

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CORY J ONKEN
Claimant

APPEAL NO. 09A-UI-16369-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DAN DIETIKER CONSTRUCTION
Employer

**Original Claim: 09/30/09
Claimant: Respondent (4)**

Section 96.5(1)d – Quit Due to Injury/Illness
Section 96.4(3) – Able and Available.

STATEMENT OF THE CASE:

Dan Dietiker Construction (Dietiker) filed an appeal from a representative's decision dated October 21, 2009, reference 02, which held that Cory Onken satisfied the availability requirements of the law as of August 30, 2009. After due notice was issued, a hearing was held by telephone on December 7, 2009. Mr. Onken participated personally. The employer participated by Julie Dietiker, Bookkeeper.

ISSUE:

At issue in this matter is whether Mr. Onken was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Onken began working for Dietiker on May 22, 2009 as a full-time laborer and last performed services on August 6. He was off work thereafter because he had surgery to repair a hernia. The condition was not work-related. He underwent the surgery on August 10 and was released from the hospital on August 24.

On or about September 10, Mr. Onken was released to return to work with restrictions. He was to be on light duty with no lifting over ten pounds and no bending. The employer did not have work he could perform within his restrictions. The employer suggested he might want to seek different work to avoid further injury but did not indicate he could not return to work for Dietiker. As of the date of the hearing, Mr. Onken had not been released to full duty.

Mr. Onken filed a claim for job insurance benefits effective August 30, 2009. He has received a total of \$4,366.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

Mr. Onken was off work after August 6, 2009 because of a medical condition that was not work-related. He was off work on his doctor's recommendation and the employer was notified of the need to be absent. In order for Mr. Onken to receive benefits pursuant to Iowa Code section 96.5(1)d, he had to re-offer his services to the employer once he recovered from his condition. Where an individual's illness or injury is not work-related, he must have a full release when he re-offers his services in order to be considered "recovered" within the meaning of section 96.5(1)d. In the case at hand, Mr. Onken had restrictions when he re-offered his services to the employer in September. Therefore, he had not recovered from his medical condition.

Mr. Onken has not presented the employer with a release that allows him to work without restrictions. It is true that the employer hired someone to perform Mr. Onken's job while he was away. This does not mean the employer will not have the need for labor when Mr. Onken is fully released. Although the employer suggested he might want to look for other work, he was not told he could not return to Dietiker when released. In short, the employer did not discharge him while he was out on medical leave or foreclose the possibility of him returning. Inasmuch as Mr. Onken has not recovered from his illness or injury and re-offered his services to the employer, he is not entitled to benefits pursuant to section 96.5(1)d. While Mr. Onken may retain the residual functional capacity to perform some type of work, the disqualifying separation precludes payment of benefits to him.

Mr. Onken has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated October 21, 2009, reference 02, is hereby modified. Mr. Onken is able to perform some work but has a disqualifying separation from Dietiker. Benefits are denied until such time as he is fully released and re-offers his services to the employer, provided no work is available and he is otherwise eligible for benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw