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

JORDAN L SPENCER	:	
	:	**HEARING NUMBER:** 22B-UI-15037
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
TEAM STAFFING SOLUTIONS 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: 96.5-1

D E C I S I O N

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

The Board modifies the **Findings of Fact** by striking them and inserting in lieu thereof the following:

Jordan Spencer (Claimant) worked for Team Staffing Solutions (Employer), a temporary employment firm, from January 8, 2019 until his employment ended. For the duration of his employment at Employer the Claimant worked on assignment as a full-time Assembler at Winegard in Burlington, Iowa.

On October 21, 2020 the Claimant underwent surgery for a hernia. (Ex. 7). In December the Claimant returned to work following the lifting of his restrictions.

Claimant last performed work at Winegard on January 20, 2021. On the 21st the Claimant called off work due to feeling pain. He saw the doctor and was put off work on the 21st due to a muscle strain, but was released to work as of the 22nd. (Ex. 4). He was scheduled to work thereafter but did not show, citing the weather and a fall. On February 1 at the request of Winegard the Employer told the Claimant his assignment had ended.

After the end of the assignment the Claimant told the Employer he wanted only work that was less physically demanding than the assembler job at Winegard, specifically only non-factory work. The Employer had no such work, and told the Claimant it had no such work either at that time or in the foreseeable future. The Claimant thereafter did not indicate he was willing to work outside these limitations he had placed on his availability for reassignment.

The Board modifies the **Reasoning and Conclusions of Law** by striking them and inserting in lieu thereof the following:

Legal Standards: This case involves a voluntary leaving of work. Iowa Code Section 96.5(1) states:

> An individual shall be disqualified for benefits:
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> 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:
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> …
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> d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Ordinarily, "good cause" is derived from the facts of each case keeping in mind the public policy stated in Iowa Code section 96.2. *O'Brien v. EAB*, 494 N.W.2d 660, 662 (Iowa 1993)(citing *Wiese v. Iowa Dep't of Job Serv.*, 389 N.W.2d 676, 680 (Iowa 1986)). "The term encompasses real circumstances, adequate excuses that will bear the test of reason, just grounds for the action, and always the element of good faith." *Wiese v. Iowa Dep't of Job Serv.,* 389 N.W.2d 676, 680 (Iowa 1986) "[C]ommon sense and prudence must be exercised in evaluating all of the circumstances that lead to an employee's quit in order to attribute the cause for the termination." *Id.* Where multiple reasons for the quit, which are attributable to the employment, are presented the agency must "consider that all the reasons combined may constitute good cause for an employee to quit, if the reasons are attributable to the employer". *McCunn v. EAB*, 451 N.W.2d 510 (Iowa App. 1989)(citing *Taylor v. Iowa Department of Job Service*, 362 N.W.2d 534 (Iowa 1985)). "Good cause attributable to the employer" does not require fault, negligence, wrongdoing or bad faith by the employer. *Dehmel v. Employment Appeal Board*, 433 N.W.2d 700, 702 (Iowa 1988)("[G]ood cause attributable to the employer can exist even though the employer is free from all negligence or wrongdoing in connection therewith"); *Shontz v. Iowa Employment Sec. Commission*, 248 N.W.2d 88, 91 (Iowa 1976)(benefits payable even though employer "free from fault"); *Raffety v. Iowa Employment Security Commission*, 76 N.W.2d 787, 788 (Iowa 1956)("The good cause attributable to the employer need not be based upon a fault or wrong of such employer."). Good cause may be attributable to "the employment itself" rather than the employer personally and still satisfy the requirements of the Act. *E.g. Raffety v. Iowa Employment Security Commission*, 76 N.W.2d 787, 788 (Iowa 1956).

Leaving work over health concerns is addressed by Iowa Administrative Code 871 IAC 24.26(6):

> The following are reasons for a claimant leaving employment with good cause attributable to the employer:
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> 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**.
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> *(6) 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 the 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 comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

The Claimant Voluntarily Left Work:

The statute uses the phrase "voluntarily left work" not "quit." Clearly a worker's voluntary choice to permanently sever the employment relationship, *aka* a "quit," is a form of voluntary leaving of work. But it does not exhaust the category. We can tell this simply by reading the statute. Code subsection 96.5(1) has ten paragraphs lettered (a) through (j). These all appear following the phrase "But the individual shall not be disqualified if the department finds that:…" Iowa Code §96.5(1)(first unlettered paragraph). These paragraphs are thus stated as exceptions to disqualification, meaning that failure to satisfy the exception would mean disqualification. In particular temporarily leaving for a sick family member is disqualifying but only so long as the worker stays away from work. Iowa Code §96.5(1)(c). Also temporarily leaving for your own non-work illness is disqualifying but only so long as the worker stays away from work. Iowa Code §96.5(1)(d). Temporarily leaving to take a family member to another climate for health reasons is disqualifying but only so long as the worker stays away from the job. Iowa Code §96.5(1)(e). And finally leaving work for a period of no more than 10 days because of compelling personal reasons is disqualifying, but only for those ten days, after which benefits are allowed if the worker is not returned to work. Iowa Code §96.5(1)(f). This last is instructive. The situation described by the *Code* is a period lasting ten working days.

If the worker leaves for compelling reasons, and stay gone for no more than 10 working days, and then the Employer does not allow the worker to return to duty, then the worker will thereafter be allowed benefits. Consider if the worker stayed away for 11 working days, and never intended to leave for longer than 11 working days. This would not be a quit, in the sense of permanent separation. Yet clearly the 11-day worker would *not* be allowed benefits else why specify 10 days in the Code? Thus even a temporary voluntary leaving of employment can be disqualifying. *Gilmore v. EAB,* No. 03-2099 (Iowa App. 11/15/2004). In this context we assess the nature of the leaving here.

In *White v. Employment Appeal Board,* 487 N.W.2d 342 (Iowa 1992) the claimant was off work as an over-the-road truck driver for eight months due to a heart condition. When he returned to the employer he indicated that he would not be able to drive. The employer told him there was no work available, and Mr. White was separated. There being a separation the Board found this to be a voluntary leaving work, the claimant appealed, and the Supreme Court affirmed (but remanded on the issue of work-relatedness). The Court found that a truck driver's separation from employment due to a non-work related heart condition would be a voluntary separation. The court even remanded to determine whether the condition was work-related – which is not an issue in discharge cases. *White* at 345-46. The Court clearly treated this fact pattern as a leaving work, and needed to know whether the leaving was work-related in order to address whether the voluntary leaving could be for good cause attributable to the employment. The Court rejected the argument that the leaving was not *voluntary*. *White* at 345.

The case before us is similar to *White*. A physical inability to work as an assembler, at least according to the Claimant, causes the Claimant to routinely miss work, and this in turn cases the Employer to tell the Claimant there is not work for him and to end the assignment. As in *White* this is a voluntary leaving of work.

In *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa Ct. App. 1985) Ms. Hedges was a nursing assistant at the VA. She suffered a non-work injury, was placed on extended leave, and then returned with restrictions. "Ms. Hedges returned to work, but the V.A. refused to reinstate her because her physician had released her return to work upon a restriction that she avoid lifting anything in excess of thirty pounds. Ms. Hedges appeared willing to violate her physician's orders, but the V.A. refused to allow her return, stating that no comparable work was available in view of her restriction." *Hedges,* 368 N.W.2d at 865. The agency found a voluntary leaving and Ms. Hedges appealed arguing "that she falls within [Iowa Code §96.5(1)(d)] because she was certified by her physician as recovered subject to a lifting restriction, she was eligible to return to work and offered her services, and the V.A. refused her offer because no comparable work could be found." *Id.* at 866. The Court of Appeals found that Ms. Hedges had to be *fully released* to avoid disqualification in this fact pattern. The full release requirement is now codified in the regulations of Iowa Workforce. 871 IAC 24.26(6)(a)("Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.") Because Ms. Hedges had gone on a leave of absence, returned at the end, but had not been *fully* released at the end the Court of Appeals found "that there was substantial evidence to show that Ms. Hedges' separation from the V.A. was voluntary and without good cause attributable to her employer…" *Id.* at 868.

In *Gilmore v. EAB,* No. 03-2099 (Iowa App. 11/15/2004). Mr. Gilmore received medical restrictions preventing him from driving, which was his job. He was placed on leave. The Administrative Law Judge found Mr. Gilmore not able and available until he was fully released, and also found that Gilmore had temporarily left his work. The Court of Appeals affirmed on the voluntary leaving theory. Even though Mr. Gilmore was on a leave of absence, and was eventually fully released and returned to work, still the Court of Appeals applied the fully released standard for voluntary leaving for the period before the full release. The Court found "the evidence clearly shows Gilmore was not fully recovered from his injury until March 6, 2003. Gilmore is unable to show that he comes within the exception of section 96.5(1)(d). Therefore, because his injury was not connected to his employment, he is considered to have voluntarily left work without good cause attributable to the employer, and is not entitled to unemployment benefits" until he had completely recovered and returned to present his full release. *Gilmore*, slip op. at 4-5.

The case at bar falls under the rule of *White, Hedges* and *Gilmore*. The Claimant was on assignment as an assembler. He missed considerable work due to health issues. He was released to work as of January 22. He did not, however, work again in part because of falling again. After his assignment ended he informed the Employer that he would not accept assignments that required the sort of work he had been doing. *This* is the focus of *our* analysis. We do *not* find a voluntary leaving of work based on Iowa Code §96.5(1)(j). We do not impose a disqualification based on a failure to tell of the end of the assignment (or to request reassignment) with three days of the ending of the *assignment*.

Under our analysis the separation does not date to February 1. That was the end of the assignment, not the employment. Instead, the separation occurred later (approximately February 3) when the Claimant made clear that he would not accept assignments back to the job he had been working, or to any place that would require him to work similar duties. This is very much akin to the workers in *White* and *Gilmore*. In both cases the voluntary leaving was found based on the claimant telling the employer his health did not permit performance of the duties for which those claimants were hired. Here the Claimant sought jobs matching his putative restrictions, and the Employer had none. This is a voluntary leaving within the meaning of the law and the precedent. We appreciate that the Claimant did not choose to have medical issues. But the sense that the statute uses voluntary is that the leaving of work was initiated by the Claimant's situation, and not by anything the Employer initiated. Thus when the Employment Security Law speaks of granting benefits to those who lost work through no fault of their own, "[t]he word 'fault,' as used in this context, is not limited to something worthy of censure but must be construed as meaning failure of volition." *Amana Refrigeration v. IDJS*, 334 N.W.2d 316, 319 (Iowa App. 1983)(*citing Moulton v. Iowa Employment Security Commission*, 239 Iowa 1161, 1172-73, 34 N.W.2d 211, 217 (1948)); *accord Wolf's v. IESC,* 59 N.W.2d 216, 220 (Iowa 1953). And in *White*, precedent we are bound to follow, the Court specifically rejected the idea that being forced to leave by his health renders the leaving "involuntary." *White* at 345.

Claimant has Not Proven The Medical Condition Was Work-Related:

Where the Claimant voluntarily leaves work the Claimant would need to satisfy the requirements of §96.5(1)(d) in order to obtain benefits unless he can prove the health condition was work related. *See e.g. Moulton v. Iowa Emp't Sec. Comm'n*, 239 Iowa 1161, 34 N.W.2d 211 (Iowa, 1948); *Wolf's v. Iowa Employment Sec. Commission,* 59 N.W.2d 216, 244 Iowa 999 (Iowa, 1953); *White v. Employment Appeal Board,* 487 N.W.2d 342, 345 (Iowa 1992). In effect when a claimant who returns at the end of medical leave

with information that he can still not do his job then that claimant does not really return to work at the end of the leave. This person is denied benefits under the rule that "[i]f the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits." 871 IAC 24.22(2).

The next issue is whether the injury was work related. The Claimant has filed a workers' compensation petition, but this is merely an allegation. Even that merely says a date of injury and when asked how the injury occurred says only "at work." (Ex. 9). All we have in the record bearing on what events or impacts are claimed to have caused the injury is that the Claimant pushed pallets as one of his job duties and that he felt pain while at work. This is a far cry from identifying a specific injury, or even type of work impacts, that *caused* the injury. The Claimant seemingly thinks it was work related, but none of his medical information addresses the cause of the condition. One note repeats his own observation that his condition hurt him when pushing and pulling pallets. (Ex. 8). But this is not a medical opinion on cause; rather it is evidence that the Claimant experienced pain while doing certain job duties. But a medical condition is not "aggravated" by the employment, such that a resulting quit can be attributable to the employment, merely because the duties required are such that they activate symptoms. This is commonly the case for many situations where the medical condition is not related to the employment. For example, an employee's back injury suffered while shoveling snow at home may make it dangerous for him to continue working heavy construction but that does not mean that the back injury can be attributable to the construction work. And if he tries to lift at work and his back hurts that is still not aggravation unless or until the underlying condition is made worse by tasks performed at the employer. The attribution rule requires that the condition be either caused by or aggravated by the employment – not merely that the condition be incompatible with previously required duties.

This is made plain by considering the statutory scheme. Iowa Code §95.5(1) disqualifies persons who voluntarily leave employment. An exception to this disqualification is if they voluntarily leave on the advice of a physician and then return. If just being told you have to quit because of your health meant that you are not disqualified to begin with then why would the Code set out a requirement that you also have to return to work in order to start collecting benefits? A claimant who is told by a physician to quit can requalify only if he returns and offers her services once fully released. 871 IAC 24.26(6)(a); *Hedges v. Iowa Dept. of Job Service*, 368 N.W. 862 (Iowa 1985). But if just having a condition that is inconsistent with your job duties makes that condition work-related then the fully healed requirement would be pointless since an employee who was not "fully released" to perform duties would, under the such an argument, *ipso facto* be suffering from a job related condition and *Hedges* would not apply. The statutory requirements and the binding precedent simply evaporate under this reading of the law and so it is clear this reading is incorrect. Moreover, this is not a case where the Employer changed the job conditions and this change was inconsistent with the worker's health condition. *See Ellis v. Iowa Dep't of Job Serv.*, 285 N.W.2d 153, 156-57 (Iowa 1979) (claimant's showing that recently installed Christmas tree would aggravate her pre-existing allergies was sufficient to constitute a "quit" that was attributable to her employer). Thus evidence that the Claimant's duties caused pain is not sufficient, by itself, to establish that the underlying condition was job related. But this is about all we have in the record – the Claimant's work caused pain. The Claimant did appear through counsel, who did at least ask him when the pain started, but there is little more evidence than this in the record. We do know that at one point in December the Claimant was ready to work again, after his surgery, but he

fell while away from work, on repeated occasions, and this made it so he felt he could not do that sort of work. Thus even if the original injury was work-related there are clearly non-work factors that caused him in 2021 to conclude he could not do that sort of job duty. Indeed, his own evidence is that his January 21 excuse from work was based on a muscle strain in his side, and not a groin injury. (Ex. 4). And he was released without restrictions as of the next day. In the end, the Claimant has not presented evidence sufficient to carry the burden of proving the medical condition that caused him to quit was work-related.

As noted above, one who quits upon the advice of a licensed physician may become eligible for benefits again by being *fully* released and returning and offering services. *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa Ct. App. 1985). One difficulty here is that we do not have information that the Claimant was advised in February of 2021 by a licensed and practicing physician that he should no longer be working at the Employer. On the other hand, when dealing with a temporary employer a Claimant may fall under the "safe harbor" provision by returning and seeking reassignment within a reasonable period of time. *Sladek v. EAB*, 939 N.W.2d 632, 638 (Iowa 2020). We think in the circumstances of this case that a reasonable period would be as soon as the Claimant receives a full-release to return to this sort of work as described in *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa Ct. App. 1985) and 871 IAC 24.26(6)(a).

DECISION:

The administrative law judge's decision dated September 27, 2021 is **AFFIRMED AS MODIFIED**.
The Employment Appeal Board concludes that the Claimant left work but not for good cause attributable to the employer. Accordingly, he is denied benefits based on leaving work until the earlier of (1) such time the Claimant has worked in and was paid wages for insured work equal to ten times the Claimant's weekly benefit amount, or (2) such time as the Claimant fully recovers and then returns and offers services to the Employer.

PROVIDED HOWEVER that the Claimant may not collect benefits even after requalifying unless he is otherwise eligible. This means even after requalifying he must still be able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the Claimant then resides.

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James M. Strohman

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Ashley R. Koopmans

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Myron R. Linn

RRA/fnv