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

THOMAS E PALOWSKI	:	
	:	**HEARING NUMBER:** 10B-UI-09202
Claimant,	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
BARR - NUNN TRANSPORTATION	:	
Employer.		

SECTION: 10A.601 Employment Appeal Board Review

D E C I S I O N

FINDINGS OF FACT:

A hearing in the above matter was held August 12, 2010 regarding the Claimant's separation and whether he was able and available for work. Both parties were unrepresented by counsel at the hearing. The administrative law judge's decision issued August 30, 2010 determined that the separation was a nondisqualiflying quit and that the Claimant was able and available for work.

The Claimant, a long distance truck driver, sustained a work-related knee injury on June 18, 2009. While the Claimant was in leave status, the Employer made two work offers, both of which the Claimant declined on the advice of his attorney. The Employer first offered a light duty assignment in its Iowa office with indication that arrangements would be made to allow the Claimant to be at home in Florida to the same extent accorded by his regular driving schedule. The Claimant declined because his attorney told him he did not have to work outside the state of Florida. On October 20, 2009, the Claimant told the worker's compensation doctor that his knee had improved and that he could drive a truck with a clutchless automatic transmission. Subsequently, the Employer conveyed a return to work date commensurate with the availability of a truck with an automatic transmission. Although the Claimant initially accepted this offer, he later realized that getting in and out of the truck would pose problems for his knee. He did not apprise the Employer of his reason for declining the offer and did not report to work where the new truck was available.

On November 16, 2009 the Claimant, his attorney, and Employer representatives attended a mediation session regarding a potential workers compensation settlement. The settlement was conditioned on Claimant's employment ending. The Employer included this provision in the settlement because they believed the Claimant had unreasonably rejected suitable job offers. At a later date the Claimant accepted the offer because he believed it was the only way he could be compensated for the injury.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 10A.601(4) (2009) provides:

> 5. Appeal board review. The appeal board may on its own motion affirm, modify, or set aside any decision of an administrative law judge on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The appeal board shall permit such further appeal by any of the parties interested in a decision of an administrative law judge and by the representative whose decision has been overruled or modified by the administrative law judge. The appeal board shall review the case pursuant to rules adopted by the appeal board. The appeal board shall promptly notify the interested parties of its findings and decision.

The majority of the Employment Appeal Board concludes that the record as it stands is insufficient to issue a decision on the merits of the case. According to the precepts of *Baker v. Employment Appeal Board*, 551 N.W. 2d 646 (Iowa App. 1996), the administrative law judge has a heightened duty to develop the record from available evidence and testimony given the administrative law judge's presumed expertise. There was scant testimony elicited as to the dates, terms and conditions of the two job offers made by the Employer, whether other job offers were made, or whether the Employer was given adequate explanation of Claimant's reasons for declining job offers such that additional accommodations or modifications could have been made. Additional testimony is also necessary to determine whether the Claimant was reasonable in declining the job offers.

For the reasons above, we remand this matter for further consideration.

DECISION:

The decision of the administrative law judge dated August 30, 2010 is not vacated at this time. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section, to reopen the record for the limited purpose of eliciting testimony from both parties, and issuing a new decision in consideration of the same. The administrative law judge shall conduct this limited hearing following due notice. After the hearing, the administrative law judge shall issue a new decision, which provides the parties appeal rights.

The majority Employment Appeal Board members would also note that the employer submitted new and additional evidence on appeal that the Board did not consider. The employer may resubmit these documents at the limited hearing for consideration.

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Monique F. Kuester

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Elizabeth L. Seiser

AMG/fnv

SEPARATE CONCURRING OPINION OF ELIZABETH L. SEISER:

I concur with my fellow board member that the administrative law judge's decision should be remanded for further consideration. Additional testimony as well as documentation of the actual settlement is needed to determine whether this case was properly analyzed as a discharge.

While there are no reported Iowa cases directly on point to analyzing a separation due to a workers' compensation settlement, relevant cases from other jurisdictions exist which have been cited by administrative law judges. In Edward v. Sentinel Management Co., 611 N.W. 2d 366 (Minn.App.2000) the court denied benefits because the claimant was capable of continuing to work while pursuing his claim, a situation analogous to negotiating for early retirement while work was still available. In Larson v. Michigan Employment Sec. Com'n, 140 N.W.2d 777 (Michigan App. 1966) the court allowed benefits to a worker so severely injured that he could not perform his former duties; the court found that his alternatives were limited to remaining employed without income or resigning in order to receive income in the form of a settlement.

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Elizabeth L. Seiser

AMG/fnv

DISSENTING OPINION OF JOHN A. PENO:

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. I would also note that a portion of the Employer's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (documents) were reviewed, I find that the admission of the additional evidence was not warranted in reaching my decision.

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John A. Peno

AMG/fnv