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

ANDY C PARRISH	:	
	:	**HEARING NUMBER:** 13B-UI-03862
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
COX MANUFACTURING CO	:	
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: 96.5-1D, 96.4-3

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

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 it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Andy C. Parrish, worked for Cox Mfg., Co. beginning June 23, 2008 as a full-time welder. (8:30; 8:19) At the start of his employment, the Employer issued him a personnel handbook, which explained its attendance policy, i.e., employees must call in each day of absence. (14:34-14:10; 8:12-7:44; 5:56-5:41) The Claimant last performed services for the Employer on November 7, 2012 (8:24), as he suffered a non-work-related back injury that took him off work from November 8th, 2012 through January 31, 2013. (17:22-17:17; 14:03, Exhibit A-numbered p. 20) He was placed on FMLA during this time. He notified the Employer of his first report on December 12, 2012. (17:15-17:04) The Claimant had surgery on February 8, 2013. (00:59-00:53)

On March 1, 2013, the Employer issued a letter to Mr. Parrish indicating that the Claimant had exhausted all leave (sick, vacation, and FMLA unpaid leave) granted to him. (7:34-7:17; 4:25-4:05) The letter further stated that the Claimant needed to return immediately, as the Employer could no longer hold his job. If Mr. Parrish didn't contact the Employer by March 7th, 2013, the Employer would presume that he quit.

(16:44-15:56; Exhibit 22) Mr. Parrish had not been calling in everyday because he understood he was on FMLA, and didn't need to call in daily; he did not know that his FMLA had expired and that he needed to call in. (13:51-13:31; 12:52-12:46; 11:40-11:36) The Employer hadn't contacted him once his FMLA expired on January 31, 2013 because they 'assumed he would return after FMLA expired, in part, and also because they had assumed he had already returned. (4:30-3:55)

When the Claimant received the letter on Saturday, March 4th, he immediately contacted the plant manager, Mark Heston, who told him that, "…it was pretty much a done deal, but he could come in to discuss things with Mr. Cox…" (13:24-13:13) The Claimant requested a meeting with Mr. Cox for the following day, March 5th (13:05-12:58; 2:24-), at which time Mr. Parrish submitted medical documentation indicating he was unable to return to work until March 20, 2013 based on restrictions at that time. (15:44-15:22; 11:58) The Employer responded by stating, "…for clarification, you're fired…" (25:42-25:32; 5:35-5:25; 2:15-1:55)

REASONING AND CONCLUSIONS OF LAW:

Quit versus Discharge: The Claimant testified that he did not know when his FMLA had expired. Given the alleged fact he had already exhausted his sick, vacation and FMLA leave on January 31, 2013, which was prior to his February 8th surgery, it is no wonder he was somewhat unsure about his expected return. It is not wholly illogical to presume that the Employer had knowledge of Mr. Parrish's surgery, hence the delay in sending the March 1st letter, instead of sending it sooner after January 31st when his leave expired.

There is no dispute that the Employer raised the issue of Mr. Parrish's continued employment when he issued that March 1st letter indicating if the Claimant did not return by March 7th, he would no longer have a job. The Employer removed the Claimant from its employ because it could no longer keep a spot open for him, even though it knew Mr. Parrish wanted to keep his job based on the March 5th meeting wherein he presented his return for March 20th. The question we face in this fact pattern is whether this is a quit, a discharge or something else. We start with basic principles.

Iowa Administrative Code 871—24.25(96) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5.

"[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). Since the Employer has the burden of proving disqualification the Employer has the burden of proving that a quit rather than a discharge has taken place. Iowa Code §96.6(2); 871 IAC 24.25. On the issue of whether a quit is for good cause attributable to the employer the Claimant has the burden of proof by statute. Iowa Code §96.6(2).

Iowa Workforce Development has defined the various types of separations from employment in 871 IAC 24.1 (emphasis added):

> 24.1(113) 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**.

Based on this record we cannot find that the Employer has proven that the Claimant quit. The record is clear that when the Claimant went on leave he was *not separated* but remained an employee of the Employer. The Claimant did not intend to quit, he only intended to stay on his leave, for precisely the reason that he needed to see a doctor before he could *safely* return to work. The separation occurred when the Employer decided that the Claimant could no longer have a spot held for him. This is not a quit. Even interpreting the testimony in a way that is the most favorable to the Employer the best we could do would be to find an "other separation", that is, the parties mutually decided to sever the employment relationship because the Claimant had not obtained a full release and therefore failed "to meet the physical standards required." 871 IAC 24.1(113). This would not be a disqualifying quit nor a disqualifying termination.

This analysis is borne out by *Prairie Ridge Addiction Treatment Services v. Jackson & EAB*, 11-0784 (Iowa App. January 19, 2012). In that case a claimant went on leave for non-work related injuries. At the end of leave she was not yet able to do all her duties and asked for extended leave. Instead the facility fired her, citing the lack of additional leave. The Court of Appeals found that this was a termination not a quit and that it was not disqualifying. *Prairie Ridge*, plus the simple fact that the Claimant did not intend to quit leads us to conclude that the Claimant did not quit.

Even had the Claimant quit, he would be allowed benefits under Iowa Code §96.5(1)(d) if he had returned to the Employer and presented his full release. Iowa Code §96.5(1)(d); 871 IAC 24.26(6)(b). If the Employer then did not rehire him he would be qualified. This provision is cast as a means by which an individual who would otherwise be disqualified for quitting may limit the disqualification to the time between the quit and the full release. In essence, the disqualified claimant is allowed to requalify by presenting a full release to the employer. If a claimant doesn't quit, or quits for good cause attributable to the employment, then Iowa Code §96.5(1)"d" is by its own terms inapplicable. *See Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991). Thus Iowa Code §96.5(1)(d) does not require a claimant

to return to the employer to offer services after a medical recovery or release if the employment has already

been terminated. This holding was first reached in *Porazil v. IWD*, 2003 WL 22016794, No. 3-408 (Iowa Ct. App. Aug. 27, 2003) and reaffirmed by *Prairie Ridge*. Thus even if the Claimant quit, and even though he did not return to offer his services once fully released, under *Porazil* and *Prairie Ridge* still he would get benefits since his termination excuses him from having to return to offer services once fully released.

Discharge Analysis: Given this the Claimant can only be disqualified based on the nature of the separation if he was fired for misconduct. It is simply not misconduct when you, with notice to the Employer, fail to come to work because the only work available to you is inconsistent with your restrictions. *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982)(insubordination not proved if failure to follow directive is based on good faith). There is no evidence the absences were not properly reported, as Mr. Parrish provided the Employer with proper medical documentation to show the reason for his absences, which was clearly for reasonable grounds. Thus, his absences do not constitute excessive unexcused absenteeism, and have not been proved to be *misconduct*. 871 IAC 24.32(7).

Although Mr. Cox denied 'firing' the Claimant, he essentially admitted, more so than not, using other terminology (terminated) that it was he who initiated the Claimant's separation from employment for which misconduct was not established.

DECISION:

The administrative law judge's decision dated June 12, 2013 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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John A. Peno

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Monique F. Kuester

_____
Cloyd (Robby) Robinson

AMG/fnv