

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOHN H MOGLER
Claimant

APPEAL 21A-UI-04537-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BARTKOWSKI LIFE SAFETY CORP.
Employer

OC: 03/15/20
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding Interview
PL 116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

Bartkowski Life Safety Corp., the employer/appellant, filed an appeal from the January 26, 2021, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on April 9, 2021. The employer participated through Kellymarie Heitmann, director of operations, Bill Nelson, foreperson and Jordan Hestermann, accountant. Mr. Mogler participated and testified. Official notice was taken of the administrative record.

ISSUES:

Did Mr. Mogler voluntarily quit without good cause attributable to the employer?
Was Mr. Mogler overpaid benefits?
If so, should he repay the benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Mogler began working for the employer on September 11, 2020. He worked as a full-time construction worker. His supervisor was Mr. Nelson. His last day of work was November 6, 2020.

Mr. Mogler was working on a project for the employer gutting parts of a federal building in Des Moines, Iowa. Before he began work on the site, Mr. Mogler signed a site safety orientation document on October 13, 2020. The employer required that Mr. Mogler sign this document before he could work on the site. The site safety orientation document informed Mr. Mogler that there was asbestos at the work site and that the employer had to store the asbestos on site and could not remove it out of the room in which they were working.

Mr. Mogler was concerned about several safety issues on the job site. He was concerned about the presence of asbestos, extension cords that did not have a grounding wire, a chipping

hammer that was improperly taped, improper scaffolding. Mr. Mogler told Mr. Nelson about some, but not all, of these issues. The project manager also noticed the issue with the hammer and the employer took the hammer out of service. Both parties agreed that Mr. Mogler could have used a ladder to complete his work at the height at which he was working. Mr. Mogler preferred to use scaffolding. Mr. Nelson testified that Mr. Mogler never raised the issue of extension cords with him. In Mr. Mogler's view, the employer did not adequately address the problems he raised. Mr. Mogler also told employees of one of the subcontractors about the issues. Mr. Mogler did not tell anyone else with the employer above Mr. Nelson about the issues because he felt that the employer would not do anything. Mr. Mogler considered his health to be at risk because the employer would not address the issues he raised.

On Friday, November 6, 2020, Mr. Mogler packed up his things and was leaving the job site. Mr. Nelson saw him and asked Mr. Mogler what was going on. Mr. Mogler said he was not feeling well and that he was leaving. Mr. Mogler left and reported that he quit to his union hall. Later that day, Mr. Nelson contacted Mr. Mogler to check on him and ask him if he would be returning to work. Mr. Mogler told Mr. Nelson to contact Mr. Mogler's union hall.

On Monday, November 9, 2020, Mr. Mogler turned in the work badge to the General Services Administration (GSA) office. Mr. Mogler never returned to work after November 6. Mr. Mogler's union representative spoke with Mr. Nelson about the issue of asbestos at the job site. Mr. Nelson explained that there was asbestos in the room in which Mr. Mogler worked and that Mr. Mogler had acknowledged knowing that asbestos was on the work site. Mr. Mogler's union representative did not raise any other issues with Mr. Nelson.

Mr. Mogler has received \$8,567.58 in REGULAR unemployment insurance (UI) benefits for 18 weeks between November 8, 2020 and March 13, 2021. Mr. Mogler received \$3,300.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits for 11 weeks between December 27, 2020 and March 13, 2021.

The employer had the opportunity to and participated in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Mr. Mogler's separation from the employment was without good cause attributable to the employer.

Iowa Code section 96.5(1) provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.26(2) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(4) The claimant left due to unsafe working conditions.

The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). “Good cause” for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm’n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

While a claimant does not have to specifically indicate or announce an intention to quit if his concerns are not addressed by the employer, for a reason for a quit to be “attributable to the employer,” a claimant faced with working conditions that he considers unsafe must normally take the reasonable step of notifying the employer about the unacceptable condition in order to give the employer reasonable opportunity to address his concerns. *Hy-Vee Inc. v. Employment Appeal Board*, 710 N.W.2d 1 (Iowa 2005); *Swanson v. Employment Appeal Board*, 554 N.W.2d 294 (Iowa 1996); *Cobb v. Employment Appeal Board*, 506 N.W.2d 445 (Iowa 1993). If the employer subsequently fails to take effective action to address or resolve the problem it then has made the cause for quitting “attributable to the employer.”

In this case, Mr. Mogler was aware of that fact that asbestos was at the work site. Mr. Mogler chose to work at the site after acknowledging this fact on October 13, 2020. Mr. Mogler did raise several others issues with the employer. However, the employer addressed the issue of the hammer and the other issues do not rise to the level of creating an unsafe work environment. Mr. Mogler has not demonstrated that a reasonable person would find the work environment unsafe. *O'Brien v. EAB*, 494 N.W.2d 660 (Iowa 1993); *Uniweld Products v. Industrial Relations Commission*, 277 So.2d 827 (FL App. 1973). Benefits are denied.

The administrative law judge further concludes Mr. Mogler has been overpaid REGULAR UI benefits in the amount of \$8,567.58, he has been overpaid FPUC benefits in the amount of \$3,300.00 and these benefits should be repaid.

Iowa Code §96.3(7) provides, in pertinent part:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer’s account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred

because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of

obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as “Federal Pandemic Unemployment Compensation”).

....

(f) Fraud and Overpayments

(2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

Mr. Mogler has been overpaid REGULAR UI benefits in the amount of \$8,567.58 as he has been found to have not qualified and/or is ineligible to receive REGULAR UI benefits.

Because Mr. Mogler is disqualified from receiving regular UI benefits, he is also disqualified from receiving FPUC benefits. While Iowa law does not require a claimant to repay regular UI benefits when the employer does not participate in the fact-finding interview, the CARES Act makes no such exception for the repayment of FPUC benefits. Therefore, the determination of whether Mr. Mogler must repay FPUC does not hinge on the employer's participation in the fact-finding interview. The administrative law judge concludes that Mr. Mogler has been overpaid FPUC benefits in the gross amount of \$3,300.00.

Even though Mr. Mogler is not eligible for regular unemployment insurance benefits under state law, he may be eligible for federally funded unemployment insurance benefits under the Coronavirus Aid, Relief, and Economic Security Act (“Cares Act”), Public Law 116-136. Section 2102 of the CARES Act creates a new temporary federal program called Pandemic Unemployment Assistance (PUA) that in general provides up to 39 weeks of unemployment benefits. If Mr. Mogler is found eligible for PUA benefits, these benefits may be used to offset (cancel) the overpayment of REGULAR UI benefits. If Mr. Mogler is found eligible for PUA

benefits he may also be eligible for Federal Pandemic Unemployment Compensation (FPUC) benefits again.

DECISION:

The January 26, 2021, (reference 01) unemployment insurance decision is reversed. Mr. Mogler voluntarily left his employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. Mr. Mogler has been overpaid REGULAR UI benefits in the amount of \$8,567.58 and overpaid FPUC benefits in the amount of \$3,300.00, which must be repaid.

NOTE TO CLAIMANT:

- This decision determines you are not eligible for REGULAR unemployment insurance benefits under state law and that you have been overpaid REGULAR UI benefits and FPUC benefits. If you disagree with this decision, you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.
- You may qualify for Pandemic Unemployment Assistance (PUA) benefits if you do not qualify for REGULAR unemployment insurance benefits under state law and you are or were unemployed for reasons related to COVID-19. **You will need to apply for PUA to determine your eligibility under the program.** For more information on how to apply for PUA, go to <https://www.iowaworkforcedevelopment.gov/pua-information>. **If you do not apply for and are not approved for PUA, you may be required to repay the benefits you've received so far.**
- You may also request a waiver of the FPUC overpayment only. Iowa law does not provide for waiver of REGULAR UI benefits. The written request to waive the FPUC overpayment must include the following information:
 1. Claimant's name & address.
 2. Decision number/date of decision.
 3. Dollar amount of overpayment requested for waiver.
 4. Relevant facts that you feel would justify a waiver.
- The request should be sent to:

Iowa Workforce Development
Overpayment waiver request
1000 East Grand Avenue
Des Moines, IA 50319

- This Information can also be found on the Iowa Workforce Development website at: <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-overpayment-and-recovery>.
- If this decision becomes final and you are not eligible for a waiver, you will have to repay the benefits you received.



Daniel Zeno
Administrative Law Judge
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April 15, 2021
Decision Dated and Mailed

dz/scn