IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KELLY P ASCHAN Claimant **HENKEL CONSTRUCTION CO** Employer	**APPEAL 19A-UI-09323-AD-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/27/19** **Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.4(3) – Eligibility – A&A – Able to, available for, work search

STATEMENT OF THE CASE:

On November 27, 2019, Kelly Aschan (claimant) filed a timely appeal from the November 21, 2019 (reference 01) unemployment insurance decision that found claimant was not eligible for benefits.

A telephone hearing was held on December 20, 2019. The parties were properly notified of the hearing. The claimant participated personally. Henkel Construction Co. (employer) participated by HR Director Katrina Moore.

ISSUE(S):

I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?
II. Is claimant able to and available for work?

FINDINGS OF FACT:

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

Claimant worked for employer as a full-time foreman. Claimant's first day of employment was June 17, 2019. The last day claimant worked on the job was July 1, 2019. Claimant's immediate supervisor was Doug Hovick. Claimant's schedule was 7 a.m. to 5:30 p.m., five days a week. Claimant separated from employment on July 1, 2019. Claimant quit effective immediately on that date.

Claimant informed Hovick the night before July 1, 2019 that he was quitting for health reasons. During the working days leading up to his resignation, claimant was having heart-attack-like symptoms. These symptoms consisted of shortness of breath and issues with circulation, including a tingling sensation. Claimant was barely able to walk across the job site.

Claimant went to see his doctor and was diagnosed with a heart blockage. Claimant's doctor did not specifically recommend he quit but did advise him to only do work he felt he could safely do. Claimant had never before been diagnosed with heart issues. Claimant's heart condition was not caused by work. However, the type of work he was performing – including performing manual labor in the heat – aggravated those symptoms.

Claimant did not discuss with Hovick the possibility of moving to another position with employer, and there were no other positions for claimant to perform. Claimant did not wish to discontinue working for employer but felt it was unfair to the employer and unsafe for him and his coworkers for him to continue to work there.

Since his separation, claimant's condition has improved through medication. However, claimant did not return to work and offer his services upon improvement. This is because claimant does not believe he will be able to return to the construction industry, given his heart condition.

Claimant does not have any restrictions from his doctor. He is actively searching for work, particular in maintenance-type positions. He has done that type of work before. He is also searching for heavy equipment operating positions. He has transportation to get to work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the November 21, 2019 (reference 01) unemployment insurance decision that found claimant is not eligible to receive benefits is REVERSED.

I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

Iowa Code section 96.5(1)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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:

Iowa Admin. Code r. 871-24.25 provides in relevant part:

> 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:
>
> **(36)** The claimant maintained that the claimant left due to an illness or injury which was caused or aggravated by the employment. The employer met its burden of

proof in establishing that the illness or injury did not exist or was not caused or aggravated by the employment.

Iowa Admin. Code r. 871-24.26 provides in relevant part:

> 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.
>
> *a. Nonemployment related separation.* The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was available. Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.
>
> *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.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). The employer has the burden of proving that a claimant's departure from employment was voluntary. *Irving v. Emp't Appeal Bd*., 883 N.W.2d 179 (Iowa 2016). "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". Id. (citing *Cook v. Iowa Dept. of Job Service*, 299 N.W.2d 698, 701 (Iowa 1980)).

Employee/claimant must give notice to the employer of work related health problems with an intent of quitting employment in order to give the employer an opportunity to remedy it. A notice of an intent to quit had been required by *Cobb v. Emp't Appeal Bd.*, 506 N.W.2d 445, 447-78 (Iowa 1993), *Suluki v. Emp't Appeal Bd.*, 503 N.W.2d 402, 405 (Iowa 1993), and *Swanson v. Emp't Appeal Bd.*, 554 N.W.2d 294, 296 (Iowa Ct. App. 1996). Those cases required an employee to give an employer notice of intent to quit, thus giving the employer an opportunity to cure working conditions. However, in 1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement. The requirement was only added 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 recently

concluded that, because the intent-to-quit requirement was added to rule 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. Emp't Appeal Bd.,* 710 N.W.2d 1 (Iowa 2005).

Although claimant's heart condition was not caused by work, the type of work he was performing – including performing manual labor in the heat – aggravated those symptoms. This constitutes a work-related health problem. Claimant was compelled to leave employment, as this health problem made it impossible for the employee to continue in employment because of serious danger to his health. Claimant gave notice of his intent to quit due to work-related health problems. While claimant did not specifically request an accommodation, claimant's notice of intent to quit due to work-related health problems was sufficient to put employer on notice of his need for an accommodation. Employer did not offer an accommodation, nor was other work available for claimant to complete.

Based on the above, the administrative law judge finds claimant's quitting was with good cause attributable to employer.

II. Is claimant able to and available for work?

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.

The administrative law judge finds claimant is able to and available for work. While claimant does not believe his heart condition will allow him to return to the construction industry, his condition has improved and he has no restrictions. He is actively searching for work, particular in maintenance-type positions. He has done that type of work before. He is also searching for heavy equipment operating positions. He has transportation to get to work.

DECISION:

The November 21, 2019 (reference 01) unemployment insurance decision is REVERSED. Claimant is eligible to receive benefits, so long as he meets all other eligibility requirements.

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Andrew B. Duffelmeyer
Administrative Law Judge
Unemployment Insurance Appeals Bureau
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Decision Dated and Mailed

abd/scn