IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

GEORGE MARKLEY Claimant **ROGNES CORPORATION** Employer	**APPEAL 21A-UI-16583-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/24/21** **Claimant: Appellant (1)**

Iowa Code § 96.5(1) – Voluntary Quit
Iowa Admin. Code r. 871-24.26(4) – Intolerable working conditions
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

The claimant, George Markley, filed an appeal from the July 19, 2021, (reference 01) unemployment insurance decision that denied benefits based upon his voluntary resignation. The parties were properly notified about the hearing. A telephone hearing was held on September 20, 2021. The claimant participated and testified. The employer participated through Owner Warren Rognes. Official notice was taken of the agency records.

ISSUES:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause attributable to the employer?
Whether the claimant is able and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full-time as an acting foreman from September 14, 2015, until was separated from employment on April 21, 2021, when he voluntarily quit. The claimant reported directly to Warren Rognes and Cody Rognes. The claimant does not use a construction helmet.

The employer has a policy stating if it is raining in the morning then everyone should still report to work, then a decision will be made whether to call off work. The employer has this policy because some employees travel from a significant distance away.

In 2014, the employee taught its employees on the proper procedures regarding preventing saws from kicking back.

In 2018, the claimant was operating a cut-off saw, when the saw kicked back and nearly cut his jugular. The claimant was not using proper form which resulted in the saw kicking back.

In 2019, the claimant collapsed on a job site in West Des Moines.

In October 2020, the claimant met with his physician, Allison Testroet in Huxley, Iowa. The claimant reported experiencing bloody stools, lack of sleep and general stress. Dr. Huxley did not state these symptoms were related to the claimant's work. However, Dr. Testroet gave the claimant recommendations regarding sleep hygiene and managing his stress.

Prior to December 2020 or January 2021, the employer was using a 40-foot rated trench box. Warren Rognes acknowledged this trench box was arguably insufficient regarding the depth of the trench. At that time, the employer provided a fully compliant Occupational Safety and Health Administration (OSHA) trench box.

In January 2021, Warren Rognes and Cody Rognes performed the claimant's performance review. During the performance review, the claimant generally said he was experiencing stress. Warren Rognes brushed this off stating that there is stress with any kind of job.

On April 1, 2021, the claimant unilaterally decided to call off working on that day because it was expected to rain that day. The claimant did not see a point in his subordinates getting wet and cold. There was not any rain in that area. Cody Rognes disagreed and began arguing with the claimant. Cody Rognes and the claimant closed distance with each other until they were nose to nose. The claimant told Cody Rognes to fire him. He also told Cody Rognes that if he did not fire him, that he would quit.

On April 19, 2021, the claimant did not go to work.

On April 20, 2021, the claimant did not go to work. The claimant sent a text message to Warren Rognes stating that he had a virus and would not be coming in on that day. He did not go to the doctor that day.

On April 21, 2021, Warren Rognes received a call from his project manager. The project manager stated that the claimant and his subordinates had been inquiring in about advertisements placed on Indeed for work that offered $40.00 per hour to new employees. The claimant was receiving $38.00 per hour as a foreman. The claimant's subordinates received $29.00 to $38.00 per hour. The claimant spoke with Warren Rognes about the issue. The claimant asked, "What is this shit," referring to the advertisements. Warren Rognes attempted to explain that he clicked on a higher range because he wanted the new employees to show up and he would negotiate with them on their pay. The claimant became so upset that he said, "That's it, I am done. If you fight me on this I'll file a workers compensation claim." The claimant then walked off the job.

The claimant received two job offers shortly after he quit. One offer was from Precision Pipe and Grading, which he accepted on June 1, 2021. The other offer was from MPS Engineers P.C. The claimant did not start working prior to that because he wanted to take some time off to relax.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's separation from the employment was without good cause attributable to the employer. Assuming arguendo the claimant's quit is with good cause to the employer, it is clear he was not able and available for work after the separation.

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. 871-24.25 (13), (21) and (22) provide:

> Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (13) The claimant left because of dissatisfaction with the wages but knew the rate of pay when hired.
>
> (21) The claimant left because of dissatisfaction with the work environment.
>
> (22) The claimant left because of a personality conflict with the supervisor.

Iowa Admin. Code r. 871-24.26(6)b 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:
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> (2) The claimant left due to unsafe working conditions.
>
> (4) The claimant left due to intolerable or detrimental working conditions.
>
> (6) Separation because of illness, injury, or pregnancy.
>
> b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with the employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.
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> In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is

> reasonably accommodated. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

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).

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. Id. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. Id.

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events as reflected in the findings of fact. Primarily, the administrative law judge finds the claimant's reason for quitting was not due to safety concerns he had. The administrative law judge finds the claimant was using a forty foot trench box that was arguably insufficient three to four months prior to his resignation. At that point, the employer upgraded the trench box to be more than compliant. The claimant did not rebut Warren Rognes' allegation he did not wear a construction helmet. In this context, the claimant does not appear have had credible safety concerns that led to his resignation. To the extent the claimant had safety concerns, they had been resolved months prior to his voluntary resignation.

Work-Related Illness

An individual who voluntarily leaves their employment due to an alleged work-related illness or injury must first give notice to the employer of the anticipated reasons for quitting in order to give the employer an opportunity to remedy the situation or offer an accommodation. *Suluki v. Employment Appeal Board*, 503 N.W.2d 402 (Iowa 1993). An employee who receives a reasonable expectation of assistance from the employer after complaining about working conditions must complain further if conditions persist in order to preserve eligibility for benefits. *Polley v. Gopher Bearing Company*, 478 N.W.2d 775 (Minn. App. 1991).

In this appeal letter and in the hearing itself, the claimant alleged work-related stress caused him to quit. The claimant cannot show his quit is attributable to his employer for two reasons: (1) the claimant denied his physician found that the symptoms he attributes to work were work-related, and (2) the claimant did not tell management he would quit if the employer did not reduce the stress on the job.

Unsafe / Illegal / Intolerable
Generally, notice of an intent to quit is required by *Cobb v. Employment Appeal Board*, 506 N.W.2d 445, 447-78 (Iowa 1993), *Suluki v. Employment Appeal Bd.*, 503 N.W.2d 402, 405 (Iowa 1993), and *Swanson v. Employment Appeal Bd.*, 554 N.W.2d 294, 296 (Iowa Ct. App. 1996). These cases require an employee to give an employer notice of intent to quit, thus giving the employer an opportunity to cure working conditions. Accordingly, in 1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement. The requirement was only added, however, to rule 871-24.26(6)(b), the provision addressing work-related health problems. No intent-to-quit requirement was added to rule 871-24.26(4), the intolerable working conditions provision. Our supreme court concluded that, because the intent-to-quit requirement was added to 871-24.26(6)(b) but not 871-24.26(4), notice of intent to quit is not required for intolerable working conditions. *Hy-Vee, Inc. v. Employment Appeal Bd.,* 710 N.W.2d 1 (Iowa 2005).

The claimant contends he quit due to intolerable, unsafe and illegal working conditions. As illustrated above in the findings of fact, the administrative law judge does not find the claimant's contention that he was compelled to work in non-compliant trench boxes credible. The administrative law judge finds the claimant was using an arguably non-compliant trench box approximately three to four months prior to quitting. At that time, the employer provided an updated trench box.

Rather, the administrative law judge finds the claimant voluntarily resigned because of incidents occurring on April 1, 2021 and April 21, 2021. The incident on April 1, 2021 shows the claimant partially disagreed due to a personality issue with his supervisors that would be disqualifying under Iowa Admin. Code r. 871-24.25(22). The dispute the claimant had with Warren Rognes appears to be over dissatisfaction with wages he agreed to receive. when he was hired. This is a disqualifying reason under Iowa Admin. Code r. 871-24.25 (13). While claimant's leaving may have been based upon good personal reasons, it was not for a good-cause reason attributable to the employer according to Iowa law. Benefits are denied.

Assuming arguendo the claimant's quit is not disqualifying, he is not entitled to benefits because he was not able and available for work.

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".

Iowa Admin. Code r. 871-24.22(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.
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> 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.

Iowa Admin. Code r. 871-24.22(2) provides:

> **Benefit 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.

Iowa Admin. Code r. 871-24.23 provides:

> **Availability disqualifications.** The following are reasons for a claimant being disqualified for being unavailable for work.
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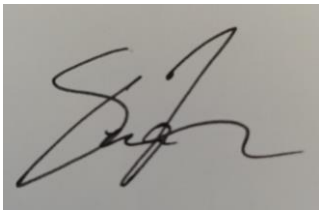
> **(16)** Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

An individual claiming benefits has the burden of proof that he is be able to work, available for work, and earnestly and actively seeking work. Iowa Admin. Code r. 871-24.22.

The claimant had job offers from two employers shortly after he left. The claimant decided to stay away from work for five weeks because he needed a break. By this inaction he has not established that he is genuinely attached to the labor market. To the contrary, the claimant was not available for work after his separation. Accordingly, he is not eligible for unemployment insurance benefits.

DECISION:

The July 19, 2021, (reference 01) unemployment insurance decision is affirmed. The claimant voluntarily left his employment without good cause attributable to the employer. The claimant was also not available for work after the separation. 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.



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Sean M. Nelson
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September 29, 2021
Decision Dated and Mailed

smn/mh