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

JOSE OTERO MALAVE	:	
	:	**HEARING NUMBER:** 17BUI-12371
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
NORTH CENTRAL TURF 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, 96.4-3

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

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

FINDINGS OF FACT:

The Claimant, Jose Otero Malave, worked for North Central Turf, Inc. as a full-time laborer beginning March 1, 2016 through October 28, 2016. (17:40-18:44; 21:40-21:58; 23:14-23:24; 33:50- 34:15) The Claimant was scheduled to work on October 18, 2016, but failed to report to work that morning because his arm was in pain from work he performed the day before. (19:35-19:38; 35:02-36:33) Later that afternoon, he came in with a doctor’s note indicating he had been in the Emergency Room for a nonwork-related injury (19:39-19:45; 23:32-23:46; 23:50-23:56), and excused the Claimant from work that day. (24:14-24:20) The Claimant told the Employer his shoulder hurt from an injury he got on a previous job about two years ago. (24:41-24:55; 25:09-25:40; 40:03-40:57)

On October 20, 2016, the Claimant provided the Employer with another doctor's note excusing him from work until October 24, 2016, at which time he can resume normal activities. (24:13-24:18; 25:56-26:07) The Claimant was a no call/no show on October 24th and 25th. (26:25-26:35) He went to the office on the 25th, but the Employer was not there and he did not stay. (48:01-48:16) The Employer contacted him on the 26th to tell him he had light duty work available (cleaning out trucks) (26:39-26:48), but the Claimant declined. (26:49-26:51) The office manager made a follow-up call on the 28th to inform him that he would not be laid off because the Employer had work for him. (27:39-27:47) Mr. Malave declined the work because he didn't want to keep hurting his arm. (27:50-28:20; 53:45-54:00) He was unable to seek additional medical attention because he had no valid health insurance. (54:05-55:51) The Employer did not hear from him again (28:28-28:32) and assumed that he quit even though there was ongoing light duty work available for him. (22:32-22:45; 29:20-29:35)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits: *Voluntary Quitting*. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25 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…

The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code §96.6(2) (amended 1998).

871 IAC 24.26(6)*"b"* provides:

> *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 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. We attribute more weight to the Employer's version of events. The record establishes that the Claimant had a pre-existing injury that was aggravated by his work. Although the doctor released him to return to work without restrictions on October 24th, the Claimant denies that he was actually able to return due to continued pain in his arm. The Employer attempted to accommodate him with his offer of light duty work, which the Claimant turned down because of his continued discomfort. The Claimant failed to present competent evidence to support that he was unable to perform the job duties offered. Rather, he simply quit reporting to work after he told the Employer he couldn't perform the light duty work. Based on this record, we conclude that the Claimant failed to satisfy his burden of proof, as the Employer still had ongoing work available.

DECISION:

The administrative law judge's decision dated December 16, 2016 is **REVERSED**. The Claimant voluntarily quit his employment without good cause attributable to the Employer. 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".

The Employer submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information submitted by the Employer was not presented at hearing. Accordingly all the new and additional information submitted has not been relied upon in making our decision, and has received no weight whatsoever, but rather has been wholly disregarded.

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Kim D. Schmett

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Ashley R. Koopmans

DISSENTING OPINION OF JAMES M. STROHMAN:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm

the administrative law judge's decision in its entirety.

AMG/fnv

James M. Strohman