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

JOHN L PFALTZGRAFF	:	
	:	HEARING NUMBER: 09B-UI-03328
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
BEEF PRODUCTS	:	
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: 96.5-2-a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board, one member dissenting, reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

The Board would also comment that it is unfortunate that confusion has been created in this case by Judge Lewis' observation that the Board failed to vacate a decision in a case that it remanded. We emphasize that on a remand things are not held in suspended animation; either benefits are allowed or they are not during the pendency of the remand. When the Board remands a case because Workforce has lost the voice file the Board has two choices: vacate the Administrative Law Judge's decision or do not vacate the Administrative Law Judge. One way benefits will be allowed during the pendency of the remand and the other way it will not. The question is what choice to make. We have no ability to make the delay caused by Workforce's error simply go away. The best we can do is try and make it so that the error has as little effect as possible. What if the file had not been lost? The previous decision would be in force and the Board would be processing the appeal. So when the record is lost the Board leaves

the decision in effect until such time as a new one is issued. Any other approach means that the loss of the file could change the outcome during the pendency of the remand.

Moreover, where, as in this case, the first Administrative Law Judge has reversed the claims representative's decision then vacation in our remand would mean reversal of the Administrative Law Judge's decision. Why would the Board do this when it has nothing in the record? The first Administrative Law Judge has heard the evidence and applied experience and judgment to make a ruling. To vacate with no record – to reverse the Administrative Law Judge – does not seem to recognize this fact. Thus the Board does not vacate. Furthermore through hard experience the Board has learned that the most efficient remand is for the Board to retain jurisdiction of the appeal until such time as the hearing is held. This is so that if Workforce finds the lost information, as it sometimes does, then the appeal may be reinstated and may proceed unhindered. What would this mean if we had vacated the first decision and reinstated the contrary claims representative decision. Would we then have to "unvacate" the decision and reactivate the appeal? Would we have to conditionally vacate the decision? There is nothing to recommend such a clumsy procedure. Certainly the law of remands does not require it.

Judge Lewis' doubt of her power on remand is not justified by the law of appellate practice. The fact is that when a remand is issued with no limitation stated then the remand is understood to be general and the power of the inferior tribunal is the same on remand as it had been in the first place. *See e.g. City of Hampton v. Iowa Civil Rights Commission,* 554 N.W.2d 532, 534 (Iowa 1996)("unless the order to an agency provides otherwise a remand is general and the agency is free to address the claim anew."); *Mundy v. Olds*, 254 Iowa 1095, 1105-06, 120 N.W.2d 469, 475-76 (1963)(Same for new trials). New trial is a little different here than in most cases when a new trial is granted since in court cases there is no one claiming benefits during the trial, that is, ordinarily no issue of what rule to apply in the interim arises. But the Board clearly has the power *not* to vacate during the remand. When the Board issues a general remand, that is, a remand with no more instructions than to hold a hearing and issue a new decision, then the Administrative Law Judge should understand that the Administrative Law Judge has plenary power, as is always the case following a general remand. Once the new decision of the Administrative Law Judge is made the old decision is a nullity as the remand is then completed. It was so in this case and so we affirmed the learned Administrative Law Judge in her March 26, 2009 decision.

_____
Elizabeth L. Seiser

_____
Monique F. Kuester

AMG/fnv

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. The claimant lied on his application. He had worked less than a month before the employer terminated him for his falsification, even though the employer admits that the charge may not have prevented his being hired. The law provides, that even in the case of a deliberate false statement, or falsification, a claimant's action will not result in disqualification from benefits unless there is some harm or potential for harm to the employer as a result of that falsification. See, *Heitman v. Cronstroms Mgf., Inc.* 401 N.W. 2d 425, 427-428 (Minn. App. 1987) wherein the court held that "[t]he falsification or misrepresentation must be materially related to job performance in order to bar the award of [unemployment] benefits."

The fact that the charge would not have prevented the claimant's hire suggests that there was no perceived harm to the employer. The employer testified that the claimant stated that the charge was dismissed and that the claimant "… felt that that wasn't what we were asking in the question." While the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). Based on this record, I would conclude that the claimant's action, at worst, was poor judgment that didn't rise to the legal definition of misconduct. Benefits should be allowed provide he is otherwise eligible.

In addition, I would also join in my fellow Board members comment with regard to vacating one of the previous administrative law judge's decisions.

_____
John A. Peno

AMG/fnv