

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DOUGLAS K KUCERA
Claimant

APPEAL NO. 09A-UI-02010-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NAMASCO CORPORATION
Employer

**OC: 12/21/09 R: 04
Claimant: Respondent (5)**

Iowa Code Section 96.5(2)(a) – Discharge
Iowa Code Section 96.5(3)(a) – Refusal of Suitable Work
Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 5, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was commenced on March 13, 2009 and concluded on March 17, 2009. Claimant Douglas Kucera participated. Attorney Brendan Quann represented the employer and presented testimony through Dennis Heiderscheid, Operations Manager, and John O’Conner, Regional Manager. Exhibits 1 through 15 were received into evidence. The administrative law judge took official notice of the Agency’s administrative record of the benefits disbursed to the claimant.

ISSUES:

Whether Mr. Kucera separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

Whether Mr. Kucera was disqualified for benefits by virtue of a refusal of suitable work without good cause.

Whether Mr. Kucera has been able to work and available for work since he established he claim for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: All dealings between Mr. Kucera and the employer at issue in this case occurred in the context of an ongoing worker’s compensation dispute that only recently resulted in a formal settlement agreement. The settlement agreement included an illegal provision whereby the claimant agreed to waive his right to unemployment insurance benefits. See Exhibit Five, page 3, paragraph 3(c).

Douglas Kucera commenced his employment with Namasco Corporation on January 15, 1993. Mr. Kucera last performed work for the employer on March 19, 2008. Mr. Kucera has worked

for the employer as a full-time commercial truck driver except during periods of light duty following motor vehicle accidents. Mr. Kucera had performed full-time truck driving duties from August 2007 through March 19, 2008. During this time, Mr. Kucera's work hours included both day and night hours as the work required. During this time, Mr. Kucera was released to work with no medical restrictions. Mr. Kucera continued to suffer pain associated with the motor vehicle accidents. Mr. Kucera had six rib fractures that never fully healed and that created four "floating" ribs. This pain made it more difficult for Mr. Kucera to obtain restful sleep.

On or about March 19, 2008, Dennis Heiderscheit, Operations Manager, notified Mr. Kucera that the employer was sending him for an additional medical evaluation. The employer had decided upon the evaluation after Mr. Kucera had mentioned difficulty staying alert during an overnight driving route.

On March 20, 2008, Mr. Kucera was evaluated by Dr. Joseph Garrity, M.D., at Tri-State Occupational Health. See Exhibit 13. Dr. Garrity and Mr. Kucera discussed the sleep issues. Mr. Kucera was on a pain medication, hydrocodone. Dr. Garrity discussed with Mr. Kucera that hydrocodone can cause drowsiness. Dr. Garrity screened Mr. Kucera for other, non-pain-related sleep issues. Dr. Garrity concluded that Mr. Kucera did not suffer from a sleep disorder and did not need further evaluation or treatment for a sleep disorder. Dr. Garrity concluded that Mr. Kucera required further evaluation and treatment for the pain issues. Dr. Garrity removed Mr. Kucera from work until those were addressed. Dr. Garrity referred Mr. Kucera to a pain specialist, Dr. Tim Miller, at Finley Hospital in Dubuque. Dr. Garrity was in contact with the employer's worker's compensation carrier and provided appropriate information regarding the evaluation, the removal from work for further evaluation, and the referral to Dr. Miller. The worker's compensation carrier was in contact with employer to provide appropriate information.

Mr. Kucera had two appointments with Dr. Miller in April 2008. At the first appointment, Dr. Miller discontinued the hydrocodone and prescribed another pain medication, Lyrica, which resolved the drowsiness issues. On April 24, 2008, Dr. Miller released Mr. Miller to return to full duty without restrictions. See Exhibit 12. Dr. Miller did suggest that Mr. Kucera and/or the employer "consider no touch loads."

Despite Dr. Garrity's conclusion that Mr. Kucera did not suffer from a non-pain-related sleep disorder and Dr. Garrity's conclusion that Mr. Kucera did not need further evaluation for a sleep disorder, the employer refused to allow Mr. Kucera to return to his driving duties after the employer received the full release from Dr. Miller. See Exhibit 14. On May 12, 2008, John O'Conner, Regional Manager, notified Mr. Kucera by letter that the release from Dr. Miller, the pain specialist, "does not address the issue which you mentioned to us of your problems with sleep, both your inability to sleep during the irregular hours needed to meet our schedules, and also your feeling very sleepy while you are driving." Mr. O'Conner notified Mr. Kucera that the employer was evaluating Dr. Miller's suggestion that Mr. Kucera and/or the employer "consider no touch loads" and indicated the employer did not have such loads. Mr. O'Conner told Mr. Kucera, "You also need to provide us a medical release for these issues prior to our decision." Mr. Kucera contacted his family doctor for an additional release. The family doctor declined to provide a medical release because he had not taken Mr. Kucera off work. The doctors who had evaluated Mr. Kucera were selected by the employer. Dr. Garrity had ruled out non-pain-related sleep issues and had communicated this to the employer's worker's compensation carrier. Dr. Miller had released Mr. Kucera to full duty after addressing the pain and pain medication issues.

In the context of the employer's refusal to allow him to return to his driving duties, Mr. Kucera started his own business as an owner-operator truck driver on June 6, 2008. Mr. Kucera entered into a lease agreement with Koppes Trucking, whereby Koppes Trucking would provide Mr. Kucera with loads to haul and Mr. Kucera would accept only loads he obtained through Koppes Trucking. Koppes Trucking's primary customer is Wady's, which operates a steel rebar production plant in Maquoketa. The steel rebar Wady's manufactures is used for road construction. Wady's ceases delivery of steel rebar when road construction slows or ceases in inclement winter weather. Wady's ceased shipping rebar for the year on or about December 17, 2008. This loss of business through Wady's and Koppes Trucking prompted Mr. Kucera's application for unemployment insurance benefits. While Mr. Kucera had been working as an owner-operator he had been done so on a full-time or near full-time basis, was hauling to multiple Midwestern states, and was not available for other work. See Exhibits Four and Six.

Mr. Kucera established a claim for unemployment insurance benefits that was effective December 21, 2008. Mr. Kucera received benefits for the period of December 21, 2008 through February 7, 2009. The benefits were disbursed at a rate of \$375.00 per week until the final week, when Mr. Kucera reported \$100.00 income and \$368.00 in benefits were disbursed. The total benefit amount was \$2,618.00. Mr. Kucera discontinued his claim for benefits when Wady's recommenced rebar shipments and Koppes Trucking again had loads for him.

In August 2008, Namasco offered Mr. Kucera employment as a full-time janitor. Mr. Kucera had worked for Namasco as a janitor when he had been on light-duty status. During those times, Mr. Kucera has received the same wage he received as a driver, which was \$17.10 per hour. Mr. Kucera rejected the offer through the attorney who was handling his worker's compensation matter. Mr. Kucera had not established a claim for unemployment insurance benefits. The employer's attorney returned to the offer of the janitor position at the time he took Mr. Kucera's deposition on November 18, 2008 in connection with the worker's compensation dispute. Mr. Kucera still did not have a claim for unemployment insurance benefits. Finally, on January 6, 2009, the employer's attorney raised the offer of the janitor position as part of the worker's compensation settlement meeting that took place that day. Mr. Kucera rejected the offer in that context because he still desired to return to the employment as a truck driver. In February 2009, the parties settled the worker's compensation matter, which included an agreement that Mr. Kucera could return to the employment as a driver.

REASONING AND CONCLUSIONS OF LAW:

Any agreement by an individual to waive, release or commute the individual's rights to benefits or any other rights under this chapter shall be void. Iowa Code section 96.15(1). Accordingly, the provision of the settlement agreement whereby Mr. Kucera waived his rights to unemployment insurance benefits is an illegal provision and is void as a matter of law.

The administrative law judge will next address the March 20, 2008 separation from the employment.

Workforce Development rule 871 IAC 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.

The weight of the evidence indicates that the employer laid Mr. Kucera off effective March 20, 2008, when the employer placed Mr. Kucera on an involuntary leave. The March 20, 2008 separation would not disqualify Mr. Kucera for unemployment insurance benefits, since it neither involved a voluntary quit without good cause attributable to the employer nor a discharge for misconduct in connection with the employment. See Iowa Code section 96.5(1) and (2)(a).

The administrative law judge will next address whether Mr. Kucera was disqualified for benefits by virtue of a refusal of suitable work without good cause.

Iowa Code section 96.5-3-b provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

b. Notwithstanding any other provision of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(3) If as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

871 IAC 24.24(1)a provides:

(1) Bona fide offer of work.

a. In deciding whether or not a claimant failed to accept suitable work, or failed to apply for suitable work, it must first be established that a bona fide offer of work was made to the individual by personal contact or that a referral was offered to the claimant by personal contact to an actual job opening and a definite refusal was made by the individual. For purposes of a recall to work, a registered letter shall be deemed to be sufficient as a personal contact.

871 IAC 24.24(14)(a)(b) provides:

Failure to accept work and failure to apply for suitable work. Failure to accept work and failure to apply for suitable work shall be removed when the individual shall have worked in (except in back pay awards) and been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

(14) Employment offer from former employer.

a. The claimant shall be disqualified for a refusal of work with a former employer if the work offered is reasonably suitable and comparable and is within the purview of the usual occupation of the claimant. The provisions of Iowa Code section 96.5(3)"b" are controlling in the determination of suitability of work.

b. The employment offer shall not be considered suitable if the claimant had previously quit the former employer and the conditions which caused the claimant to quit are still in existence.

In determining what constitutes suitable work, the administrative law judge must consider, among other factors, whether the work offered is within the person's customary occupation. See 871 IAC 24.24(15)(f).

Finally, both the offer of work and the claimant's accompanying refusal must occur within the individual's benefit year, as defined in subrule 24.1(21), before the Iowa Code subsection 96.5(3) disqualification can be imposed. 871 IAC 24.24(8). In other words, the person has to have established a claim for unemployment insurance benefits and the claim must be active.

The weight of the evidence in the record establishes that the janitorial work the employer asked Mr. Kucera to consider in August 2008, November 2008, and January 2009 was not suitable work. The evidence indicates that the work was outside Mr. Kucera's usual occupation. The evidence indicates that Mr. Kucera possessed the necessary qualifications to continue in his customary field. The evidence indicates that Mr. Kucera had demonstrated the ability to perform his regular duties over the course of the employment and during the several months immediately preceded his involuntary separation from the employment in March 2008. Mr. Kucera had good cause for rejecting the janitorial position each time the employer raised it. The administrative law judge further notes that only the January 6, 2009 discussion regarding the janitorial work occurred at a time when Mr. Kucera had a claim for unemployment insurance benefits. Mr. Kucera's decision not to accept the janitorial position did not disqualify him for unemployment insurance benefits.

The administrative law judge will next address the question of whether Mr. Kucera has been able to work and available for work since he established his claim for unemployment insurance benefits.

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 and (2) provide:

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.

(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.

The evidence indicates that Mr. Kucera has had a full medical release and has been able to perform full-time work since he established his claim for benefits. The evidence indicates as well that Mr. Kucera has been available to return to his regular truck driving duties at Namasco since he established his claim for unemployment insurance benefits. The weight of the

evidence indicates that Mr. Kucera was no longer pursuing self-employment at the time he established the claim for unemployment insurance benefits that was effective December 21, 2008 because that work had evaporated for the season. The weight of the evidence indicates that Mr. Kucera discontinued his claim for unemployment insurance benefits as soon as he was again able to pursue the self-employment trucking venture. The evidence indicates that Mr. Kucera was at all relevant times available to return to his regular duties at Namasco. Mr. Namasco was eligible for benefits provided he was otherwise eligible.

DECISION:

The Agency representative's February 5, 2009, reference 01, decision is modified as follows. The claimant was laid off on March 20, 2008. There was no suitable offer of employment and no rejection of a suitable offer of employment. The claimant was able and available for work during the period of December 21, 2008 through February 7, 2009, when he had an active claim for unemployment insurance benefits. The claimant was eligible for the benefits he received, provided he was otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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