IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DERIVISA KURTOVIC
Claimant

MASTERBRAND CABINETS INC
Employer

APPEAL NO. 13A-UI-13035-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/19/10
Claimant: Appellant (4)

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

STATEMENT OF THE CASE:

Dervisa Kurtovic filed a timely appeal from the November 13, 2013, reference 01, decision that denied benefits based on an agency conclusion that she had voluntarily quit due to a non-work-related medical issue. After due notice was issued, a hearing was held on December 17, 2013. Ms. Kurtovic participated personally and was represented by attorney Michael McEnroe. Mr. McEnroe presented testimony through Ms. Kurtovic and Eldis Kurtovic. Jodi Schafer represented the employer. Bosnian-English interpreter Azra Sikiric assisted with the hearing. Claimant's Exhibits One through Nine were received into evidence.

ISSUES:

Whether Ms. Kurtovic separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

Whether the employer's account may be charged for benefits.

Whether Ms. Kurtovic had been able to work and available for work since she established the claim for benefits that was effective October 6, 2013.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dervisa Kurtovic was employed by Masterbrand Cabinets, Inc., d/b/a as Omega Cabinets, as a full-time woodworker from 2001 and last performed work for the employer on August 24, 2011. On August 9, 2011, Ms. Kurtovic suffered a workplace injury to her back. Ms. Kurtovic immediately reported the injury to her supervisor, Paul Franer. Mr. Franer and Ms. Kurtovic immediately reported the injury to the Safety Director. The Safety Director completed an incident report. The employer had a physical therapist on staff. The physical therapist treated Ms. Kurtovic for a few days before referring her to a doctor for medical evaluation and treatment. The employer treated the matter as a worker's compensation injury and arranged for the medical evaluation. The doctor restricted Ms. Kurtovic to light-duty work and continued the physical therapy.

Ms. Kurtovic returned to work on the light-duty restriction and continued to perform light-duty work until August 24, 2011.

Ms. Kurtovic continued to be in severe pain. Toward the end of August 2011, Ms. Kurtovic went to her own primary care physician, who ordered an MRI. The MRI revealed a slipped disc at L5 and a pinched nerve. Ms. Kurtovic then returned to the worker's compensation doctor with the MRI results. The worker's compensation doctor took Ms. Kurtovic off work completely and referred her to an orthopedic surgeon.

The employer approved Ms. Kurtovic for a medical leave of absence. The employer initially deemed the medical leave of absence of a leave under the Family and Medical Leave Act. The 12 weeks of FMLA leave expired in December 2011. The employer extended the approved leave through January 9, 2012. The employer then extended the approved leave through February 22, 2012. On February 23, 2012, the employer notified Ms. Kurtovic that she had exhausted all available leave and that her employment was terminated. Ms. Kurtovic had not been released by a doctor to return to work. Ms. Kurtovic had not said or done anything to indicate an intention to voluntarily quit the employment. In a letter to Ms. Kurtovic, dated February 23, 2012, the employer characterized Ms. Kurtovic's extended absence from the workplace as being based on Ms. Kurtovic's "own serious health condition." The letter made no reference to the work injury that had triggered the serious health condition. In the employer's November 5, 2013 Answer to Ms. Kurtovic's worker's compensation Original Notice and Petition, the employer, through legal counsel, admitted that Ms. Kurtovic had indeed suffered a workplace injury on August 9, 2011.

Ms. Kurtovic received worker's compensation benefits for total temporary disability (TTD) for a period that started in 2011 and that ended in 2012. Ms. Kurtovic later received worker's compensation benefits for permanent partial disability (PPD) for the period of October 12, 2012 through October 16, 2013.

Ms. Kurtovic underwent a functional capacity evaluation (FCE) on August 23, 2013. Ms. Kurtovic's evaluation results indicated that she could perform work in a light demand vocation, per the Dictionary of Occupational Titles. With regard to functional deficits related to Ms. Kurtovic's lower back, the evaluator indicated as follows:

> Diminished ability to complete material handling activities including waist to floor lifting, waist to crown lifting and carrying.
> Diminished ability to complete non-material handling activities including standing work, walking, sitting, stair climbing, forward bending, kneeling, and squatting.

The FCE evaluator concluded that Ms. Kurtovic could safely perform the following activities at work:

> Waist to floor lifting – 15 lbs., occasionally.
> Waist to crown lifting – 15 lbs., occasionally.
> Bilateral carrying – 15 lbs., occasionally.
> Standing work – Occasionally, with positional changes as required.
> Walking – Occasionally, with positional changes as required.
> Stair climbing – Occasionally.
> Squatting – Never
> Kneeling – Occasionally with mechanical support for transitional movements.

With regard to the restrictions on sitting and standing, the FCE evaluator documented that Ms. Kurtovic was able to sit for 10 consecutive minutes, occasionally; able to perform standing work for 16 consecutive minutes, occasionally; and able to kneel for 1.5 consecutive minutes, occasionally. The evaluator further indicated that Ms. Kurtovic "was able to maintain a seated posture for 9 minutes 17 seconds prior to requesting a positional change secondary to reports of increased lower back and left lower extremity discomfort." The evaluator further indicated that Ms. Kurtovic "was able to complete 23 minutes of continuous standing work activity prior to requesting a positional change secondary to reports of increased lower back and left lower extremity discomfort. Weight bearing appeared to be diminished through the left lower extremity at times." The evaluator further indicated that Ms. Kurtovic "was apparently unable to ascend/descend stairs in a reciprocating fashion. Pace was slowed with decreased weight bearing through the left lower."

The FCE evaluator further stated that: "The client, Dervisa Kurtovic, gave a maximum voluntary effort during physical testing despite frequent overt pain behaviors and three out of four positive self-report instruments indicating [sic] possible symptom magnification."

In connection with the FCE evaluation, Ms. Kurtovic reported the following complaints related to the workplace injury:

> Constant left lower back, lateral left lower extremity and foot pain ranging in intensity from 4 to 8 out of 10.
> Hypersensitivity to touch along the lateral aspect of the distal left lower extremity and foot.
> Diminished truck and left lower extremity active range of motion.
> Diminished core and left lower extremity strength.
> Frequent swelling in the area of the left ankle.
> Temperature differences between the bilateral lower extremities.

Dr. Robert Broghammer, M.D., a Board-Certified Specialist in Occupational and Environmental Medicine, reviewed the FCE and sent a letter, dated September 6, 2013, to the worker's compensation case manager. Dr. Broghammer wrote the following:

> In my medical opinion, the worker is likely able to work at the light level and possibly higher. While I understand that Mr. Kruzich has opined that this is a valid representation of Ms. Kurtovic's physical capabilities, in my medical opinion, given the overt pain behaviors that I noticed on examination as well as those noticed by Dr. Harbut and additionally those noted by Mr. Kruzich on functional capacity testing as noted, which included frequent overt pain behaviors and ¾ positive self report instruments, I am concerned that despite Mr. Kruzich's opinion, the functional capacity may represent simply the level that Ms. Kurtovic is comfortable testing at currently. In addition, given Ms. Kurtovic's age and gender and evidence of deconditioning (the worker is approximately 5'5" and 210 lbs), it is also likely that many of the limitations found on functional capacity testing are due to the worker's age and gender and have a physiologic personal and genetic basis rather than an injury basis.
>
> As such, I would place Ms. Kurtovic at the light duty level currently, with advancement to the medium demand level over the next 4-6 months. Recognize that the medium demand level work is likely a normal physiologic mean for someone Ms. Kurtovic's age and gender.

Ms. Kurtovic established an original claim for unemployment insurance benefits that was effective October 6, 2013, but lacked any base period wages for that claim. The Agency treated the application for benefits as a request to reopen a benefit claim year that had started December 19, 2010, and a request for emergency unemployment compensation benefits (EUC) in connection with that earlier claim year. The Agency deemed October 6, 2013 the effective reopen date.

Since the October 6, 2013 claim date, Ms. Kurtovic had continued to face obstacles with regard to her ability to work and availability for work. Ms. Kurtovic has had no further medical evaluation since the FCE and the medical evaluation by Dr. Broghammer. Ms. Kurtovic is uncertain, due to her health, of her ability to perform any work, but indicates she is willing to try employment to see whether she is physically able to work. Ms. Kurtovic is a native Bosnian-speaker, but has some functional English that she has picked up through prior employment.

Ms. Kurtovic's bilingual son has assisted her with her job search. During the week that ended October 12, 2013, Ms. Kurtovic applied at Wal-Mart and Sears. During the week that ended October 19, 2013, Ms. Kurtovic applied at Subway and Target. During the week that ended October 26, Ms. Kurtovic applied at Hobby Lobby and Menards. Ms. Kurtovic could not recall where she might have applied during the weeks that ended November 2 or subsequent weeks and did not have her job contact log available at the time of the hearing. Ms. Kurtovic's son was able to provide limited additional work search information. Ms. Kurtovic did not search for work during the weeks that ended November 30 and December 7, 2013. During the week that ended December 14, Ms. Kurtovic applied at Hy-Vee and an unspecified store in Cedar Falls. On December 16, Ms. Kurtovic applied at Kmart and Slumberland.

Between August 2013 and mid-November 2013, Ms. Kurtovic, with the assistance of her son, made multiple attempts to contact the former employer about returning to the employment in some capacity. An employer representative eventually agreed to look into the matter and get back to Ms. Kurtovic, but did not in fact get back in touch with Ms. Kurtovic.

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.

This case is similar to case recently decided by the Iowa Court of Appeals. See Prairie Ridge Addiction Treatment Services vs. Sandra Jackson and Employment Appeal Board, No. 1-874/11-0784 (Filed January 19, 2012). While the Prairie Ridge case has not yet been published, it provides guidance for the administrative law judge to follow in analyzing the present case. In Prairie Ridge, Ms. Jackson had requested and been approved for a leave of absence after she was injured in an automobile accident. The employment ended when the employer decided to terminate the employment, rather than grant an extension of the leave of absence once the approved leave period had expired. Like the present case, Ms. Jackson had not yet been released to return to work at the time the employer deemed the employment terminated. The court held that Ms. Jackson had not voluntarily quit the employment. The Court further held that since Ms. Jackson had not voluntarily quit, she was not obligated to return to the employer and offer her services in order to be eligible for unemployment insurance benefits.

Ms. Kurtovic is actually in a stronger position than Ms. Jackson was because the weight of the evidence indicates that the basis for Ms. Kurtovic's leave was a workplace injury, rather than the non-work-related injury that prompted Ms. Jackson's leave. The evidence indicates that Masterbrand Cabinets/Omega Cabinets ended Ms. Kurtovic's employment on February 23, 2012, because Ms. Kurtovic had exhausted all the leave the employer elected to make available and had not been released by a doctor to return to the employment. At no time did Ms. Kurtovic evidence an intention to sever the employment relationship. Ms. Kurtovic did not voluntarily quit the employment. Instead, the employer elected to discharge Ms. Kurtovic from the employment effective February 23, 2012. The discharge was not based on misconduct and would not disqualify Ms. Kurtovic for unemployment insurance benefits. See Iowa Code section 96.5(2)(regarding discharge for misconduct) and 871 IAC 24.32(1)(a)(defining misconduct). Because the separation from employment was involuntary, Iowa Code section 96.5(1)(d), which requires an employee who quit for non-work related medical issues to return to the employer upon recovery from a non-work-related medical condition and offer her services, does not apply.

Based on the separation from the employment, Ms. Kurtovic would be eligible for benefits provided she meets all other eligibility requirements. The employer's account may be charged for 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:
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> 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.

871 IAC 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.

The weight of the evidence indicates that Ms. Kurtovic has not been able to work and available for work since she established the claim for benefits that was effective October 6, 2013. Ms. Kurtovic expresses reservations about whether she is physically able to work. The medical restrictions reflected in the August 2013 FCE and Dr. Broghammer's September 2013 letter indicate substantial limits on Ms. Kurtovic's ability to perform work. Those restrictions included substantial restrictions on sitting, standing and walking that together effectively eliminate Ms. Kurtovic's ability to perform work in the labor market. Ms. Kurtovic's job contacts, those she was able to recall, appear to all have been for employment exceeding the restrictions indicated in the FCE and Dr. Broghammer's letter. Ms. Kurtovic has presented insufficient evidence to establish that she is able to perform, and available to perform, any specific type of work that laborers perform in the labor market.

Ms. Kurtovic has not met the work ability and availability requirements since establishing the claim that was effective October 6, 2013. For this reason, benefits are denied effective October 6, 2013. The able and available disqualification continues as of the appeal hearing date.

DECISION:

The Agency representative's November 13, 2013, reference 01, decision is modified as follows. The claimant was discharged for no disqualifying reason. The discharge was effective February 23, 2012. The discharge did not disqualify the claimant for benefits and the claimant would be eligible for benefits if she were able to meet all other eligibility requirements. The employer's account may be charged for benefits.

The claimant has not been able to work or available for work since she established the claim that was effective October 6, 2013. For this reason, benefits are denied effective October 6, 2013. The able and available disqualification continues as of the appeal hearing date.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs