

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL PETTEY
Claimant

APPEAL NO: 12A-UI-05061-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ELMORE TRUCK AND TRAILER
Employer

OC: 12/25/11
Claimant: Respondent (2/R)

Iowa Code § 96.5-1 - Voluntary Quit
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Elmore Truck and Trailer (employer) appealed an unemployment insurance decision dated April 27, 2012, reference 05, which held that Michael Pettey (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing began on June 26, 2012 and was completed on August 21, 2012. The claimant participated in the hearing on June 26, 2012 with Attorney Laurie Pederson but was not available for the hearing date of August 21, 2012 so his attorney participated on his behalf. The employer participated through owner Marlon Dahl, Safety Director Barb Owen and Controller Sue Benschoter. Employer's Exhibits One through Seven and Claimant's Exhibit A were admitted into evidence.

The procedural delays are noted as follows: The employer filed its appeal on May 2, 2012 and the hearing was scheduled for May 22, 2012. The employer requested a postponement and the hearing was re-scheduled for June 5, 2012. The administrative law judge went on unanticipated sick leave the week of June 4, 2012 so the hearing was rescheduled to June 26, 2012 and went forward on that date. It could not be completed during the allocated time so the administrative law judge offered to complete the hearing at 5:00 p.m. that day but the time would not work for the parties. The parties' schedules were very limited but all agreed to participate at 8:00 a.m. on July 23, 2012. The employer subsequently informed the Appeals Section that the hearing needed to be held after 10:00 a.m. and before 1:30 p.m. The hearing was rescheduled for July 23, 2012 at 10:00 a.m.

The administrative law judge called the parties at the scheduled time on July 23, 2012 and was able to reach the claimant and one of the employer witnesses. However, the owner of the company was not available and the claimant's attorney could not be reached at several different numbers. The administrative law judge elected not to go forward and waited for the parties to return the calls. An attempt was made to complete the hearing on July 26, 2012 but that did not work out. However, on that date, the parties did agree to go forward on August 21, 2012 at 10:30 a.m. and a new hearing notice was sent out. On August 21, 2012, the claimant was not available to participate in the hearing. The claimant's attorney stated that she had not been able to reach him and requested an additional postponement which was denied. Three calls were made to the claimant during the hearing but he was not available and did not return the

calls during the hearing or even before the end of the day. 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.

ISSUE:

The issue is whether the claimant's voluntary separation from employment qualifies him to receive unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant filed an unemployment insurance claim effective November 28, 2010. He filed weekly claims and received benefits from December 4, 2010 through March 5, 2011. However, the claimant was hired as a full-time truck driver with the employer on February 7, 2011. The following is a list of his weekly claims, wages earned, wages reported and benefits paid for the weeks after he was hired by the employer. The wages were paid two weeks after they were earned.

Week ending date	Wages earned	Wages reported	Benefits paid
02/12/11	\$303.42	\$0.00	\$274.00
02/19/11	\$500.21	\$0.00	\$274.00
02/26/11	\$361.55	\$303.00	\$0.00
03/05/11	\$521.31	\$333.00	\$0.00

No further weekly claims at this time.

The claimant voluntarily quit on September 6, 2011 but called back on September 9, 2011 and said he was not going to quit. The employer allowed him to return to work. The claimant began filing for unemployment insurance benefits as of December 31, 2011 even though he was not laid off work.

The employer had previously granted the claimants' request for time off work on February 6, 2012. The claimant called owner Marlin Dahl on February 3, 2012 and told him he quit to take another job. He said he was going to work for Cedar River Poultry hauling chickens and it paid \$2,000.00 per week, which was a lot more than the employer paid. The claimant received wages through February 17, 2011 since the paychecks ran two weeks behind the actual pay period. The following is further information regarding his weekly unemployment claims.

Week ending date	Wages earned	Wages reported	Benefits paid
12/31/11	\$0.00	\$0.00	\$385.00
01/07/12	\$369.75	\$0.00	\$385.00
01/14/12	\$286.70	\$0.00	\$385.00
01/21/12	\$433.71	No weekly claim	
01/28/12	\$353.31	No weekly claim	
02/04/12	\$345.00	No weekly claim	
02/11/12	\$0.00	\$0.00	\$385.00
02/18/12	\$0.00	\$0.00	\$385.00

Sue Oldenburger from Cedar River Poultry in Charles City, Iowa sent three requests to the employer seeking information on the claimant. The first document was a request for DOT drug and alcohol information. The claimant signed the release of information on this document on

February 17, 2012 and it was witnessed by Ms. Oldenburger with her signature under the claimant's. The third document was a request for FMCSA safety performance history from the previous employer. The claimant signed the release for this document on February 17, 2012 and Ms. Oldenburger witnessed it with her signature.

The claimant called and spoke with Mr. Dahl again on February 23, 2012 and wanted to know when they were going to put him to work and Mr. Dahl told him that he had voluntarily quit. The claimant said he decided not to take it because the new company was not going to run him 2500 mile per week and that was why he did not take the job. The claimant continued calling in after that and spoke with Controller Sue Benschoter. The employer received a hand written letter from the claimant dated February 23, 2012 stating that he called in to find out why he was not working and had been told he quit. The claimant stated that he did not quit and further stated, "So I'm clear I want to work!" He later wrote that he believed he was fired because of a work comp injury.

Ms. Benschoter documented that there were no issues with worker's comp and the claimant had been released by his doctor to return to work in October 2011. The claimant worked from that time until he requested time off from February 4, 2012 through February 6, 2012.

The claimant filed a claim for unemployment insurance benefits effective December 25, 2011 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant's voluntary separation from employment qualifies him to receive unemployment insurance benefits. He is not qualified to receive unemployment insurance benefits if he voluntarily quit without good cause attributable to the employer. Iowa Code § 96.5-1.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980) and *Peck v. Employment Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992). The claimant demonstrated his intent to quit and acted to carry it out by telling the owner on February 3, 2012 that he quit his employment.

The claimant contends that he was fired but the evidence does not support that contention. He told the employer he was going to work for Cedar River Poultry in Charles City, Iowa and subsequently signed employment paperwork with that company on February 17, 2012. The paperwork, which included the pre-employment verification form, was sent to the employer so that information could be provided to his new employer, Cedar River. The claimant called back on February 23, 2012 and claimed he had never quit.

The law presumes it is a quit without good cause attributable to the employer when an employee is considered to have left employment after giving the employer employer notice of an intention to resign and the employer accepted such resignation. 871 IAC 24.25(37). Furthermore, the Iowa Court of Appeals considers it a voluntary quit when a claimant gives notice of resignation which is accepted by the employer, even though the claimant subsequently attempts to withdraw the resignation. *Langley v. EAB*, 490 N.W.2d 300 (Iowa App. 1992).

It is the claimant's burden to prove that the voluntary quit was for a good cause that would not disqualify him. Iowa Code § 96.6-2. He has not satisfied that burden and benefits are denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated April 27, 2012, reference 05, is reversed. The claimant voluntarily left work without good cause attributable to the employer. Benefits are withheld until he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue and whether the claimant had earned but unreported wages.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs