

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEAN L BISSEN
Claimant

APPEAL NO. 07A-UI-02881-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC.
Employer

**OC: 12/31/06 R: 01
Claimant: Respondent (5-R)**

871 IAC 24.1(113) – Other Separations

STATEMENT OF THE CASE:

Tyson Fresh Meats filed a timely appeal from the March 9, 2007, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on April 6, 2007. Claimant Dean Bissen participated. William Kunnecke, Human Resources Manager, represented the employer. The administrative law judge took official notice of the Agency's records concerning benefits disbursed to the claimant. The administrative law judge took official notice of the documents the parties had submitted with a fact-finding interview.

ISSUE:

Whether the claimant separated from the employment for a reason that makes him ineligible for unemployment insurance benefits.

Whether the claimant has been able to work and available for work since establishing his claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On March 17, 1994, Dean Bissen commenced full-time employment with Tyson Fresh Meats as a ramp helper/yards employee. Mr. Bissen's duties consisted of moving cattle from the yard area of the workplace to kill floor. On December 13, 2005, Mr. Bissen suffered an episode of vertigo and blacked out at home. When Mr. Bissen reported for work that day, he was directed to the company nurse. Mr. Bissen discussed his symptoms with Nurse Manager Deb Adams, who told Mr. Bissen that he would not be allowed to work given his health condition and would need to commence a medical leave. Mr. Bissen had previously been off work during the period of March to July 2005 due to similar symptoms.

Mr. Bissen saw his family doctor, who referred him to a heart specialist. Mr. Bissen saw the heart specialist on January 3, 2006. The heart specialist noted fluctuations in Mr. Bissen's blood pressure. The heart specialist imposed work restrictions. These restricted Mr. Bissen from "above ground" work or operating heavy equipment and imposed a requirement that Mr. Bissen behave and sit down as needed. Mr. Bissen provided the employer with appropriate

documentation of his medical condition. Mr. Bissen desired to return to work, but the employer deemed Mr. Bissen's condition to be non-work-related and refused to accommodate work restrictions. Mr. Bissen applied for and was approved for 12 weeks' leave under the Family Medical Leave Act (FMLA). Mr. Bissen was also deemed eligible for nine months' company leave. Mr. Bissen continued to desire to return the employment.

As Mr. Bissen's period of approved medical leave was coming to an end, the employer instructed its Human Resources Director to determine whether the employer could make reasonable accommodations so that Mr. Bissen could continue in the employment. On December 13, 2006, the employer contacted Mr. Bissen and requested that Mr. Bissen assist in clarifying whether his restrictions were temporary or permanent. On December 28, 2006, Nurse Manager Deb Adams requested clarification from Mr. Bissen's healthcare provider regard to whether the restrictions were temporary or permanent. The healthcare provider responded on January 3, 2007, and reported that the restrictions were permanent. The employer concluded that it could not accommodate Mr. Bissen's permanent medical restrictions.

On January 22, 2007, Human Resources Manager William Kunneke drafted a letter to Mr. Bissen indicating that the employer could not accommodate his permit restrictions and indicating that the employer was severing the employment relationship. On January 26, Mr. Kunneke met with Mr. Bissen to deliver and discuss letter dated January 22. Mr. Bissen continued to express an interest in returning to the employment.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113), provides as follows:

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 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.

The evidence in the record establishes that Mr. Bissen did not quit the employment. The evidence indicates that the separation from the employment falls within the "other separations" category insofar as Mr. Bissen's separation from the employment was based solely on his inability to meet the physical standards required. See 871 IAC 24.1(113)(d). A separation for this reason would not disqualify Mr. Bissen for unemployment insurance benefits. In the alternative, if the administrative law judge were to consider the separation a discharge, the evidence indicates that it would be a discharge for no disqualifying reason, and Mr. Bissen would be eligible for benefits, provided he was otherwise eligible. See Iowa Code section 96.5(2)(a) and 871 IAC 24.32(1)(a).

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a 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.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Mr. Bissen's ability to work and availability for work is a separate and distinct eligibility requirement. This issue was addressed in the reference 01 decision entered by a claims representative on February 6, 2007, which deemed Mr. Bissen able to work and available for work effective December 31, 2006. Mr. Bissen's testimony at the appeal hearing raises the question of whether Mr. Bissen is in fact able to work and available for work. Mr. Bissen indicated that he had been searching for farm work washing hog houses or moving grain, but that his attempts to obtain such employment have been thwarted by farmers', or insurers', concern that his medical condition represented an unacceptable risk. While the administrative law judge will not at this time disturb the prior decision about Mr. Bissen's ability to work or availability for work, the administrative law judge believes those issues require closer scrutiny by a claims representative. Accordingly, the administrative law judge remands this matter to a

claims representative for a determination of Mr. Bissen's ability to work and availability for work since entry of the February 6, 2007, reference 01 decision.

DECISION:

The claims representative's March 9, 2007, reference 03, decision is modified as follows. The claimant neither quit nor was discharged from the employment. The claimant's separation falls into the category of "other separations" and was due his inability to meet the physical requirements of the employment. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant. This matter is remanded to a claims representative for a determination of the claimant's ability to work and availability for work since entry of the February 6, 2007, reference 01, decision.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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