

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TROY M REAMS
Claimant

APPEAL NO. 16A-UI-11647-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MORTON BUILDINGS INC
Employer

OC: 11/15/15
Claimant: Appellant (4/R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Troy Reams filed a timely appeal from the October 25, 2016, reference 02, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Mr. Reams had voluntarily quit on October 10, 2016 without good cause attributable to the employer and due to a non-work related illness or injury. After due notice was issued, a hearing was held on November 10, 2016. Mr. Reams participated. John Sadowski represented the employer. Exhibits A through E were received into evidence.

ISSUES:

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

Whether Mr. Reams has been able to work and available for work within the meaning of the law since he established the additional claim for benefits that was effective October 9, 2016.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Troy Reams was employed by Morton Buildings, Inc. (MBI) as a full-time construction lead. Mr. Reams began his employment in 2003 and last performed work for the employer on September 8, 2016. Mr. Reams' work involved repairing damaged and/or deteriorated structures as part of a construction crew. The work involved removing sheets of steel from structure, replacing rotted and/or damaged wood, and replacing the steel sheets. The work regularly involved use a ladder and rooftop work. For the rooftop work, Mr. Reams would usually have access to a scissor-lift to assist him in getting onto the roof and/or perform repairs to the roof. The work involved use of power tools such as screw guns and demolition tools such as nail pullers and "cats' claws."

On April 16, 2016, Mr. Reams suffered injury to his left leg in a non-work related motorcycle accident when he collided with a deer. The collision fractured Mr. Reams' left tibia and fibula about six inches above his ankle. Surgical repair of the injuries included insertion of a metal rod

and four screws. Mr. Reams remained off work for an extended period as he recovered from his injury. The employer approved the medical leave of absence and treated a substantial portion of it as leave under the Family and Medical Leave Act (FMLA).

Mr. Reams was released to return to his full duties effective July 11, 2016 and returned to work at that time. At the time the orthopedic surgeon released Mr. Reams to return to work, the surgeon advised Mr. Reams that he would need to return for monthly follow up appointments to monitor the status of his leg.

On August 8, 2016, Mr. Reams saw the orthopedic surgeon for a follow-up medical appointment. X-rays taken at the time of that appointment indicated a space between two sections of healing bone. The orthopedic surgeon told Mr. Reams that he would need to undergo minor surgery to address the issue. On August 9, 2016, Mr. Reams underwent outpatient surgery on his leg. The surgeon removed two screws that secured an end of the metal rod. Upon discharge from the surgery, the surgeon advised Mr. Reams that he would need to be off work for a week. The employer approved an additional leave period so that Mr. Reams could recover from the surgery.

What was supposed to be a one-week recovery period ended up being a much longer recovery period. On September 8, 2016, Mr. Reams exhausted the 12 weeks of FMLA leave. On September 12, Cory Lindeland, who supervised the structure repair division, told Mr. Reams that the employer would approve an additional 30-day period of unpaid medical leave. On September 13, 2016, Mr. Reams and Mr. Lindeland entered into a written agreement regarding the additional leave period. The document they signed stated as follows:

RE: Special Circumstances

Troy Reams is requesting a special circumstance due to not having FMLA time available nor Vacation/Personal Time. Troy is experiencing a medical issue that is requiring him to miss work. MBI is granting Troy a one-time Special Circumstance leave for up to 1 month of unpaid time off. Troy's supervisor has approved this special circumstance leave. Troy must have a doctor's note stating he can return to work with no restrictions and that he is no longer taking any type of narcotic pain medication, prior to returning to work.

If at any time MBI determines that this arrangement is not in the best interest of Troy and/or the company, MBI reserves the right to terminate this Special Circumstances arrangement.

Approved Days off Without Pay: 9/9/16 – 10/9/16

On September 16, 2016, Mr. Reams returned to the doctor for a follow-up appointment that included removal of stitches. The swelling in Mr. Reams' leg had diminished. The provider fitted Mr. Reams with a medical walking boot. The walking boot was secured to Mr. Reams' leg by Velcro. The walking boot included an "air cast" that positioned and protected Mr. Reams' leg within the boot. Though Mr. Reams would ordinarily wear work boots when performing his work duties, he could not wear footwear on his left foot while his leg was in the walking boot. The walking boot included a plastic cover that covered Mr. Reams' toes. The surgeon released Mr. Reams to return to work, but restricted him from performing any work that would require him to be off the ground. The surgeon specifically restricted Mr. Reams from using a ladder. The restrictions prevented Mr. Reams from working on roofs. The surgeon was concerned that a fall from a ladder would result in the unsecured metal rod being bent. The practical impact of the

medical restrictions was that Mr. Reams could not perform work for the employer because he was unable to perform the work. Mr. Reams spoke with Mr. Lindeland on September 16, 2016 after the medical appointment. Mr. Reams told Mr. Lindeland that the doctor had taken him off work for another month.

On October 6, 2016, Mr. Reams returned to the surgeon for a follow up appointment. At that time, the surgeon continued Mr. Reams under the same medical restrictions. Mr. Reams continued to be unable to perform his work duties.

When Mr. Reams was still unable to return to work as of the October 9, 2016 expiration of his additional leave period, the employer terminated his employment. On October 10, 2016, Elizabeth Lowery, Benefits Manager, sent Mr. Reams a letter by certified mail that stated as follows:

Dear Troy:

Our understanding is that you have been unable to perform the essential functions of your job for a total of 12 weeks in the past 12 months. Employees are allowed up to twelve weeks of Family Medical Leave (FMLA) as stated in the paperwork sent to you in April. In addition, you were granted a 4-week personal leave. Your Family Medical Leave and personal leave were exhausted on August 9, 2016. We also granted you a one-time one month special circumstances leave. This leave expired September [sic] 9, 2016.

Please allow this letter to give formal notice of the termination of your employment with Morton Buildings, Inc. effective October 10, 2016. You will receive Cobra paperwork in the mail from Payflex within the next few weeks.

Thank you for your past contributions and best wishes in your future endeavors. Please keep in mind that when you are fully released to return to work, we invite you to apply for any open positions as we are an Equal Opportunity Employer.

Ms. Lowery copied the letter to Mr. Lindeland

At all relevant times, Mr. Reams desired to return to the employment. At no time did Mr. Reams form an intention to separate from the employment or communicate such intention to the employer.

After Mr. Reams received the termination letter, he established an "additional claim" for benefits that was deemed effective October 9, 2016, the Sunday that started the week during which he made his application for benefits. The additional claim was part of an original claim and claim year that went into effect on November 15, 2015.

At the time of the November 10, 2016 appeal hearing, Mr. Reams had made four weekly claims in connection with the October 9, 2016 "additional claim." The weekly claims were for the weeks that ended October 15, 22 and 29 and November 5, 2016. In connection with each weekly claim, Mr. Reams reported that he had made two job contacts. During the week that ended October 15, Mr. Reams applied for work with a home building construction company and with a roofing company. During the week that ended October 22, Mr. Reams applied for work with two concrete construction companies to assist in pouring concrete. During the week that ended October 29, Mr. Reams applied for work as a taxicab driver and as a furnace installer. During the week that ended November 5, Mr. Reams applied for work with a construction

company to perform work including building stud walls and bridges. During that same week, Mr. Reams applied for work with an asphalt company to assist in laying asphalt. At the time of the appeal hearing at 11:00 a.m. on Thursday, November 10, 2016, Mr. Reams had not applied for any work during the week of November 6-12, 2016.

On November 3, 2016, Mr. Reams obtained an updated work release from his doctor. This is the only actual medical release document Mr. Reams submitted for the appeal hearing. The medical release indicates that Mr. Reams “can return to light work,” is restricted from climbing ladders, is restricted from working on roofs, and is restricted to wearing the walking boot.

REASONING AND CONCLUSIONS OF LAW:

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.

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.

In Prairie Ridge Addiction Treatment Servs. v. Jackson and Emp't Appeal Bd., 810 N.W.2d 532 (Iowa Ct. App. 2012), the claimant, who had been injured in a non-work related automobile accident had requested a leave of absence so that she could recover from her injury. The employer approved the initial request. The employer also approved an extension of the leave of absence. The employment ended when the employer decided to terminate the employment, rather than grant an additional extension of the leave of absence. The claimant had not yet been released to return to work at the time the employer deemed the employment terminated. The Iowa Court of Appeals held that Ms. Jackson had not voluntarily quit the employment. The Iowa Court of Appeals further held that since Ms. Jackson had not voluntarily quit, she was not obligated to return to the employer upon her recovery to offer her services in order to be eligible for unemployment insurance benefits. The effect of the court's decision was to treat the separation as a discharge from the employment.

The Prairie Ridge decision is on point with the present case. Mr. Reams at all relevant times desired to continue in the MBI employment and at no time indicated a desire to separate from the employment. Mr. Reams' recovery from his injuries sustained in his non-work related motor vehicle accident did not go as smoothly or as quickly as he and the employer hoped, just as in Prairie Ridge. The employer allowed an extension of the approved leave period, just as in Prairie Ridge. Mr. Reams was unable to return to work at the end of the additional leave period because his doctor has not released him to return to perform the essential duties of the employment, the employer deemed the employment terminated, just as in Prairie Ridge. Mr. Reams was discharged from the employment effective October 10, 2016. The discharge was not based on misconduct in connection with the employment and, therefore, did not disqualify him for unemployment insurance benefits or relieve the employer's account of liability for benefits. See Iowa Code section 96.5(2)(a) (regarding disqualification for discharges based on misconduct in connection with the employment) and Iowa Administrative Code rule 871-24.32(1)(a) (regarding the definition of misconduct). Because Mr. Reams was discharged for no disqualifying reason, he is eligible for benefits provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to Mr. Reams.

The additional eligibility requirements that Mr. Reams must meet include that requirement that he be able to work, available for work, and actively and earnestly involved in a search for new employment.

Iowa Code § 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".

Iowa Admin. Code r. 871-24.22(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.

Iowa Admin. Code r. 871-24.22(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.

Since Mr. Reams established the additional claim that was effective October 9, 2016, and through the benefit week that ended November 5, 2016, Mr. Reams made two job contacts per week. Prior to his separation from MBI, Mr. Reams had worked in the construction industry for at least 13 years. Six of the eight job contacts Mr. Reams made during the four-week period of October 9 through November 5, 2016 were jobs in the construction industry. The only medical release document Mr. Reams submitted for the administrative law judge's consideration is the release dated November 3, 2016. That release indicates that Mr. Reams "can return to light work," is restricted from climbing ladders, is restricted from working on roofs, and is restricted to wearing the walking boot. The evidence in the record establishes that Mr. Reams' medical restrictions prior to November 3, 2016 were at least as restrictive as those set forth in the November 3, 2016 release document. A reasonable person would conclude that construction work, including each of the construction jobs Mr. Reams applied for during the four-week period of October 9 through November 5, 2016, is not "light work." While Mr. Reams asserts that none of these prospective employers expressed concern about the walking boot, a reasonable person would conclude that the walking boot and the other restrictions set forth in the November 3 medical release prevent Mr. Reams from performing construction industry work. During the week that ended October 29, 2016, Mr. Reams applied for one job that was completely unrelated to the construction industry and for one job that was somewhat related to the construction industry. The unrelated position was the taxicab driver position. A reasonable person would conclude that the walking boot and the condition of Mr. Reams' leg would prevent him from performing such work. Mr. Reams' medical ability, or inability, to safely perform the furnace installation work is less clear. The fact that Mr. Reams has knowingly applied for work that he knows he cannot perform is best illustrated by his application for a job with a roofing company. The condition of Mr. Reams' leg does not prevent him from being able to perform all types of work. Indeed, there are many types of work that Mr. Reams would be able to perform with the restrictions set forth in the November 3 medical release. Mr. Reams just has not sought work in those other fields. Mr. Reams has not demonstrated an active and earnest search for work within his capabilities since he established the additional claim for benefits, has not met the availability requirement, and therefore has not been eligible for benefits since establishing the additional claim that was effective October 9, 2016. Mr. Reams can resolve availability and work search issue by adjusting his work search to work within his medical restrictions.

Based on the work search and availability issues, benefits are denied effective October 9, 2016. The availability and work search disqualification continued as of the November 10, 2016 appeal hearing, meaning that the disqualification continues at least through the benefit week that ended November 12, 2016. This matter will be remanded to the Benefits Bureau for determination of whether Mr. Reams has been able to work and available for work, and engaged in an active and earnest search for work, since the period beginning November 13, 2016.

DECISION:

The October 25, 2016, reference 02, decision is modified as follows. The claimant was discharged for no disqualifying reason effective October 10, 2016. The discharge did not disqualify the claimant for benefits. Based on the separation, the claimant would be eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

The claimant's leg condition does not prevent him from being able to perform some types of work in the labor market, but does prevent him from being able to perform work in the construction industry. The claimant has not demonstrated an active and earnest search for work within his capabilities and thereby has not demonstrated that he is available for work within the meaning of the law. Benefits are denied effective October 9, 2016. The availability and work search disqualification continued as of the November 10, 2016 appeal hearing.

This matter is remanded to the Benefits Bureau for determination of whether the claimant has been able to work, available for work, and engaged in an active and earnest search for work, since the period beginning November 13, 2016.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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