

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NANCY K PARKER
Claimant

APPEAL NO. 10A-UI-10653-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL MEAT SOLUTIONS CORP
Employer

OC: 06-13-10
Claimant: Appellant (2)

Iowa Code § 96.5(1)d – Voluntary Leaving/Illness or Injury
871 IAC 24.26(6) – Separation Due to Illness or Injury
Iowa Code § 96.4(3) – Able and Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 28, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 16, 2010. The claimant did participate and was represented by Steve Hamilton, Attorney at Law. The employer did not participate though they did submit documents to be considered by the administrative law judge in making the decision. Claimant's Exhibit A was entered and received into the record. Employer's Exhibit One was entered and received into the record.

ISSUES:

Is the claimant able to and available for work?

Has the claimant been temporarily separated from her employment?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a box trim worker full time beginning September 22, 1997 through date of hearing as she remains an employee. The claimant suffered work-related injuries in the form of torn rotator cuffs to both her right and left shoulder. She was treated surgically on the left shoulder by Theron Jameson, D.O. She has most recently been seen by orthopedic surgeon Kyle Galles, M.D. who determined that there would not be much hope of a re-repair of the left shoulder surgery performed by Dr. Jameson. Dr. Galles has imposed permanent work restriction on the claimant including no work over shoulder height, no lifting over fifteen pounds on the right and no lifting over twenty pounds on the left. The claimant has attempted on seven or eight occasions to return to work in various capacities to find work within her current work restrictions. She has been unable to perform some of the jobs offered to her as they are not within her work restrictions. On some occasion the other jobs she has tried the supervisor has disqualified her from the position as they did not feel she could adequately perform the job duties. The claimant is able to work within her work restrictions.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant is temporarily separated from her employment with good cause attributable to the employer.

Iowa Code § 96.5-1-d 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. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

871 IAC 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:

(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.

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.

Where disability is caused or aggravated by the employment, a resultant separation is with good cause attributable to the employer. *Shontz v. IESC*, 248 N.W.2d 88 (Iowa 1976). Where illness or disease directly connected to the employment make it impossible for an individual to continue in employment because of serious danger to health, termination of employment for that reason is involuntary and for good cause attributable to the employer even if the employer is free from all negligence or wrongdoing. *Raffety v. IESC*, 76 N.W.2d 787 (Iowa 1956).

The claimant's return to the employer to offer services after the medical recovery evinces an intention to continue working. She has continued to report to work to attempt work within her physician-imposed work restrictions. The claimant has work restrictions due to a work-related injury. Currently, the employer has no work for the claimant within her work restrictions; therefore, the temporary separation is attributable to a lack of work by the employer. Benefits are allowed.

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work effective June 13, 2010.

Iowa Code § 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 24.23(1) and (35) provide:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(1) An individual who is ill and presently not able to perform work due to illness.

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

Inasmuch as the injury is considered work related for the purposes of unemployment insurance benefits only and the treating physician has released the claimant to return to work, even with restrictions the claimant has established her ability to work. Because the employer had no work available or was not willing to accommodate the work restrictions, benefits are allowed.

DECISION:

The July 28, 2010, reference 01, decision is reversed. The claimant is temporarily separated from her employment with good cause attributable to the employer. Benefits are allowed, provided she is otherwise eligible. The claimant is able to work and available for work effective June 13, 2010.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css