

fractured the humerus, which required immediate medical attention. (Tr. 9, 24, 26) The claimant was scheduled to return to work on July 26<sup>th</sup> (Tr. 12), however, his doctor released him from work and referred him to an orthopedic doctor. The claimant's wife faxed the doctor's note to the employer on the same day. (Tr. 9)

Page 2  
08B-UI-09392

The note indicated, "...keep shoulder immobilized on right shoulder. No work until after seen by doctor appointment..." (Tr. 9-10, 25, 26, Exhibit A)

On July 29<sup>th</sup>, the claimant sought medical attention at the VA Hospital where he was sent to physical and occupational therapy as well as an orthopedist. (Tr. 10) The VA doctor issued a work release excusing Mr. Hinshaw from work for a few weeks. (Tr. 11, 26, Exhibit B) The claimant was unable to perform any work at this time. He saw an orthopedist on August 27<sup>th</sup> who continued his release from work "...until reevaluated..." on September 10<sup>th</sup>, 2008. (Tr. 11, 21-22, 26, Exhibit C) Mr. Hinshaw contacted the employer on August 28<sup>th</sup> to inform him of his continued physical therapy and requested (of Juli Barber) to go back to Kraft. (Tr. 25) The employer denied his request stating that they had no place to assign him, which would allow his restrictions. (Tr. 13, 25, 28)

When Mr. Hinshaw returned to see his doctor on September 10<sup>th</sup>, the doctor released him to return to work on September 15<sup>th</sup> with a five-pound weight restriction. (Tr. 10, 12, 14, 17, Exhibit D) He contacted the employer, again, to request work, but was denied due to his restrictions. (Tr. 27) The claimant continued seeking other employment, i.e., computer operator position, which he had done for 14 years previously at Sara Lee. (Tr. 14-15) He also sought employment in areas outside of his hometown of Thornton. (Tr. 18-19)

## REASONING AND CONCLUSIONS OF LAW:

The first issue to be determined is that of the separation. Did the claimant quit or was the claimant terminated? The record establishes that Mr. Hinshaw was, initially, off work due to a work-related injury that occurred at Eaton, which was resolved on June 13, 2008. (Tr. 24) His subsequent right shoulder injury occurred while assigned to Kraft, but during a home repair incident (nonwork-related). There is no dispute that the claimant maintained contact with the temporary employment agency as required. Nor is there any dispute that the claimant submitted medical documentation that released him to return to work on September 10<sup>th</sup>, 2008. (Tr. 10, 12, 14, 17, Exhibit D) His return, however, was essentially predicated on a five-pound weight restriction

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.

Page 3  
08B-UI-09392

- 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.**

Although the claimant returned to his employer to offer his services, the employer was unable to place him due to his physical limitation. Thus, we conclude that Mr. Hinshaw experienced an “other separation” based on his “failure to meet the physical standards required” within the meaning of the aforementioned rule. As such, he would not be disqualified for unemployment benefits; however, the question of whether he is able and available for work must be determined. The burden is on the claimant to establish that he able and available for work within the meaning of the statute.

871 IAC 24.22 provides:

*Benefit eligibility conditions.* For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

24.22(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual’s customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual’s customary occupation, but 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 individual resides.

Mr. Hinshaw provided unrefuted testimony that he had worked in the computer operating industry for over a decade prior to his employment with Synico, Inc. In addition, he offered testimony that he had been actively seeking employment via the Internet both at home and outside of Thornton. (Tr. 14-15,

18-19) His past employment history, coupled with his efforts to secure future employment are probative that he is able and available for work, "... not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor..." See, 871 IAC 24.22(1)" b". For these reasons, we conclude that the claimant has satisfied his burden of proving that he able and available to return to the workforce as of September 10, 2008.

**DECISION:**

The administrative law judge's decision dated November 3, 2008 is **REVERSED**. The claimant was separated from employment for reasons that do not disqualify him from benefits beginning September 10, 2008. Accordingly, he is allowed benefits provided he is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/ss

**DISSENTING OPINION OF MONIQUE F. KUESTER:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

AMG/ss

A portion of the claimant'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 (documents) 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.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/ss