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

PERCY L MOORE

Claimant,

and

LABOR READY MIDWEST INC

Employer.

HEARING NUMBER: 08B-UI-01984

EMPLOYMENT APPEAL BOARD
DECISION

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 March 13, 2008. The administrative law judge's decision was issued March 13, 2008. The claimant appealed the administrative law judge's decision to the Employment Appeal Board. The Board, however, is unable to make a decision as to the merits of this case based on a failure to address issues related to the separation.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 10A.601(4) (2007) 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.

Here, the record fails to address an important issue in cases of intermittent employment services supplied to a party through a third employing agent. That issue is whether the employment relationship is that of continuing employment with temporary assignments or of discontinuous discrete periods of employment lasting only so long as the assignments themselves. The issue is, we think, a critical one.

As cited by the Administrative Law Judge Iowa Code section 96.5(1)(j) provides:

> 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, but the individual shall not be disqualified if the department finds that:
>
> j. The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm of completion of an employment assignment and who seeks reassignment. Failure of the individual to notify the temporary employment firm of completion of an employment assignment within three working days of the completion of each employment assignment under a contract of hire shall be deemed a voluntary quit unless the individual was not advised in writing of the duty to notify the temporary employment firm upon completion of an employment assignment or the individual had good cause for not contacting the temporary employment firm within three working days and notified the firm at the first reasonable opportunity thereafter.
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> To show that the employee was advised in writing of the notification requirement of this paragraph, the temporary employment firm shall advise the temporary employee by requiring the temporary employee, at the time of employment with the temporary employment firm, to read and sign a document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify. The document shall be separate from any contract of employment and a copy of the signed document shall be provided to the temporary employee.
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> For the purposes of this paragraph:
>
> (1) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their work force during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.
>
> (2) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

In addition, and of some importance in this matter, the rules of Workforce also provide

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer: ...

. . .

24.26(15) Employee of temporary employment firm.

a. The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm within three days of completion of an employment assignment and seeks reassignment under the contract of hire. The employee must be advised by the employer of the notification requirement in writing and receive a copy.

b. The individual shall be eligible for benefits under this subrule if the individual had good cause for not contacting the employer within three days and did notify the employer at the first reasonable opportunity.

c. Good cause is a substantial and justifiable reason, excuse or cause such that a reasonable and prudent person, who desired to remain in the ranks of the employed, would find to be adequate justification for not notifying the employer. Good cause would include the employer's going out of business; blinding snowstorm; telephone lines down; employer closed for vacation; hospitalization of the claimant; and other substantial reasons.

d. Notification may be accomplished by going to the employer's place of business, telephoning the employer, faxing the employer, or any other currently accepted means of communications. Working days means the normal days in which the employer is open for business.

. . .

24.26(19) 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 construed 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. The provisions of Iowa Code section 96.5(3) and rule 24.24(96) are controlling in the determination of suitability of work. However, this subrule shall not apply to substitute school employees who are subject to the provisions of Iowa Code section 96.4(5) which denies benefits that are based on service in an educational institution when the individual declines or refuses to accept a new contract or reasonable assurance of continued employment status. Under this circumstance, the substitute school employee shall be considered to have voluntarily quit employment.

871 IAC 24.26. At first glance, rules 24.26(15) and 24.26(19) appear to be in conflict. Does a "temporary employee" have to return within three days of the ending of the assignment to request more work as described by paragraph 15 or can an employee "employed on a temporary basis for assignment to spot jobs or causal labor" make a decision not to report for a new assignment as described by paragraph 19? We note that paragraph "j" of Iowa Code §96.5(1) was added in 1997 while the first two sentences of rule 24.26(19) appear to date from at least 1983. See 77 GA ch. 132 §1 (1997); Des Moines Independent Community School Dist. v. Department of Job Service, 376 N.W.2d 605, 608 (Iowa 1985)(quoting rule). Yet the spot labor rule of Workforce remains in place along side the temporary employment firm rule. We conclude that the two provisions are to be reconciled based on analysis of the contract a claimant

has with the entity that assigns the claimant to work.

We gain some insight on this issue from the decision of the Supreme Court in Des Moines Independent Community School Dist. v. Department of Job Service, 376 N.W.2d 605 (Iowa 1985). Although that case dealt with the special case of substitute teachers there was some general discussion of the spot labor rule. According to the Court "[r]ule 4.26(19) applies only to those temporary employees who fulfill their contract of hire when each job is completed." Id. At 610. The concept is much as with employees who are hired to perform work for a specific period of time. For those employees, once the specified time for the contract of hire is expired the employment ends by virtue of that alone and the situation is not a quit. 871 IAC 24.26(22). With spot labor the employee is often hired for a specific task, rather than a specified time, and when the job is completed the employment is ended. The ending of the task means the ending of contract and, as with those hired for a specific period, the separation is the result of the operation of the contract and is not the result of a quit. Similarly spot labor may also be for a very limited specified term, for example, a single day. We clarify with some examples.

> Suppose someone goes to a business to offer services and the business says "we need someone to clean up this mess out back." The business then hires the person to do this specific task with the understanding that the job will last only so long as the task does. When the clean-up is done, the employment relationship is over. While the task lasts the worker is subject to the supervision and control of the business. This is spot labor.
>
> Suppose someone goes to a business to offer services and the business says "we need someone to answer phones for a day." The business then hires the person to answer phones (a task that is never "completed") with the understanding that the job is only for a single day. When the day ends so does the employment relationship. During this day the worker is subject to the supervision and control of the business. This is spot labor and also employment for a specified term.
>
> Suppose someone goes to a business to offer services and that business is a temporary employment firm. The firm then enters into a contract of continued employment with the worker who is then assigned out to clients as the need arises. Although pay does not continue between assignments, the contract provides that the employment relationship does. Because of this the firm is able to impose requirements the employee must satisfy (e.g. maintain a driver's license) in order to maintain employment even though not on assignment. This is not spot labor but rather temporary employment governed by §96.5(1)(j).

These examples are, we think, not subject to serious debate. The issue now is this: What happens if a temporary employment broker assigns workers to clients but only for a fixed term? The answer, as we have indicated, is in the contract.

If the contract with the employment brokerage firm provides that the worker is the brokerage firm's "employee" on a continuing basis without regard to whether the worker is actually assigned to a client at the time then this is not a spot labor situation. Such a situation would be governed by

§96.5(1)(j) and rule 24.26(15). Those provisions would govern the respective duties of the parties with respect to ending of assignments and reassignment. If, on the other hand, the employment brokerage firm's contract provides that at the end of the work day, the worker will no longer be an employee of the firm and that the worker will not be deemed to be an employee of the firm until the worker next begins working another job assignment then that is spot labor. This is so because the contract of employment itself is not continuing. The contract of employment ends when the job ends and the separation is the automatic result of the ending of the assignment/contract not a quit.

Finally, we come to what we need to know on remand. We need to know the substance of the contract between the Claimant and the Employer. Specifically, we need to know whether the employment relationship itself continues between assignments or whether each assignment is deemed to be a separate employment. If the former its "temporary employment" as contemplated by §96.5(1)(j) and if the later then it is a case of "spot jobs". We emphasize that with spot labor "[a]n election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment." 871 IAC 24.26(19). Thus if this case is one of spot labor the mere fact that the Claimant had a repeat ticket would not mean he quit merely by his election not to report. By the same token, indeed the same rule, where the Claimant is aware of a job opportunity but fails to take it then "[t]he issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer." 871 IAC 24.26(19). Of course a refusal of suitable work must occur in the benefit year. 871 IAC 24.24(8). We thus remand on the issue of the contents of the contract with the Employer, as discussed above. If the contract appears to be one of spot labor then the issue of refusal of suitable work should also be addressed. Since the parties were unrepresented the administrative law judge has an affirmative duty to develop the record. See, Baker v. Employment Appeal Board, 551 N.W. 2d 646 (Iowa App. 1996); 871 IAC 26.14(2)("The presiding officer shall inquire fully into the factual matters at issue…"). Since the record of the hearing before the administrative law judge is incomplete, the Employment Appeal Board cannot make a decision on the merits. For this reason, this matter must be remanded to address these issues.

DECISION:

The decision of the administrative law judge dated March 13, 2008, is not vacated at this time. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section for the limited purpose of reopening the record and eliciting additional testimony that is consistent with the Board's concerns set forth in this decision's Reasoning and Conclusions of Law. The administrative law judge shall conduct this supplemental hearing following due notice. After the hearing, the administrative law judge shall issue a new decision, which provides the parties appeal rights.

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Elizabeth L. Seiser

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John A. Peno

RRA/fnv