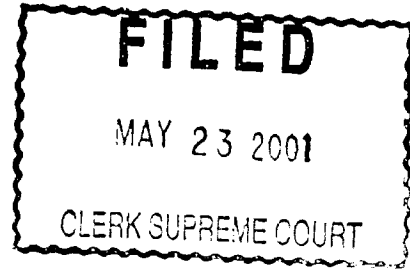


IN THE COURT OF APPEALS OF IOWA

No. 0-756 / 00-0703
May 23, 2001



MARIA MORRIS,
Petitioner-Appellee,

vs.

IBP, INC., Employer,
Respondent-Appellant.

Appeal from the Iowa District Court for Des Moines County, John G. Linn,
Judge.

The employer, IBP, Inc., appeals a district court's ruling on judicial review
that reversed the industrial commissioner's determination the employee had
voluntarily terminated her employment. **AFFIRMED.**

Christopher J. Godfrey of Pingel & Templer, P.C., West Des Moines, for
appellant.

Thomas M. Wertz of Wertz & Leehey, P.C., Cedar Rapids, for appellee.

Considered by R. Peterson, Honsell, and C. Peterson, Senior Judges.*

*Senior Judges assigned by order pursuant to Iowa Code § 602.9206
(2001).

R. PETERSON, S.J.

IBP, Inc. appeals the ruling of the district court reversing the industrial commissioner's denial of temporary disability benefits contending there was substantial evidence in the record to support the commissioner's finding Maria Morris had voluntarily refused suitable work that was made available to her by IBP. We affirm.

Maria Morris (Maria) began working for IBP, Inc. (IBP) in August of 1993. Her last day of employment was November 29, 1993. Maria was born on June 26, 1949, in Mexico, and completed the ninth grade there. She is married to Greg Lynn Morris. She has been in the United States since 1978, but her primary language is Spanish. She has little understanding of English and an interpreter was provided for her during the hearings. Prior to working for IBP she did not have any health problems. She is presently living in Pasadena, Texas.

Maria's daughter, Zulema Hernandez (Zulema), who was twenty-five years old at the time of the hearing was also employed at IBP. Her last day of work was also November 29, 1993. At the present time she is also living in Pasadena, Texas.

Maria's initial position with IBP was on a conveyor where she removed portions of the carcass as it moved by her. These duties were fast paced and involved repetitive use of her upper extremities.

On October 29, 1993, and November 22, 1993, Maria experienced pain in her right arm and shoulder. The pain was diagnosed in November of 1993, as overuse syndrome of the right upper extremity and right biceps tendonitis. Maria

was then placed on restrictions by the diagnosing doctor. As a result of these restrictions, Maria was placed on a light-duty job doing what is known as "counting blue feet."

On November 26, 1993, after Maria had completed her shift, she was going up some stairs, holding onto the handrail when she slipped on something and fell down on her right arm and her right leg. At that moment, she felt a pain in her back.

Maria was then advised to go to the nurse's station, which she did. She was not examined there and was given an icepack and told to go.

Zulema had made arrangements to terminate her employment on November 29, 1993. Zulema intended to take care of her sick father, Maria's ex-husband, who was living in Mexico at the time. On the same day, Maria wanted to talk to Terry Zimmerman (Zimmerman) who is the medical case manager for IBP. Maria wanted to find out if there was some other type of light work that she could do. She asked that Zulema go with her to interpret for her. They went to Zimmerman's office and asked to speak to him. They were told by an individual named David that Zimmerman was not available at that time. Maria again asked David if she could speak to him and he then replied there was no way she would be able to talk to him and suggested she go to the security office and leave her I.D. there. They went to the security office and asked one of the individuals in the office if Maria could speak to Zimmerman. The individual replied she could talk to him and told her to wait there. She also requested Maria give her her I.D.

so she could check the number. Maria did this and was told to have a seat in the room and wait.

They waited there "for hours." They continued asking if Zimmerman was coming and were finally told he was not coming and would not talk to Maria. Maria was asked to fill out an exit interview like the one Zulema had filled out. Maria declined to do this because she did not want to quit and wanted to talk to Zimmerman. Maria and Zulema then left.

On November 30, 1993, a termination report, which is an internal document of IBP, was completed which indicated Maria was terminated because she "stated that she was quitting to take care of her sick husband." The document was signed by Otis L. Pettit as a supervisor and David Duncan who was the assistant to the personnel manager. This document is not shown or made available to the employees. Neither Pettit nor Duncan were called to testify. When relevant evidence is in the control of the party whose interest is affected, a court may infer the evidence, if not presented, would be unfavorable to that party. *Hammer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 262 (Iowa 1991). It was Zulema who quit and wanted to take care of her father, Maria's ex-husband.

IBP submitted interrogatories to Maria. Number 4 concerned her previous job experience. Subparagraph h of that interrogatory asked that she indicate "why you terminated each employment." In responding to that interrogatory with respect to IBP, she indicated her answer to subparagraph h was "due to work injuries and continued pain."

Maria has not obtained employment since returning to Texas. She indicates she has not looked for work because she does not think she would be able to perform a job with the pain in her shoulder, her arm, and her back. Her treating doctor in Texas, however, has released her to go to work without any restrictions.

On June 30, 1997, the deputy industrial commissioner found Maria had received an injury arising out of and in the course of her employment. He found Maria was not entitled to permanent disability benefits, but he did find she was entitled to temporary total disability benefits from November 11, 1994, through October 1, 1996, at the rate of \$171.88 per week.

This decision was appealed by IBP to the industrial commissioner. On July 24, 1998, she entered an order affirming the decision of the deputy. IBP appealed that decision to the Iowa District Court.

On December 11, 1998, the district court remanded the matter back to the commissioner for clarification of the findings. This was because of the deputy's finding "it could not be found she was involuntary terminated by IBP. Given the conflicting evidence it also cannot be found she refused an offer for suitable employment by IBP."

On April 16, 1999, the industrial commissioner entered an order finding Maria voluntarily terminated her employment with IBP. By voluntarily terminating her employment, claimant refused suitable work offered by IBP. Accordingly, the industrial commissioner ruled Maria should take nothing in this matter.

Scope of Review.

We review the district court's decision regarding the validity of agency actions for correction of errors at law. *U.S. Communications, Inc. v. Overholtzer*, 556 N.W.2d 783, 785 (Iowa 1997). In determine whether the district court erred in exercising its power of judicial review, we apply the standards of Iowa Code section 17A.19(a) (1995) to the agency action to determine whether our conclusions are the same as the district court. *ENT Assocs. v. Collentine*, 525 N.W.2d 827, 829 (Iowa 1994). We are bound the commissioner's factual findings if they are supported by substantial evidence in the record. We review the record made before the agency in its entirety. *Second Injury Fund v. Bergesson*, 526 N.W.2d 543, 546 (Iowa 1995). Evidence is substantial if a reasonable person would find it adequate for reaching a decision. *People's Mem'l Hosp. v. Iowa Civil Rights Comm'n*, 322 N.W.2d 87, 91 (Iowa 1982). The fact the appellant court could draw inconsistent conclusions from the same evidence does not mean substantial evidence does not support the commissioner's determinations. *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 271 (Iowa 1995).

Discussion.

The ultimate issue in this case is whether Maria voluntarily left her employment at IBP or whether she was involuntarily terminated. Maria was offered suitable work during her healing period. A worker who refuses suitable work surrenders the right to temporary disability benefits. *McCormick v. North Star Foods, Inc.*, 533 N.W.2d 196, 199 (Iowa 1995). If Maria voluntarily left her employment, she would have refused suitable work and forfeited her benefits.

The commissioner, in determining Maria voluntarily terminated her work, based her decision on three grounds. She initially contends the testimony of Maria and Zulema was confusing and sometimes contradictory. She failed to set forth any specific facts to support this conclusion as required by Iowa Code section 17.16(1). We do not find, after review of the testimony of Maria and Zulema, their testimony is so contradictory and confusing as to support a decision Maria voluntarily terminated her employment with IBP.

The commissioner next based her decision on the fact Maria and Zulema both began working with IBP at the same time and then moved out of the state within a week or so of each other. We agree with the trial court the mere fact Maria moved out of the state approximately a week after her daughter did is irrelevant in the determination as to whether her termination from IBP was voluntary or involuntary. The events that took place on November 29, are the relevant facts in determining whether Maria's termination was voluntary or involuntary.

The commissioner next based her decision on Maria's response to Interrogatory No. 4, subparagraph h, which answer was with respect to IBP. The reason Maria gave for her termination to that interrogatory from IBP was "due to work injuries and continued pain." The interrogatory does not specifically ask whether or not her termination from various employees was voluntary or involuntary. We agree with the trial court it cannot be implied from the phrase "due to work injuries and continued pain" the termination was voluntary.

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. To establish a voluntary quit, the employee must intend to terminate the employment and it must be shown by an overt act on behalf of the employee. *Peck v. Employment Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). The record shows no overt act by Maria that she intended to leave the employment of IBP. She did turn over her I.D. badge, however, she was asked for the I.D. badge when she indicated she wanted to see Zimmerman. She was simply following instructions at that time.

Maria refused to sign the exit interview because she did not want to quit. It was Zulema who was quitting to care for her sick father, Maria's ex-husband, contrary to what is set out in the termination report.

.. In conclusion, we find there is not substantial evidence in this case to support the conclusion Maria voluntarily terminated her employment with IBP. We do find there is substantial evidence to support the conclusion Maria was involuntarily terminated from her employment with IBP, and, consequently, did not refuse suitable work offered by IBP. We affirm the trial court.

AFFIRMED.