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

TERRY D PRENTICE

Claimant,

and

BARGMAN INC

Employer.

HEARING NUMBER: 07B-UI-09102

EMPLOYMENT APPEAL BOARD
DECISION

N O T I C E

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 E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The claimant appealed this case to the Employment Appeal Board. Three members of the Employment Appeal Board reviewed the entire record. Those members are not in agreement. Elizabeth Seiser would remand, Mary Ann Spicer would affirm, and John Peno would reverse the decision of the administrative law judge.

Since there is not agreement, the decision of the administrative law judge is affirmed by operation of law. The Findings of Fact and Reasoning and Conclusions of Law of the administrative law judge are adopted by the Board and that decision is **AFFIRMED** by operation of law.

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Elizabeth L. Seiser

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Mary Ann Spicer

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John A. Peno

RRA/fnv

The Employer submitted a written argument to the Employment Appeal Board. The Employment Appeal Board reviewed the argument. A portion of the argument consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the argument and additional evidence (documents) were considered, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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Elizabeth L. Seiser

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John A. Peno

RRA/fnv

CONCURRING OPINION OF MARY ANN SPICER:

In the reasoning and conclusion the Administrative Law Judge concisely explains the rationale for the use of **White v. Employment Appeal Board**, 487 N.W.2d 342,345 (Iowa 1992) as it relates to the denial of benefits. In accordance with the Department of Labor (DOL) safety regulations Subpart E 391.41 physical qualifications for drivers was not the issue even though Mr. Prentice lost his CDL due to disqualification because of insulin injections as a diabetic. The issue at hand is that Mr. Prentice involuntary quit his due to the bulk of the employer's commercial offering were for truck drivers. Therefore, the claimant could not maintain his regular truck driver job because he was not physically qualified to drive a commercial motor vehicle due to his insulin dependency, which was not aggravated by his employment. Thus, I would affirm the decision of the Administrative law Judge. I would also accept the new and additional information submitted by the Employer but this information is not determinative in my vote.

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Mary Ann Spicer

RRA/fnv

DISSENTING OPINION OF ELIZABTH L. SEISER:

I respectfully dissent from the decision of the Employment Appeal Board; I would remand the decision of the administrative law judge. Obviously this is a very confusing area of the law as the Iowa appellate courts have given less-than-crystal-clear guidance in the area. Indeed the Court has, on occasion, found identical facts to be a disqualifying quit in one case and no quit at all in another case. Compare Hedges v. Iowa Dept. of Job Service, 368 N.W. 862 (Iowa 1985) with in Geiken v. Lutheran Home for the Aged, 468 N.W.2d 223 (Iowa 1991)("this case does not present a voluntary quit situation"). With such

a lack of clarity and with both parties being unrepresented I would find that they may be excused for no more fully developing the record on whether there was a separation. As the Iowa Court of Appeals noted in 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 expertise.

Similarly, even assuming that the Claimant is not separated, I am concerned that there is not more evidence on the parameters of the Federal Diabetes Exception Program and the Claimant's failure to preserve his CDL through this program. Here the Claimant is required to have a CDL in order to continue his employment as a truck driver and the Employer is willing to continue his employment if Claimant is authorized through this exception. If the Claimant had reasonable assurance of preserving his CDL and did not have good reason for failing to pursue this avenue, even if no separation is proved, whether this constitutes a period of voluntary unemployment (during which Claimant would not be eligible for benefits) should be considered. Additionally, the Employer made some kind of offer of alternate work to the Claimant pending his pursuit of the diabetes exception which potentially raises the issue of refusal of suitable work, however, there is not enough information in the record to determine how the offer was made, if it was suitable, and whether the Claimant had good cause for turning the offer down.

For these reasons I would remand on the question of the separation and on the Federal Diabetes Exemption program. At a minimum, testimony and documentary evidence should be elicited and evaluated regarding the letter sent by the Employer to the Claimant in late June 2007, information about the Federal Diabetes Exemption Program, and any offer of alternate work made to the Claimant.

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Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. The Employment Security Law provides that an unemployed individual may receive benefits unless he is disqualified for some reason. A claimant who has been separated from employment may be disqualified based on the nature of the separation. But this Claimant is not separated. A person may be unemployed, that is, not receive wages for work performed in a week, and yet still not be separated from the employer (as occurs in some forms of "lay off" or unpaid leave). Not being separated the Claimant cannot be disqualified based on the nature of the separation. Thus he cannot be disqualified for having voluntarily quit without good cause attributable to the Employer nor can he be disqualified for being discharged for misconduct. He did not quit, he was not discharged, he is not separated. He cannot be disqualified based on the nature of an event that did not occur. Even were I inclined to find a separation I would find it to be a non-disqualifying "other separation" since it was a "[t]erminatio[n] of employment for … failure to meet the physical standards required." 871 IAC 24.1(113)(d). No disqualification appearing the Claimant thus should receive benefits so long as he is unemployed and otherwise eligible.

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John A. Peno

RRA/fnv