

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD R PREMO
Claimant

APPEAL NO. 12A-UI-08066-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DECKER TRUCK LINE INC
Employer

OC: 06/09/13
Claimant: Respondent (4)

871 IAC 24.1(113) – Other Separations
Iowa Code section 96.4(3) – Able & Available
Iowa Code section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 2, 2013, reference 01, decision that allowed benefits based on an agency conclusion that the claimant was discharged for no disqualifying reason. After due notice was issued, a hearing was held on August 14, 2013. Claimant Richard Premo participated. Courtney Bachel represented the employer and presented additional testimony through Andrea Kloberdanz and Aaron Johnson. Exhibits Seven through Eleven were received into evidence.

ISSUE:

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

Whether Mr. Premo has been able to work and available for work within the meaning of the law since he established his claim for benefits.

Whether Mr. Premo has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Richard Premo was employed by Decker Truck Line, Inc., as a full-time commercial truck driver from October 31, 2012 and last performed work for the employer on February 6, 2013. On February 6, Mr. Premo fell while performing work for the employer and fractured his wrist. On February 8, Mr. Premo suffered a stroke. Mr. Premo thereafter continued off work in connection with fractured wrist and stroke. On May 3, 2013, Mr. Premo was released to return to work insofar as the wrist injury was concerned. However, because Mr. Premo had been diagnosed as having suffered as stroke, he was ineligible, under federal department of transportation regulations, to operate a commercial motor vehicle until 12 months after the date of the stroke. Mr. Premo's doctor would not release him to return to the commercial truck driving duties and Mr. Premo could not obtain the medical card he needed to possess to legally operate a

commercial motor vehicle. Once the workers' compensation wrist issue was resolved, the employer authorized a 30-day personal leave. At the time the personal leave period expired on June 3, 2013, Mr. Premo had still not been released to return to his truck driving duties. Mr. Premo was willing to perform any other work the employer had for him, but the employer did not have other work for him. When Mr. Premo was unable to return to work by June 3, 2013, the employer ended the employment effective that date.

Mr. Premo established a claim for unemployment insurance benefits that was effective June 9, 2013. The doctor who has been treating Mr. Premo in connection with stroke has not provided Mr. Premo with anything to indicate that he is released to return to work. Mr. Premo has not provided Workforce Development with any such medical documentation.

Since Mr. Premo filed his claim for benefits he had engaged in an often dubious search for new employment.

During the week that ended June 15, 2013, Mr. Premo did not look for any work.

During the week that ended June 22, 2013, Mr. Premo made two employer contacts, at Kum & Go and at a hardware store in Eagle Grove.

During the week that ended June 29, 2013, Mr. Premo inquired about a secondary road crew job with Wright County. Mr. Premo is under the belief that he would not need a medical card to perform the government work. Mr. Premo also inquired with American Concrete in Webster City to run a cement truck. Mr. Premo's lack of a commercial driver's medical card made him ineligible for the cement truck driver position.

During the week that ended July 6, 2013, Mr. Premo returned to the hardware store in Eagle Grove, even though he has just inquired there a couple weeks before. Mr. Premo also inquired at the Dollar Store and at the Wright County landfill.

During the week that ended July 13, 2013, Mr. Premo inquired about work at a gas station. Mr. Premo also returned to the Landfill, though he had just been there the week before.

During the week that ended July 20, 2013, Mr. Premo contacted Decker Truck Line, to inquire about whether they had any position for him, despite the fact that Decker Truck Line had previously declined to provide him with any alternative work since February 6, 2013 and had continued to take that same position up to June 3, 2013, when the employer ended the employment. Mr. Premo also completed an online application for a position at a feed plant in Eagle Grove.

During the week that ended July 27, 2013, Mr. Premo again applied for secondary road crew work with Wright County. Mr. Premo made no other job contacts.

During the week that ended August 3, 2013, Mr. Premo inquired for work with a window manufacturer and again contacted Wright County about secondary road crew work.

During the week that ended August 10, 2013, Mr. Premo made a third inquiry for work at the same hardware store that had had no work for him during the week that ended June 22 and July 6. Mr. Premo made no other job contacts.

Since Mr. Premo established his claim for benefits, he has so far received \$3,960.00 in benefits for the period of June 9, 2013 through August 17, 2013.

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 general rule is that claimant who *voluntarily* quits employment without good cause attributable to the employer is disqualified for unemployment insurance benefits until the claimant has worked in and been paid wages equal to ten times his weekly benefit amount. See Iowa Code section 96.5(1). There are a few exceptions to the disqualification rule that applies to *voluntary* quits. *Id.* A claimant who is discharged for misconduct in connection with the employment is similarly disqualified for benefits. See Iowa Code section 96.5(2)(a). On the other hand, employees whose employment ends due to layoff or an "other separation" are not subject to disqualification based on the separation from the employment. See Iowa Code section 96.5(1) and (2)(a) and 96.7(2) (regarding employer liability for benefits).

The evidence in the record establishes that Mr. Premo's separation from the employment at Decker Truck Line, Inc., falls into that category known as other separations. Mr. Premo did *not* voluntarily quit the employment. Mr. Premo at no time indicated, by word or act, an intention to voluntarily separate from the employment. From the time Mr. Premo went off work in February in connection with the fractured wrist and then the stroke to the time the employer told him the employment was done on June 3, 2013, Mr. Premo had never been released to return work. There was no *failure* to return at the end of an approved absence because Mr. Premo did not have the *ability* to return. Instead, Mr. Premo involuntarily separated from the employment effective June 3, 2013 because the stroke prevented him from meeting the physical standards

required to obtain the medical card, and required to perform the work. Mr. Premo's separation from the employment did not disqualify him for unemployment insurance benefits. Mr. Premo would be eligible for benefits if he 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:

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.

Mr. Premo has presented insufficient evidence to establish that he has been released by his doctor to perform *any* type of work since his stroke. Given the medical basis for the separation from Decker Truck Line and the medical basis for Mr. Premo not being able to perform his regular duties of commercial truck driving, Mr. Premo's failure to provide medical documentation

to establish that he has been released to return to *any* work amount to a failure to prove that he has been able or available for work since he filed his claim for benefits. Benefits are denied effective June 9, 2013 and Mr. Premo continued to be ineligible for benefits this reason at the time of the August 14, 2013 appeal hearing.

The work search requirement is part of the work availability requirement. The evidence further indicates that Ms. Premo has made a less than active and earnest search for new employment during multiple weeks since he filed his claim. By meeting the work search requirement in any given week, Mr. Premo would not meet the work availability requirement. Mr. Premo did not look for work at all during the week that ended June 15, 2013 and did not meet the work search requirement. Mr. Premo made two employer contacts during the week that ended June 22, 2013 and, therefore, the work search requirement was satisfied. The weight of the evidence indicates that during the week that ended June 29, 2013, Mr. Premo applied for two driver jobs he knew he would never be hired for in light of his medical status. Mr. Premo did not satisfy the work search requirement during the week that ended June 29, 2013. During the week that ended July 6, 2013, Mr. Premo's contact with the Dollar Store and the landfill satisfied the work search requirement, despite his recycling of the hardware store as a job contact. During the week that ended July 13, 2013, Mr. Premo made at most one legitimate job contact and recycled the landfill as a job contact. Mr. Premo did not satisfy the work search requirement during the week that ended July 13, 2013. During the week that ended July 20, 2013, Mr. Premo used Decker Truck Line, Inc., as a job contact even though he knew by several months' experience that they had no alternative work for him. Mr. Premo at most made one legitimate job contact during the week that ended July 20, 2013, the feed plant application, and did not meet the work search requirement that week. During the week that ended July 27, 2013, Mr. Premo recycled Wright County secondary crew as a job contact, even though he knew there was little chance of him being hired in light of his medical condition. Mr. Premo made no other job contacts that week and did not meet the work search requirement. During the week that ended August 3, 2013, Mr. Premo made only one legitimate job contact, the window manufacturer, and did not meet the work search requirement. During the week that ended August 10, 2013, Mr. Premo again recycled the hardware store as a job contact, made no other job contacts, and did not meet the work search requirement.

A claimant who receives benefits and is later deemed ineligible for benefits is required to repay those benefits when the overpayment is based on a finding that the claimant did not meet the able and available requirements. See Iowa Code section 96.3(7). The benefits Mr. Premo has received to date, at a time when he has not met the able and available requirements, represent an overpayment of benefits that Mr. Premo is required to repay. Mr. Premo is, so far, overpaid \$3,960.00 in benefits for the period of June 9, 2013 through August 17, 2013.

DECISION:

The agency representative's July 2, 2013, reference 01, decision is modified as follows. The claimant neither quit nor was discharged from the employment. The claimant's June 3, 2013 separation falls into the category of "other separations" and was due his inability to meet the physical requirements of the employment. The separation would not disqualify the claimant for unemployment insurance benefits. The claimant would be eligible for benefits if he met all other eligibility requirements, including but not limited to proving that he is able and available for work within the meaning of the law. The employer's account may be charged for benefits.

As outlined above, the claimant has not met the work ability and availability requirements since he established his claim for benefits and is not eligible for benefits for that reason. Based on the able and available issues, benefits are denied effective June 9, 2013. The ineligibility continued

as of the August 14, 2013 appeal hearing. To become eligible for benefits going forward, the claimant must provide competent medical evidence that he has been released to return to some kind of work. He must also demonstrate an *active and earnest* search for new employment. He must also meet all other eligibility requirements.

The claimant has been overpaid \$3,960.00 in benefits for the period of June 9, 2013 through August 17, 2013. The claimant must repay that amount.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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