

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**Appeal Number: 05A-UI-03983-JTT
OC: 04/25/04 R: 02
Claimant: Appellant (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

**MICHAEL D WATERS
50 TROWBRIDGE ST
DES MOINES 50315**

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**BORGEN SYSTEMS
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(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(1)(d) – Separation Due to Work-Related Illness
871 IAC 24.26(6)(b) – Separation Due to Work-Related Illness
Section 96.4(3) – Able and Available for Work

STATEMENT OF THE CASE:

Michael Waters filed a timely appeal from the April 8, 2005, reference 05, decision that denied benefits. After due notice was issued, a hearing was held on May 5, 2005. Mr. Waters was represented by attorney John Hemminger and participated personally. Attorney Steve Nadel represented the Borgen Systems and presented testimony through Jeffrey Merrill, Production Manager. Exhibits A and B were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michael Waters was employed by Borgen Systems as a full-time laborer from September 20,

2004, until February 4, 2004, when he quit. Mr. Waters last worked a shift for the employer on January 24, 2005.

Mr. Waters' duties consisted of building flower display cases for Wal-Mart. A coworker would cut the pieces of wood to size. Mr. Waters would then use the pieces of wood to construct the walls of the display case. Two other employees performed the same duties. The employees were expected to be available to assist one another with lifting and turning the display case during its construction. However, these employees were busy with their own work and were sometimes unavailable to assist Mr. Waters, and Mr. Waters would have to turn and lift the display case without assistance. Mr. Waters constructed three to five display cases each day.

Mr. Waters has longstanding health problems that pre-date his employment with Borgen Systems. Mr. Waters experiences discomfort in both shoulders and intermittently in his right arm. Mr. Waters ruptured the bicep tendon on his right arm a couple years ago while lifting a piece of plywood. Mr. Waters had lower back surgery in the 1990's that may have involved removal of a spinal disk. Mr. Waters has had hernia repair. Mr. Waters has a history of hypertension and is medicated for this condition.

On December 28, 2004, Mr. Waters was examined by Dr. Christopher Ronkar, M.D., at the Mercy Clinics Arthritis and Osteoporosis Center in Des Moines. Dr. Ronkar noted the above referenced medical history and suspected that Mr. Waters had degenerative arthritis in both shoulders. Dr. Ronkar concluded that a lot of Mr. Waters' symptoms of shoulder discomfort, elbow discomfort, and tingling in his hands were related to repetitive use and/or trauma. Dr. Ronkar's notes include the erroneous assertion that Mr. Waters had "a long history of working at Borgen Systems in the framing department." Dr. Ronkar's notes of the visit indicate that this was an initial visit, and that further assessment and a follow up appointment were contemplated. Mr. Waters did not provide any additional documentation regarding possible follow up with Dr. Ronkar.

On February 3, 2005, Mr. Waters was examined by Dr. Stephen Ash, M.D., at the Iowa Orthopedic Center in Des Moines. Dr. Ash indicated he wanted to see whether Mr. Waters' condition would improve with a course in physical therapy. Dr. Ash denied Mr. Waters' request that the doctor take him off work. The doctor indicated that he did not believe Mr. Waters' health situation warranted being completely off work. Dr. Ash indicated that he would give Mr. Waters a ten-pound lifting restriction and have Mr. Waters attempt full duty again in a week. Dr. Ash indicated that he thought Mr. Waters "would be well served by seeking other types of employment for the long term, as many patents his age cannot keep up with the heavy activities as they get older." Dr. Ash indicated that he would see Mr. Waters in a month if needed and if Mr. Waters' condition was not improving. Mr. Waters did not return to Dr. Ash. Instead, Mr. Waters quit his employment the following day.

At the end of January, before his February 4, 2004 quit, Mr. Waters had a discussion with Plant Manager Jeffrey Merrill, at which time Mr. Waters advised he had been seen by a doctor and had "poor shoulders." Mr. Merrill asked Mr. Waters if he wished to be seen by the employer's Worker's Compensation doctor, Mr. Waters declined. Mr. Waters advised that he needed to work light duty for a while. The employer does have light duty work available on occasion. This work would consist of cutting wood or copper. Mr. Merrill had allowed Mr. Waters to perform such work earlier in January, but Mr. Waters had shortly thereafter commenced his normal duties. It is not clear whether Mr. Waters or the employer prompted the return to normal duties. Mr. Merrill and Mr. Waters reached an agreement whereby Mr. Waters would be expected to perform less work, would ask from a coworker as needed, and would wait

for the coworker to become available. Despite the employer's request for medical documentation of Mr. Waters' health issues and any medical restrictions, Mr. Waters did not provide the employer with such documentation.

At the time Mr. Waters quit, he had plans in place to travel to California and help his brother operate a construction business by performing the paperwork for the business. A week after Mr. Waters quit, he did in fact to travel to California and worked with his brother for approximately a month before returning to Iowa.

Mr. Waters is currently employed with Frito Lay as a delivery order picker. This employment does not require Mr. Waters to lift more than ten pounds. Prior to Mr. Waters commencing the employment with Frito Lay, he was not actively seeking employment. Mr. Waters had limited himself to considering only positions that would require him to lift no more than ten pounds.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the evidence in the record establishes that Mr. Waters' voluntary quit was for good cause attributable to the employer.

A person who voluntarily quits employment is disqualified for benefits unless the quit was for good cause attributable to the employer. See Iowa Code section 96.5(1).

Iowa Code section 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 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.

Before quitting employment due to a work-related health problem, an employee must give the employer notice of the work-related health problems. The employee must also advise the employer that the employee intends to quit unless those problems are corrected or the employee is otherwise reasonably accommodated. Absent such notice, an employee is deemed to have voluntarily quit without good cause attributable to the employer and is not eligible for unemployment compensation benefits. See Suluki v. Employment Appeal Board, 503 N.W. 2d 402, 405 (Iowa 1993).

The evidence in the record establishes that Mr. Waters quit the employment due to factors and circumstances directly connected with the employment which aggravated his already poor health, specifically his shoulders, right elbow, and hands. However, the evidence fails to establish that the working conditions were such that it was impossible for Mr. Waters to continue in the employment because of serious danger to his health. The medical evidence submitted by Mr. Waters fails to substantiate the need for a permanent lifting restriction or termination of the employment. Dr. Ash's response to Mr. Waters' request to be taken off work completely was that Mr. Waters' condition did not justify such a recommendation. Dr. Ash recommended only a one-week respite from the normal lifting duties of Mr. Waters' employment at Borgen Systems, with a follow up visit if Mr. Waters attempted but was unable to return to his full duties in a week. Even if the working conditions had justified termination of the employment, Mr. Waters failed to adequately inform the employer of the work-related health problem. In addition, Mr. Waters failed to inform the employer that he intended to quit the employment unless the employer reasonably accommodated his poor health. The employer indicated a willingness to accommodate Mr. Waters' poor health with or without appropriate documentation, but Mr. Waters quit anyway.

Based on the evidence in the record and the law cited above, the administrative law judge concludes that Mr. Waters' voluntary quit was without good cause attributable to the employer. Accordingly, Mr. Waters is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The employer's account shall not be charged for benefits.

The evidence in the record further establishes that even if Mr. Waters were otherwise eligible for benefits, he was not able and available for work between the date he established his claim and the date he commenced his new employment at Frito Lay. A claimant must be physically able to work and available for work referrals to be eligible for benefits. See Iowa Code section 96.4(3).

DECISION:

The Agency representative's April 8, 2005, reference 05, decision is affirmed. The claimant's voluntary quit was without good cause attributable to the employer. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The employer's account shall not be charged for benefits. The claimant was not able and available for work from the time he established his claim to the date he commenced his new employment.

jt/kjw