be improving while Mr. Wirth continued to perform his regular duties. Mr. Keim had reviewed Mr. Wirth's medical status and had concluded that the husband and wife driving team should be reassigned to driving a 53 foot van until Mr. Wirth's condition improved. At the time of the June 10 meeting, all parties knew that Mr. Wirth had an appointment with the doctor set for June 17 and that his shoulder condition, along with his medical restriction, would be reconsidered at that time.

The employer paid the Wirths 37 cents per mile as a team to drive a tractor-trailer rig. The van assignment paid 34 cents per mile. Before Mr. Wirth's injury, the Wirth's had averaged 3000-5000 miles per week. After Mr. Wirth's injury, the Wirths average weekly miles driving had dropped below 3000. The Wirths believed that driving the van would result in a further reduction in pay. This belief was based in part on the three cent difference in the pay per mile. The Wirth's belief that driving the van would result in a further reduction in pay was also based on their belief that there was less freight available on the van assignment and that, therefore, there would be fewer miles for them to drive. However, a substantial portion of the employer's business involved hauling freight using vans instead of tractor-trailer rigs and the employer did not foresee any shortage of freight. The Wirths had on prior occasions been assigned to haul freight with a van. The most recent assignment had been two or three months earlier, when the Wirths had operated a van for over a week.

Mr. Wirth initially indicated a wiliness to accept reassignment to operating the van while he recovered from his injury. After Mr. Wirth's initial meeting with the employer on June 10, he and the employer brought Margaret Wirth into the discussion. The employer communicated to Mrs. Wirth the substance of the previous discussion and the employer's decision to have the Wirths operate the van until Mr. Wirth's condition improved. Mrs. Wirth was not interested in performing work outside the team driving arrangement with her husband and having her drive a truck by herself did not come up as a topic for discussion. After this second meeting, the Wirths returned to their assigned truck, ostensibly to wait for the employer to find a load for them to haul with the van. Just a short while later, the Wirths each notified the employer that they had decided to quit the employment because they felt they could find another position that would pay more.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mrs. Wirth's voluntary quit was for good cause attributable to the employer. It does not.

Iowa Code § 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.

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.

871 IAC 24.26(1) 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:
>
> (1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

"Change in the contract of hire" means a substantial change in the terms or conditions of employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986). Generally, a substantial reduction in hours or pay will give an employee good cause for quitting. See Dehmel v. Employment Appeal Board, 433 N.W.2d 700 (Iowa 1988). In analyzing such cases, the Iowa Courts look at the impact on the claimant, rather than the employer's motivation. Id. An employee acquiesces in a change in the conditions of employment if he or she does not resign in a timely manner. See Olson v. Employment Appeal Board, 460 N.W.2d 865 (Iowa Ct. App. 1990).

The weight of the evidence in the record establishes that Mr. and Mrs. Wirth each voluntarily quit the employment in response to a perceived change in the conditions of the employment. The change in question was a three-cent reduction in per mile pay for a short period, possibly no more than a week, so that Mr. Wirth and the employer could comply with the medical restriction and so that Mr. Wirth would have the best chance of quickly recovering from his injury. Reassigning the Wirths to operate a van involved a temporary change in assignment, but was not in fact a change in the conditions of the employment. The Wirths had previously performed the same van work for the employer and had done so as recently as two or three months prior. The reassignment was prompted by two things. The first was Mr. and Mrs. Wirth's failure to comply with the sole medical restriction. The second was the employer's desire to return Mr. Wirth to full health as quickly as possible. The weight of the evidence does not support the Wirths' assertion that they would necessarily end up making less money per week by driving the van. On the contrary, the evidence suggests that the Wirths would have been able to drive more miles per week if Mr. Wirth was not aggravating his shoulder by performing work he knew he was not supposed to be performing. The Wirths elected to

separate from the employment rather than provide the employer a reasonable opportunity to secure a load of freight for the van.

The weight of the evidence establishes that Mrs. Wirth voluntarily quit the employment without good cause attributable to the employer. Accordingly, Mrs. Wirth is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Mrs. Wirth.

DECISION:

The Agency representative's July 6, 2011, reference 03, decision is affirmed. The claimant voluntarily quit the employment without good cause attributable to the employer. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs