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

THOMAS A CROZIER	:	**HEARING NUMBER:** 10B-UI-04907
Claimant,	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
CARDINAL GLASS INDUSTRIES 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: 96.5-3A

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. 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:

Thomas Crozier (Claimant) worked full time as a production employee for Cardinal Glass Industries Inc. (Employer) from April 18, 1999 until he was separated as of May 4, 2009. (Tran1 at p. 6; Tran2 at p. 6; p. 19). The Claimant worked both second and third shifts during his employment. (Tran1 at p. 8-9; Tran2 at p.6-7). The Claimant typically worked an eight-hour shift. (Tran1 at p. 9; Tran2 at p. 5). The Claimant experienced pain in his feet during this period, but did not seek medical treatment for it. (Tran1 at p.14-15; p. 18; Tran2 at p. 18). He found he was just able to tolerate an eight-hour day. (Tran2 at p.20; p. 25).

As of December 1, 2008, the claimant was placed on temporary layoff. (Tran1 at p. 8; p. 14;; Tran2 at p. 4; p. 19; p. 23). The Employer does not dispute the Claimant's receipt of unemployment insurance benefits from December 1, 2008, through May 2, 2009. (Tran2 at p. 4). While the Claimant was on layoff, the Employer decided Employees would start working on third shift and would work four, ten-hour days instead of eight-hour days. (Tran1 at p. 9-10; Tran2 at p. 5; p. 9). The employer made this decision for economic reasons and because a majority of employees wanted to work ten-hour shifts. (Claimant Exhibit D.)

On April 30, 2009, Human Resource Manager Lori Ramsey started calling employees to return to work on May 4, 2009. (Tran1 at p. 14; Tran2 at p. 4-5; p. 19; p. 23). When Ms. Ramsey told the Claimant that the Employer was recalling him to return to work on May 4 for ten-hour shifts, the Claimant responded he would work eight hours, but could not and would not work ten-hour shifts. (Tran1 at p. 8; p. 14; p. 15; p. 17-18; Tran2 at p. 6; p. 14; p. 17; p. 18). The Claimant told the Employer that he would not work the ten hours because of his heal pain. (Tran1 at p. 17, ll. 34; p. 18; p. 20; Tran2 at p. 6; p. 12; p. 18; p. 19). Ms. Ramsey then told the Claimant that this was a refusal, and was considered a quit. (Tran2 at p. 6). The Claimant responded that he was not quitting. (Tran2 at p. 6; p. 20). Ms. Ramsey told the Claimant that there was no 8-hour shift possible for him. (Tran2 at p. 18). The Claimant did not return to work for the Employer. (Tran2 at p. 6). When the Claimant did not return to work, the Employer no longer considered him an employee as of May 4. (Tran2 at p. 6). The Claimant did not quit, and the Claimant was not terminated.

The Claimant sought medical treatment for his feet on July 9, 2009. (Tran1 at p. 15-16; p. 20; Tran2 at p.18). The Claimant's doctor restricted him to working eight-hour shifts. (Tran1 at p. 15-16; Tran2 at p. 20; Claimant Exhibit B.)

REASONING AND CONCLUSIONS OF LAW:

A. PRELIMINARY MATTERS:

The Claimant argues that since the Employer's protest did not include issues about a separation then this case was improperly remanded by the Administrative Law Judge. The Claimant asserts that this disposes of the entire cause. For its part the Employer asserts that under rule 24.24(2)(b) every refusal of a recall shall automatically result in a disqualification. The Employer seems to assert that this disposes of the entire cause. Wish that our job was this easy.

The rules of the Department state that "[i]f factual issues generally relevant to a party's eligibility or liability for benefits but unrelated to the underlying facts in controversy in the present contested case are exposed, the presiding officer shall not take testimony or evidence on such issue but **shall** remand the issue to the appropriate section of the department for investigation and preliminary determination." 871 IAC 26.14(5)(emphasis added). The able and available requirement applies regardless of the nature of a separation, and of any refusal of work. The burden of proof is on different parties, the provisions are in separate sections, and the issues are much different. Remand was exactly the right thing to do.

Meanwhile, the Employer's short-cut argument does not work either. First on all, rule 24.24(2)(b) appears in the context of a rule on the offer being within the claimant's capabilities. In context, the rule is saying that if the same job if offered to the same claimant, and nothing has changed, then that becomes a refusal of suitable work. This is what the rule means by the word "recall" – to the same job. Second, rule 24.24(14) governs "employment offer from former employer" and states that "[t]he claimant shall be disqualified for a refusal of work with a former employer if the work offered is reasonably suitable and comparable and is within the purview of the usual occupation of the claimant. The provisions of Iowa Code section 96.5(3)(b) are controlling in the determination of suitability of work." The rule provides for applying the statutory factors - not automatic disqualification. Third, the Employer's interpretation runs afoul of the statute. We are not authorized by the regulation to disregard the statutory factors. If the Employer's argument prevailed then an employer could lay off a worker, recall them at a much lower wage rate, and then automatically prevail on refusal of work if the worker declines the recall. The statute would be made a nullity and certainly we would see a sudden jump in layoff/recalls by those employers seeking to alter wage rates without incurring a "change in contract of hire" case. Such a recall at a reduced wage was addressed in *Biltmore Enterprises, Inc. v. Iowa Dept. of Job Service*, 334 N.W.2d 284 (Iowa 1983). In that case the employee was laid off, applied for benefits, and then was recalled at a lower wage rate. He refused, and the Supreme Court found that the offer was not suitable by applying the statutory suitability factors. We see no difference here. The *statute specifies* that "[i]n determining whether or not any work is suitable for an individual, the department **shall** consider the degree of risk involved to the individual's health..." Iowa Code §96.5(3)(a)(emphasis added). There is no cut-and-dried "recall from layoff" exception, not for wage rates and not for health issues.

Having disposed of the short-cut arguments we know address the more complicated questions. The parties seem confused over whether the Administrative Law Judge has found a disqualifying separation, or only a refusal of suitable work. We don't blame them, and as consequence we doggedly address every possible theory of disqualification. The Claimant is not disqualified for refusal of suitable work, nor based on the nature of the separation.

B. REFUSAL OF SUITABLE WORK

Iowa Code section 96.5-3-a provides:

> An individual shall be disqualified for benefits:
>
> 3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual.... To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.
>
> a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the

available work from the individual's residence, and any other factor which the department finds

bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

(1) One hundred percent, if the work is offered during the first five weeks of unemployment.

(2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.

(3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.

(4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

The rules of Workforce expound on the issue of suitability of the offer in rule 871 IAC 24.24.

24.24(4) Work refused when the claimant fails to meet the benefit eligibility conditions of Iowa Code section 96.4(3). Before a disqualification for failure to accept work may be imposed, an individual must first satisfy the benefit eligibility conditions of being able to work and available for work and not unemployed for failing to bump a fellow employee with less seniority. If the facts indicate that the claimant was or is not available for work, and this resulted in the failure to accept work or apply for work, such claimant shall not be disqualified for refusal since the claimant is not available for work. In such a case it is the availability of the claimant that is to be tested. Lack of transportation, **illness or health conditions**, illness in family, and child care problems are generally considered to be good cause for refusing work or refusing to apply for work. However, the claimant’s availability would be the issue to be determined in these types of cases

…

24.24 (15) Suitable work. In determining what constitutes suitable work, the department shall consider, among other relevant factors, the following:

a. **Any risk to the health**, safety and morals of the individual.
b. The individual’s physical fitness.
c. Prior training.
d. Length of unemployment.
e. Prospects for securing local work by the individual.
f. The individual’s customary occupation.
g. Distance from the available work.
h. Whether the work offered is for wages equal to or above the federal or state minimum wage, whichever is higher.
i. Whether the work offered meets the percentage criteria established for suitable work which is determined by the number of weeks which have elapsed following the effective date of the most recent new or additional claim for benefits filed by the individual.

j. Whether the position offered is due directly to a strike, lockout, or other labor dispute.
k. Whether the wages, hours or other conditions of employment are less favorable for similar work in the locality.
l. Whether the individual would be required to join or resign from a labor organization.

Where the claimant actually refuses work, as opposed to not applying for work, the refusal of suitable work question involves whether the work was "suitable" and, if so, whether the refusal was for "good cause". In *Pohlman v. Ertl Co.*, 374 N.W.2d 253 (Iowa 1985) the Supreme Court placed the burden of proof on good cause on the claimant. Subsequently in *Norland v. Iowa Department of Job Service*, 412 N.W.2d 904, 910 (Iowa 1987) the Court ruled that the employer had the burden of proving suitability of the offer. On the issue of suitability the Employer has a burden of putting on a *prima facie* case. The Claimant has a burden to identify the suitability factors at issue, at least as to some of them. *Norland v. IDJS*, 412 N.W.2d 904, 911 (Iowa 1987). If the employer proves that a suitable offer was made and refused, then the claimant can avoid disqualification by showing that the refusal was for good cause. Suitability of an offer is a fact issue that must be resolved "in light of those facts peculiar to each given case." *Norland v. IDJS*, 412 N.W.2d 904, 912 (Iowa 1987). "The question of good cause, like that of suitability, is a fact issue within the discretion of the department to decide." *Norland v. IDJS*, 412 N.W.2d 904, 914 (Iowa 1987).

The Employer cites rule 24.24(6) and argues that since the Claimant did not have medical certification at the time of the refusal then he is automatically prevented from claiming a health risk made the offer not suitable. The rule does not say this. The rule says that a "medical certification from a medical practitioner must be submitted to support the claimant's statement that work offered is not suitable…" The rule is in the passive voice and does not say to whom or when the certification is to be submitted. But the rule does say the certification is to "support" a "statement that work offered is not suitable…" Surely a claimant does not make such a statement to every employer who makes an offer, nor can the requirement to make such a statement be found in any provision of law. Obviously the statement is the one made to *Workforce* and the submission is one made to *Workforce* not the offering entity. At the time the Claimant tries to refute suitability the Claimant must then "submit" a certification. Certainly not at the time of refusing the offer to work.

Not only the wording of the rule, but also practical issues show that rule 24.24(6) cannot mean that certification must be submitted to the offering employer at the time of the offer. A refusal of suitable work occurs whenever any employer – not just a former employer – offers suitable work that is refused without good cause. So how is an employee supposed to have on hand, and immediately producible, certification covering every conceivable job that their health might compel them to turn down? Would the law really require an unemployed person to turn over to a business they never worked for, and can never work for, their private medical records? No, this is not what the provision means, not by its wording and not by common sense. The Claimant is expected to provide medical certification to the agencies – we will not just take his word for it that he could not do the work physically. In the context of this case, the failure to produce the certification earlier does affect our weighing of the evidence, and credibility issues, but it does not bar the Claimant from claiming good cause for his refusal. We thus turn to the question of whether the Claimant refused an offer of suitable work without good cause.

We take up first the issue of good cause, since the Claimant had the burden on that issue. Generally health conditions are good cause for refusing work. Given the Claimant's testimony, and the opinion of his physician – the only medical opinion in evidence – we find that the Claimant has proven that had he worked 10 hour days on a regular basis he would have experienced substantial pain in both heals due to plantar fasciitis. He has supplied the required medical certification. We find he has shown good cause for purposes of refusing suitable work. In addition, we find that the Claimant has put the health question into issue, and that the Employer has failed to prove that the offer of ten hour shifts was "suitable" within the meaning of the Employment Security Law.

B. QUIT ANALYSIS

Although we have found that the Claimant did not quit we will, in the alternative, analyze the case as a quit. This is because we take it that either the Claimant quit, the Claimant was discharged, or the Claimant was separated in some other way. We proceed in the alternative since under all three approaches the Claimant is allowed benefits. We start with a quit analysis.

Iowa Code Section 96.5(1) states:

> An individual shall be disqualified for benefits:
>
> 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.

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.

Quitting 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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> ....
> *(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.

In *White v. Employment Appeal Board*, 487 N.W.2d 342, 345 (Iowa 1992) the Supreme Court explained:

> We have held that an illness-induced quit is attributable to one's employer only under two circumstances. First, when the illness is either "caused or aggravated by circumstances associated with the employment," regardless of the employee's predisposition to succumb to the illness, ... Second, when the employer effects a change in the employee's work environment such that the employee would suffer aggravation of an existing condition if she were to continue working.... 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).

We find that the Claimant has proven his condition was work related. First, we accept the medical evidence that the Claimant's heel problems more likely than not were caused by his job that required 8-hours of standing. (Exhibit F). Second, even assuming the condition was not *caused* by the employment this case is one where "the employer effects a change in the employee's work environment such that the employee would suffer aggravation of an existing condition if [h]e were to continue working." *White* at 345. The classic case for this is *Ellis v. Iowa Dep't of Job Serv.*, 285 N.W.2d 153, 156-57 (Iowa 1979). In that case the Employer brought in a Christmas tree to the workplace. The claimant had preexisting non-work-related allergies. But once the tree was brought in the job conditions changed, and the resulting quit was because the employment now aggravated her condition. The Supreme Court reversed the agency's denial of benefits in that case.

True, the Claimant here did not have a physician's statement at the time of his quit, but neither did the claimant in *Ellis*. We do find credible the physician's limitations. We find the Claimant has satisfied the good faith element, and that he has satisfied the requirement of showing adequate health reasons through competent evidence. Thus even if we were to assume that the heel problems were not *caused* by the work, we would find for the Claimant under the second aggravation prong of *White*. Since the Employer was well aware that the Claimant's objections to working the 10-hour days were based on health concerns, and since the Employer was unable to accommodate the Claimant, the Claimant has satisfied any notice requirement that he would quit if not accommodated.

B. Termination Analysis

We need not pause long on this section of our analysis. There is no question that the Claimant was concerned about serious pain if he worked the 10-hours. He told the Employer, and the Employer made clear there were no 8-hour shifts. The Claimant's failure to come in was based on his good faith concern for his health. Even if he were wrong "good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute." 871 IAC 24.32(1)(a). Again, we recognize that the Claimant did not provide a doctor's excuse at the time he was absent. But in absenteeism cases such a requirement is not imposed. *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007). Any absence was for the reasonable ground of illness, it was reported, and under *Gaborit* the Claimant cannot be required to have provided a physician's release. Moreover, if we were to view this as a case of insubordination the law is that an employee's failure to work may not constitute misconduct if such failure is in good faith or for good cause. *See Woods v. Iowa Department of Job Service,* 327 N.W.2d 768, 771 (Iowa 1982); *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985). The Claimant's refusal was in good faith, and not an act of insubordination. Even viewing the case as a discharge, we find the Employer has not proven a discharge for misconduct.

B. Other Separation Analysis

We have found that the Claimant was not terminated, and was not fired. We have supplied alternative analysis above, but our actual finding is that this case involves an "other separation."

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**.

An other separation (including those for failure to meet the physical standards) is a "termination of employment" and falls within the definition of a "separation." But such a separation does not fall within the definition of a quit or a discharge. We conclude, therefore, that the Claimant is not disqualified by the separation.

This treatment of other separations is compelled by logic. We know that the only disqualifying separations are discharges and quits. We have found that the Claimant was neither discharged nor did he quit. We are required to conclude, therefore, that the Claimant was not disqualified by the nature of his separation. This result is, we think, inescapable once it has been determined that the separation was an "other separation." If the claimant did not quit he cannot be disqualified for quitting without good cause. If the Claimant was not fired he cannot be disqualified for being fired for misconduct. We conclude therefore that the Claimant was not disqualified by this "other separation."

DECISION:

The administrative law judge's decision dated June 7, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant was was not separated from employment in a manner that would disqualify the Claimant from benefits, and did not refuse suitable work without good cause. Accordingly, the Claimant is allowed benefits **provided** the Claimant is otherwise eligible. We note that the Administrative Law Judge remanded the issue of whether the Claimant earned $250 since filing for benefits, and that today's decision does not change that action.

John A. Peno

Elizabeth L. Seiser

RRA/fnv