

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

TRESA K BARTMAN

Claimant,

and

MENARD INC

Employer.

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HEARING NUMBER: 09B-UI-05099

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-d

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The claimant appealed this case to the Employment Appeal Board. All members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds the administrative law judge's decision is correct. With the following modification, 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** with the following **MODIFICATION**:

Add after the third paragraph of the "Findings of Fact" the following:

However, Mr. Klaisner called the Claimant back on January 26 to recheck her availability and intentions. (Tran at p. 6). The Claimant told him that she would not be

able to return due to the injuries *and the commute*. (Tran at p. 3; p. 6).

Amend the first sentence of the third paragraph of the “Reasoning and Conclusions of Law” to read as follows:

Ms. Bartman has not been released to return to work and, even when that time comes, she will not seek employment from Menard due to the commute – and she so notified her manager of this on January 26, 2009.

Elizabeth L. Seiser

Monique Kuester

RRA/fnv

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board. After careful review of the record, I would reverse the decision of the administrative law judge. The record establishes that the Claimant was terminated because she had no available leave. 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 by the employer. Porazil v. IWD, 2003 WL 22016794, No. 3-408 (Iowa Ct. App. Aug. 27, 2003). Although I would reverse on the separation question, I would remand the able and available issue back to claims as the Claimant’s availability is, on this record, questionable.

John A. Peno

RRA/fnv