

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THOMAS D RIAK

Claimant

APPEAL NO: 13A-UI-10458-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARZETTI FROZEN PASTA INC

Employer

OC: 12/23/12

Claimant: Respondent (1)

Section 96.4-3 – Able and Available
871 IAC 24.22(2)j – Leave of Absence
Section 96.5-1-d – Voluntary Leaving/Illness or Injury
871 IAC 24.26-6-b – Work-related Illness or Injury

STATEMENT OF THE CASE:

Marzetti Frozen Pasta, Inc. (employer) appealed a representative's September 6, 2013 decision (reference 06) that concluded Thomas D. Riak (claimant) was qualified to receive unemployment insurance. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 8, 2013. The claimant participated in the hearing and was represented by Justin Swaim, Attorney at Law; John Hemminger, Attorney at Law made a professional statement, subject to cross-examination, on behalf of the claimant. Joan Tapps appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant eligible for unemployment insurance benefits by being able and available for work? Was there period of voluntary unemployment through a leave of absence?

FINDINGS OF FACT:

The claimant started working for the employer on November 1, 2009. He worked full time as a production worker. His last day of work was March 28, 2013.

The claimant was performing a task on May 1, 2012 when he felt pain in his back. He reported this to his supervisor and was sent home. He filed a workers' compensation claim asserting that he had suffered a work-related injury. In March 2013 there was an initial denial of coverage under workers' compensation; that denial has been appealed by the claimant, and an appeal hearing before a workers' compensation deputy is scheduled in 2014. The claimant has some evidence from a medical practitioner expressing the opinion of that doctor that the claimant's injury was caused by the work.

As of the date of the hearing in this matter, the claimant's work restrictions were a ten-pound lifting restriction, with no repetitive stooping, bending, or lifting. The claimant could not perform his regular job duties with these restrictions. Before the initial denial of the workers' compensation claim the employer was providing work to the claimant which would accommodate his work restrictions. When the initial denial of workers' compensation benefits was issued, the employer ceased providing accommodations for the claimant's restrictions. Since he could not return to his regular job duties with those restrictions, as of March 29 the employer placed the claimant on medical leave status. Through May 10, 2013 that leave was covered under FMLA (Family Medical Leave), and upon expiration of the FMLA he was considered under a general medical leave. As the employer considers the claimant's medical condition to be non-work-related, it has subsequently determined to fill the claimant's position as he has not returned to the employment without restrictions.

The claimant has been applying for other work with other employers that he can perform within his current work restrictions, such as a grocery store cashier.

REASONING AND CONCLUSIONS OF LAW:

For each week for which a claimant seeks unemployment insurance benefits, he must be able and available for work. Iowa Code § 96.4-3. In general, an employee who is only temporarily separated from his employment due having requested and been granted a leave of absence is not "able and available" for work during the period of the leave, as it is treated as a period of voluntary unemployment. 871 IAC 24.22(2)j; 871 IAC 24.23(10). However, where an employee is involuntarily placed on the leave of absence by an employer which cannot or will not make accommodation because of an injury which is demonstrated as being work-connected, it is not a period of voluntary unemployment.

The claimant's period of unemployment beginning March 29 was due to the employer placing him on a leave of absence due its decision not to provide work accommodations for what is asserted to be a medical issue caused or aggravated by the work conditions. The initial denial of workers' compensation benefits is not determinative of this issue, particularly where that denial is under appeal. The claimant has cited some medical evidence that the condition was caused or aggravated by the work. The claimant has sufficiently demonstrated that factors or circumstances directly connected with the employment either caused or aggravated the claimant's condition so as to make it impossible for the employee to continue in employment without accommodation, and that the employer was unable or unwilling to provide reasonable accommodation in order to retain the claimant's employment. Iowa Code § 96.5-1-d; 871 IAC 24.26(6)b.

Unless a claimant was on a voluntary leave of absence, to be found able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). The claimant has demonstrated that he is able to work in some gainful employment. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's September 6, 2013 decision (reference 06) is affirmed. The claimant able and available for work effective March 29, 2013, and the period of at least temporary separation

was a period of involuntary unemployment attributable to the employer. Benefits are allowed, if the claimant is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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