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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WENDALL E. BATES,	)	
Petitioner-Appellee,	)	Filed December 21, 1978
vs.	)	
IOWA DEPARTMENT OF JOB SERVICE,	)	667
Respondent-Appellant.	)	2-61600
and	)	
HOME PLASTICS, INC.	)	
Respondent.	)	

Appeal from the Jasper District Court - Dale S. Missildine, Judge.

Department of Job Service appeals from judgment of district court reversing agency determination that petitioner is disqualified from receiving unemployment benefits. Affirmed.

H. Edwin Detlie, Walter F. Maley, and Blair H. Dewey, of Des Moines, for appellant.

George A. Wilson, III, of Des Moines, for respondent, Home Plastics, Inc.

Don Salisbury, of Salisbury, Fleck & Walker, of Newton, for appellee.

Heard by Oxberger, C.J., and Snell, Carter and Johnson, JJ. Donielson, J., takes no part.

PER CURIAM

Respondent, Iowa Department of Job Service, appeals from judgment of the district court reversing the agency determination that petitioner, Wendall E. Bates is disqualified from receiving unemployment benefits. For reasons hereinafter stated, we affirm the district court.

The action of the agency in denying unemployment benefits to petitioner was predicated upon § 96.5(1), the Code, which provides, in part: "an individual shall be disqualified for benefits . . . if he or she has left his or her work voluntarily without good cause attributable to his or her employer if so found by the department." The issue presented in the application of this statute to petitioner's claim is whether he is excused from his application by reason of subsection (d) thereof, which provides:

> "But, he or she shall not be disqualified if the department finds that:
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> * * *
>
> "d. He or she left his or her employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for such absence immediately notified his or her employer, or his or her employer consented to such absence, and after recovering from such illness, injury or pregnancy when recovery is certified by a licensed and practicing physician, he or she returned to his or her employer and offered his or her service and his or her regular work or comparable suitable work was not available, if so found by the commission, provided he or she is otherwise eligible."

Petitioner's compliance with certain elements of this proviso are not disputed. Petitioner left his employment because of illness and notified his employer of the medical condition and the necessity for treatment. Petitioner was hospitalized for this condition and acted upon the advice of one or more licensed physicians. Three days following his release from the hospital, petitioner presented himself for work at his regular employment, but was told that he had been replaced at his regular job and was not offered other suitable work. In spite of these circumstances, the hearing examiner ruled that petitioner was disqualified because "the record is void of any evidence establishing that the claimant had recovered from the illness sufficiently to render his services and the record is further absent of any evidence certifying such recovery by a licensed and practicing physician." This determination was upheld by the agency appeal board.

In attacking the district court decision reversing the agency action, the agency asserts that that court improperly received and considered additional evidence not presented to the hearing examiner and further acted improperly in making its own independent findings of fact with respect to petitioner's claim. These contentions appear to have merit. But, we deem it possible and advisable to avoid any problems incident to the trial court's review by conducting our own independent review of the record before the hearing officer without considering the additional evidence presented in the district court. Our task upon such review is to determine if the agency decision is (a) unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole; or (b) affected by an error of law. Section 17A.19(8), The Code; City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 311-12 (Iowa 1978).

Petitioner urges that this case is controlled by the decision in Wilson Trailer Co. v. Iowa Employment Security Commission, 168 N.W.2d 771, 776 (Iowa 1969). We agree that that decision renders inapplicable one of the grounds relied upon by the agency in its determination that petitioner was disqualified from receiving unemployment benefits. It is not disputed that petitioner had been replaced on his regular job prior to his presenting himself as ready for return to work and that he was not offered other suitable work. Under such circumstances, the absence of a physician's certificate is not fatal to his claim. The requirement of a physician's certificate in § 96.5(1)(b) is for the protection of the employer. It is a means by which the employer may avoid taking the employee's word as to present physical condition or health status in the process of making the decision of whether to permit the employee to resume working. But where, as in the present case, the employee has already been replaced before an attempt is made to resume working, there is no decision for the employer to make and the certificate is not essential. We believe this to be the rationale of Wilson Trailer Co. v. Iowa Employment Security Commission, supra, at 776, and find it fully applicable to petitioner's situation.

It remains, however, for the employee to establish that he or she had in fact recovered from the illness which necessitated the absence from work. Such requirement is part of the proviso of subsection (d) to § 96.5(1). Its purpose is to limit

payment of unemployment benefits to those who are physically able to work, yet remain unemployed. Conversely, it operates so as to prevent payment of benefits for continued unemployment due to physical disability unrelated to the job. The hearing examiner found that petitioner failed to establish that he had recovered from the illness sufficiently to render his services. We have reviewed the entire record before the hearing examiner, including that which detracts from the evidentiary support for this finding. Upon such review, we cannot agree that said finding is supported by substantial evidence.

There is no evidence in the record before the hearing examiner contradicting petitioner's testimony that he had recovered sufficiently to return to work and had been released by his doctor for this purpose. The hearing examiner gave no reason for rejecting the petitioner's uncontroverted testimony on this point. aff. Catalfo v. Firestone Tire & Rubber Co., 213 N.W.2d 506, 510 (Iowa 1973).

A claimant's appearance before an administrative hearing officer should not be a trap for the unwary whereby a claim is denied because of uncertainty as to what evidence the agency is seeking. Following the ruling of the hearing officer, the petitioner appealed to the appeal board of the agency and supported his appeal by providing that body with a physician's certificate stating that he was able to return to work on December 30, 1976 (the date he reported back to the job). The appeal board refused to consider this evidence because it had not been presented to the hearing officer. We believe the appeal board should have returned the matter to the hearing officer for further consideration pursuant to Job Service Rule 370-6.4(1)(g)(3), so that this new evidence could be considered. Had this certificate been presented to the hearing officer, we do not see how petitioner's claim could properly have been rejected.

We believe no useful purpose would be served at this time by remanding this case to the agency for further consideration. On the record made, petitioner's claim should have been allowed, and the district court's judgment so providing is affirmed.

AFFIRMED.