

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

ORLANDO TRIMBLE

Claimant,

and

AXCESS STAFFING SERVICES LLC

Employer.

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HEARING NUMBER: 11B-UI-07675

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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

DECISION

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. 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, Orlando Trimble, worked for Axcress Staffing Services, LLC beginning November 16, 2010 (Tr. 2, 4-5, 8) Employees were expected to report to the employer every day, sign their names on a list and if needed, the employer would send them out on assignment. (Tr. 6) Employees were assigned work on a 'first come/first serve' basis according to the daily sign-in sheet (Tr. 6) unless an employee was already assigned to a particular line that still had work the following day. (Tr. 13)

The employer had an ongoing contract with Rock Tenn facility located in Iowa City in the same building as the employer. (Tr. 2, 3, 6) When the Claimant reported to work (usually two hours early) on any given day, he'd sign in and if his name came up, he'd be sent to Roc Tenn. (Tr. 9) The Claimant "...could be gone for a number of weeks, and still be able to come back."

Throughout the months of March and April, the Claimant was frequently sent home after he signed in and waited for assignment. (Tr. 10) In early May, the employer sent Mr. Trimble home, as other employees' names had been called and his services were not needed on May 5th and 6th. (Tr. 8- 9) He sought unemployment benefits, but continued to report to the employer for which he was assigned work until May 24th when the employer sent him home, again, because the employer had run out of product. (Tr. 9, 12) The following day, the employer turned him down for work once again, which led the Claimant to seek unemployment benefits. (Tr. 8, 11)

Mr. Trimble didn't understand why he wasn't getting work because sometimes his name was at the top of the list and he still wouldn't be called. (Tr. 11, 13) He had received only one verbal warning for working too slow. (Tr. 12) The Claimant suspected the employer had favorite groups of employees who were more consistently assigned work. (Tr. 10) Discouraged because he wasn't offered work (again) two days in a row and he wasn't earning money, Mr. Trimble stopped contacting the employer. (Tr. 3) The employer assumed he quit since the last day he made contact with the employer was May 25th, 2011. (Tr. 2-3, 7, 8)

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.26(19) provides:

The claimant was employed on a temporary basis for assignment to spot jobs or casual labor work and fulfilled the contract of hire when each of the jobs was completed. An election not to report for a new assignment to work shall not be considered as a voluntary leaving of employment. The issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer...

According to the employer's testimony, which was corroborated by Mr. Trimble, he was required to sign in daily and if work was available, he would be assigned to work. (Tr. 6) The fact that Mr. Trimble had to sign in before he could work and could not simply return to the job he worked the previous day (even though the employer had an ongoing contract with the same client-Rock Tenn), is indicative that each day was considered a new and separate job. In other words, this daily ritual supports the premise that upon each day the Claimant accepted and completed an assignment, he fulfilled that day's contract of hire. Additionally, the employer's testimony that the Claimant "...could be gone for a number of weeks and still be able to come back..." further establishes that the nature of this employment was that of spot labor within the meaning of the law. (Tr. 5)

The employer's argument that Trimble's failure to contact the employer for three consecutive workdays was a voluntary quit (Tr. 3) contradicts prior testimony where the employer testified that they didn't enforce the contact policy. (Tr. 5) And according to Iowa law, Mr. Trimble's "...election not to report for a new assignment...shall not be considered a voluntary leaving of employment..." See, 871 IAC 24.26(19), *supra*.

The next issue to be determined is whether the Claimant refused a suitable offer of work. There is nothing in the record to substantiate that the Claimant was ever offered any work after May 25th. According to the

employer's testimony, he quit, and that was the end of their contact. (Tr. 3)

871 IAC 24.24(1) *Bona fide offer of work* provides:

- a. In deciding whether or not a claimant failed to accept suitable work, or failed to apply for suitable work it must first be established that a bona fide offer of work was made to the individual by personal contact or that a referral was offered to the claimant by personal contact to an actual job opening and a definite refusal was made by the individual...

Since no personal contact was made by the employer, nor was any referral offered to the Claimant for an actual job opening for which he could accept or decline, we conclude that the Claimant did not fail to accept suitable work. Rather, for whatever reason, the employer stopped offering work to the Claimant, which we conclude was tantamount to a discharge for which misconduct must be established.

871 IAC 24.1(113)"a" provides:

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.

871 IAC 24.32(4) provides:

Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In the cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The record is void of any evidence that the Claimant committed any wrongdoing such that would place his job in jeopardy. By Mr. Trimble's own testimony, he received only one verbal warning for working too slow. (Tr. 12) Other than that, there is nothing to substantiate that this was an ongoing problem, which led to his separation. Based on this record, we conclude that the employer has satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated July 8, 2011 is **REVERSED**. The Claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

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.

Monique F. Kuester

AMG/fnv