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

RICHARD H ZOHNER Claimant and **SCHUSTER GRAIN CO INC** Employer	**HEARING NUMBER:** 19BUI-01731 **EMPLOYMENT APPEAL BOARD DECISION**

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, 96.5-1-D

D E C I S I O N

The Claimant 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 Claimant worked for this Employer beginning in 2011 as an over-the-road truck driver, and last performed work on March 23, 2018. He was injured at work on that day. Although the Claimant had pre-existing issues with his back, the work injury aggravated them. When the Claimant was hired, he was made aware that passing a DOT physical would be a continued requirement of the job. Originally, the Claimant was expected to return to work on April 5, 2018, but he did not and during the period of April 5 through August 1, 2018, remained in contact with the Employer as a worker's compensation claim was pursued. Around August 17 the Claimant's temporary Workers' Compensation benefits ceased.

On November 16, 2018, the Employer emailed the Claimant's attorney, stating the Claimant had a position to return to with the Employer upon completing his DOT physical, since the medical certification expired (Claimant Exhibit C). The Claimant was expected to go to LeMars, Iowa to complete a drug test, physical capacity test and the DOT physical before resuming driving. Due to timing of the letter and logistics, the Claimant could not have been in LeMars, Iowa on November 19, 2018, as directed in the letter. However, the

Claimant's attorney did communicate with the Employer on November 19, 2018 in response to the Claimant being offered his position. (Exhibit E.) Mr. Walker, on behalf of the Claimant, wrote in an email to the employer, "Also, given that I just now received your email, it will be at least a few days after we receive the job description before we can respond to your letter" (Claimant Exhibit E). He also requested that a job description be emailed to him.

On December 14, 2018, on his own accord, the Claimant attempted, but did not pass the DOT physical (Claimant Exhibit G). Thereafter, his counsel notified the Employer that he had failed the physical and could not perform his job duties as a truck driver. The Claimant, through counsel, also inquired about job opportunities. By this time, the Employer assumed since the Claimant did not show up to LeMars, Iowa after Mr. Walker received the letter dated November 16, 2018 and did not make additional contact with the employer for one month, that separation had ensued. Non-driving jobs for the Employer would be located in Le Mars, 560 miles from the Claimant's current home.

REASONING AND CONCLUSIONS OF LAW:

The separation here seems most like a mix up. The Claimant's attorney assumed he would be receiving a job description, and that this would then start any clock to return – which is what he said in the email. The Employer assumed that since the Claimant's attorney indicated that it would be "at least a few days" that the passage of the days without further contact meant the Claimant had abandoned the job. In this it looks like separation by mistake, or a termination based on miscommunication, neither of which in these circumstances would be disqualifying. Nevertheless even if we assume for the purposes of analysis that the Claimant effectively quit the employment over his injury we would not find the separation disqualifying. We could not and do not find a discharge for absenteeism because the Claimant was never scheduled. He wasn't scheduled because he did not pass the physical. Thus at worst we can treat this as a case where the Claimant abandoned the job due to his medical condition. We would then turn to why the Claimant quit.

When we find a voluntary leaving in an unemployment case the next step is to address why the employee voluntarily left employment. This does not change just because the leaving takes the form of a failure to return from leave, or of job abandonment. These are ways of leaving employment that differ from a expressed decision, but the reasons for leaving still can be good cause attributable to the employment even if the leaving is through inaction or nonappearance. We thus turn to the issues shown in the record for the Claimant's decision not to return following leave. Clearly, the reason the Claimant did not return was because he could not pass the physical. Further for light duty work the Claimant would have to move to Le Mars, and as we have found in our decision in case 01732, the Claimant is not realistically qualified for most office duties in any event. The first issue is whether the injury causing the Claimant's quit is work related. Based on this record we find the Claimant has proven the condition was work-related for the purposes of our law.

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and

consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above, and the Board's collective common sense and experience. We have found credible the Claimant's evidence that his condition is work related. We have the one direct medical opinion in evidence that "I do feel the work injury is the substantial factor in Mr. Zohner's low back pain and that his back pain and hip pain are directly related to the industrial injury." As against this we have only that the Claimant had some pre-existing back condition, and we have the Employer stating in a very summary fashion that another physician opined that the condition is not work related under the Workers' Compensation law. The standards for the Employment Security Law are set out by regulation:

> *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. (Emphasis added.)

871 IAC 24.26(6)(b). In *White v. Employment Appeal Board*, 487 N.W.2d 342 (Iowa 1992) the Supreme Court explained:

> [W]hen the illness is either caused or aggravated by circumstances associated with the employment, *regardless of the employee's predisposition to succumb to the illness*, the separation will be deemed to be with good cause attributable to the individual's employer….An illness or disability may correctly be said to be attributable to the employer even though the employer is free from all negligence or wrongdoing in connection therewith.

Even a pre-existing health condition that is *aggravated* by the job is attributed to the Employer under *White*. *See Rooney v. Employment Appeal Bd*., 448 N.W.2d 313, 315-16 (Iowa 1989)(noting that a recovering alcoholic who terminates employment with bar and liquor store may do so without disqualifying himself for unemployment benefits to the extent that the employment is found to have "aggravated" his condition); *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). Given the initial physician's opinion is the only one we have directly in the record, and that the Claimant did have an injury at work we do find the condition is work-related *for our purposes.*

Here the Claimant has a long history of being a driver, and is located some 560 miles from Le Mars Iowa. Under these conditions we excuse strict compliance with rule 871 IAC 21.26(6)(b). For many of the same reasons that we find the Claimant not eligible for benefits in case 01732, it would have been merely a pointless exercise for the Claimant to inform the Employer of his intent to quit if not accommodated. Of driving no accommodation without the physical was legally possible, and for non-driving the only accommodation was plainly not one the law could reasonably expect the Claimant to have to take before quitting. Under these circumstances we find the Claimant satisfied all the conditions of quitting over a health condition aggravated by the employment. 871 IAC 24.26(6)(b)("comparable work"); 1 E. Coke, *Commentarie upon Littleton* §319 (1628)("Quod vanum et inutile est, lex non requirit."); *Bouvier's law Dictionary*, p. 2161 (8th. Ed. 1914) *c.f. Nora Springs Co-op. Co. v. Brandau*, 247 N.W.2d 744 (Iowa 1976)(notice of waiver not required since pointless); *Brandenburg v. Carmichael*, 192 Iowa 694, 704, 185 N.W. 486, 490 (1921)(*citing Smith v. McLean*, 24 Iowa 322, 326)(law does not require "vain and useless labor"); *Conrad Brothers v. John Deere Ins. Co*., 640 NW 2d 231, 241 (Iowa 2001); *Porazil v. IWD*, 2003 WL 22016794, No. 3-408 (Iowa Ct. App. Aug. 27, 2003)(requiring claimant to work to offer services where claimant was already fired would be "erroneous and unreasonable"). In the alternative given the delay and miscommunications we think the request for other work sent by the Claimant's attorney after the failed physical is sufficient to satisfy the requirement of rule 21.26(6)(b). We thus find the quit was for good cause *attributable* to the employment.

Finally, we point out that "[a] finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter, and is not binding upon any other proceedings or action involving the same facts brought by the same or related parties before the division of labor services, division of workers' compensation, other state agency, arbitrator, court, or judge of this state or the United States." Iowa Code §96.6(4). This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise. *See also* Iowa Code §96.11(6)(b)(3)("Information obtained from an employing unit or individual in the course of administering this chapter and an initial determination made by a representative of the department under section 96.6, subsection 2, as to benefit rights of an individual shall not be used in any action or proceeding, except in a contested case proceeding or judicial review under chapter 17A…).

DECISION:

The administrative law judge's decision dated March 28, 2019 is **REVERSED**. The Employment Appeal Board concludes that the Claimant not disqualified by the nature of the separation from working for the Employer. The Claimant need not earn 10 times his weekly benefit amount before he is allowed benefits. **However,** we have today affirmed the finding in case 01732 that the Claimant is ineligible for a failure to report his medical condition to Iowa Workforce, and for not being able and available for work. The Claimant will under that decision remain ineligible for benefits unless and until he updates his medical condition to Iowa Workforce, and Iowa Workforce concludes based on that information that he is able and available for work under the standards set out by law. *See e.g.* 871 IAC 24.22. We emphasize to this Claimant that the worker must be "genuinely attached to the labor market" and that "[s]ince, under unemployment insurance laws, it is the

availability of an individual that is required to be tested, the labor market must be described in terms of the individual." 871 IAC 24.22(2).

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv