

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

STEVEN REN

Claimant,

and

DES STAFFING SERVICES INC

Employer.

:
:
:
:
:
:
:
:

HEARING NUMBER: 09B-UI-05718

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, Steven Ren, worked intermittently for DES Staffing Services, Inc. beginning November 15, 2003. (Tr. 2, 7) The employer has a policy which provides that once an employee completes an assignment, that employee must contact the employer within three days, "... otherwise it's deemed a voluntary quit..." (Tr. 3-4) Ms. Ren signed off in acknowledgement of this policy and was also given a copy. (Tr. 4)

The claimant's last assignment began January 7, 2008 with JR Motorsports in a warehouse position during which time he suffered a work-related injury. (Tr. 3, 7) The claimant initially sought medical attention on September 2, 2008 from his own doctor in conjunction with seeing the employer's worker's

compensation doctor. (Tr. 3, 7) At that juncture, the doctor released him to work with restrictions. (Tr. 5-6) The company assignment did not comply with his restrictions which caused further injury. (Tr. 7) Every time the claimant visited a doctor, he immediately contacted the employer as instructed by phone or visit along with his girlfriend to apprise the employer of his circumstances and submit medical papers regarding his restrictions. (Tr. 4, 5, 7, 11) The employer never contacted Mr. Ren about light-duty work that was within his restrictions. (Tr. 5-6)

The claimant was taken off work and had surgery in October of 2008. (Tr. 8) On November 11, 2008, Mr. Ren was released to return to work without restrictions. (Tr. 3, 8, 13-14) He immediately contacted the employer to provide his new telephone number and inform the employer that he was ready to return to work. (Tr. 9) The claimant initially spoke with the receptionist who transferred his call to Shane Sorenson's (Divisional Manager) voicemail where he left a message. (Tr. 9) The receptionist also told the claimant that the employer would get back to him, which never happened. (Tr. 10) Two weeks later, the employer received the medical release via fax from the doctor's office. (Tr. 13-14) The employer considered the claimant to have voluntarily quit. (Tr. 3)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(1)(d)(2007) provides:

An individual shall be disqualified for benefits: *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:

The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department provided the individual is otherwise eligible.

The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code §96.6(2) (amended 1998).

The claimant acknowledges that he was supposed to report back to the employer for reassignment after his November 11th full release. (Tr. 7) According to his testimony, he complied with the employer's notification policy by contacting the employer that same day only to be told to leave a voice mail that was never responded to. (Tr. 9) Although the dates are unclear as to when he received his initial release *with restrictions*, it is clear that Mr. Ren tried to maintain an employment relationship early on by routinely providing the employer with medical documentation to secure appropriate light duty work. (Tr. 5-6) The employer admits discussing the claimant's restrictions with both him and his girlfriend,

but denies that he ever specifically spoke to Mr. Ren after his surgery and full release. (Tr. 5)

In viewing this record as a whole, Mr. Ren's actions are not probative of a man who intended to sever his employment relationship. [Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." FDL Foods, Inc. v. Employment Appeal Board, 460 N.W.2d 885, 887 (Iowa App. 1990), accord Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992). Here, not only does the record lack substantial support that he intended to quit, there is no overt act to accompany that alleged intention. Additionally, even through the employer has a notification policy, the record supports that the employer knew he had surgery back in October and was awaiting his release. Theoretically, Mr. Ren was absolved of having to report back within three days of his October 8th operation as he wasn't available for reassignment at that time. His phone call to the employer on the same day he was released, however, was in keeping with the employer's notification policy and was consistent with his prior action in keeping the employer apprised of his previous restrictions. Thus, we attribute more weight to Mr. Ren's version of events on November 11th in light of the employer's denial of having ever heard from him.

Iowa law provides that if an employee who is off work due to injury (which the employer had knowledge and consented to the absence) once that employee recovered and returned to offer his services, that employee shall be entitled to benefits if the employer has no work available. See, Iowa Code section 96.5(1)"d." Here, the employer never contacted the claimant to offer him work even though he was fully released to return to work. For this reason, we conclude that Mr. Ren's separation is not a disqualifying event.

DECISION:

The administrative law judge's decision dated May 8, 2009 is **REVERSED**. The claimant return to the employer to offer his services but work was not offered to him. Accordingly, he is allowed benefits provide 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