BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

WILLIAM S OPDYKE	:	
	:	**HEARING NUMBER:** 12B-UI-15711
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
MEL EASTON & SONS INC	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Employment Appeal Board adopts and incorporates as its own the administrative law judge's Findings of Fact with the following addition:

Both the Claimant and the Employer ‘mutually agreed’ that the Claimant would no longer work after early October. (Tr. 2)

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.1(113) provides:

> *Separations*. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> *a. Layoffs.* A layoff is a *suspension* from pay status initiated by the Employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
>
> *b. Quits. A quit is a termination of employment initiated by the employee* for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
>
> *c. Discharge.* A discharge is a *termination of employment initiated by the Employer* for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
>
> *d. Other separations.* Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and *failure to meet the physical standards required*. (Emphasis added.)

Although we sympathize with the Claimant's predicament, substantial evidence supports that the Claimant's separation was neither a quit nor a discharge. In order for this separation to be characterized as a discharge, the separation must have been initiated by the Employer. But for the Claimant's becoming insulin dependent, the Employer would have continued his employment if there was work available that didn't require DOT compliance, like truck-driving.

In order for this case to be a quit, the Claimant must have initiated the separation. "[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." FDL Foods, Inc. v. Employment Appeal Board, 460 N.W.2d 885, 887 (Iowa App. 1990), accord Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992). The Claimant showed no prior intention to quit his employment, nor did he take any action to effectuate a quit. In fact, it was the progression of the Claimant's medical condition (diabetes), which caused him to become insulin dependent rendering him unable to qualify under DOT regulations to continue driving the truck. (Tr. 4) There is nothing in this record to establish that the Claimant's underlying medical condition, or its progression, was caused by or aggravated by his employment such that it could have led to a quit that could arguably be attributable to the Employer. See, 871 IAC 24.26(6)"b". Had it been up to Mr. Opdyke, he would have continued working for the Employer in some other capacity; had it been up to the Employer, he would have continued his employment as well, but for the fact that he had no other work available.

The fact that both men agreed to sever the relationship based on the Claimant's medical condition renders this to be an 'other separation' within the meaning of the rule, "…*failure to meet the physical standards required."* See, 871 IAC 24.1(113)"d", supra. Mr. Opdyke's separation must be characterized as an involuntary one. We look to White v. Employment Appeal Board, 487 N.W.2d 342, 345 (Iowa 1992) for some guidance. The court in White held that "…[a] worker [is] disqualified if the cause of the disability which caused him to leave employment was not work-related but was not disqualified if the disability that led to his separation from employment was work-related..." The burden of proving eligibility for benefits is on the Claimant. In the instant case, the Claimant offered no evidence to establish that his disability, in any way, was brought on by the circumstances of his employment. Based on this record, we conclude that the Claimant failed to satisfy his burden of proof.

DECISION:

The administrative law judge's decision dated January 17, 2012 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was involuntarily separated from his employment due to disability that was not caused by or aggravated by his employment. Accordingly, he is denied benefits until such time he has worked in and was paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(1)"g".

A portion of the Employer's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

The Claimant submitted a written argument to the Employment Appeal Board. The Employment Appeal Board reviewed the argument. A portion of the argument consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the argument and additional evidence were considered, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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John A. Peno

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Monique F. Kuester

AMG/fnv