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

AUBERY MOORLET	:	
	:	HEARING NUMBER: 09B-UI-02315
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
LABOR READY MIDWEST INC	:	
Employer.		

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-j

D E C I S I O N

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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Aubery Moorlet (Claimant) first started performing services on assignment from Labor Ready (Employer) on June 12, 2007. (Tran at p. 2). Workers at the Employer come in everyday to sign in. (Tran at p. 2). Each assignment ends at the end of the day and the worker is paid off at that time. (Tran at p. 3). "At the end of the work day, [a worker is] deemed to have quit until [the worker] next begin[s] working another job assignment." (Ex. 1). A worker is "not employed until [the worker] actually begin[s] working a job assignment." (Ex. 1). The Claimant last assignment ended on April 16, 2008. (Tran at p. 3). The Claimant ceased employment with the Employer at the end of that day. (Tran at p. 3; Ex. 1) The Claimant has not returned to request reassignment. (Tran at p. 4).

REASONING AND CONCLUSIONS OF LAW:

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.
>
> 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.
>
> 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 snow storm; 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) appears 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.

If a temporary employment broker assigns workers to clients but only for a fixed term then the contract is examined. 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. *See Des Moines Independent Community School Dist. v. Department of Job Service,* 376 N.W.2d 605, 610 (Iowa 1985)("Rule 4.26(19) applies only to those temporary employees who fulfill their contract of hire when each job is completed.")

There is no question that the Claimant was a spot laborer. The contract provides "at the end of the work day, I will be deemed to have quit until I next begin working another job assignment" and "I am not employed until I actually being working a job assignment." (Ex. 1). This is exactly the situation addressed by the spot labor rule. And it is exactly the situation not meant to be covered by §95.5(1)(j).

After all how many times can the Claimant be "deemed" to have quit? The Employer "deems" a quit at the end of the weekday. If so, then the relationship is, at that point, severed. It can't be severed again by not asking for another assignment for three *subsequent* days. Also either the Claimant has to come back or he doesn't. Either the Claimant understands "I am not required to work on any particular and whether I report to a *Labor Ready* branch office is always my choice" or he understands that "I must notify Labor ready of completion of an employment assignment and seek a reassignment with Labor Ready." (Ex. 1). We do not think he can have both these understandings at the same time – they are contradictory. Finally, it certainly seems pointless for the Claimant to notify the Employer of the end of an assignment when the *Employer* specifies assignments end when the day does. If the day is over, so is the assignment. Surely the Employer needs no notice of this. These inconsistencies but bolster our conclusion that the Claimant was a spot laborer. As such he did not quit merely by not seeking reassignment.

DECISION:

The administrative law judge's decision dated March 10, 2009 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

_____
John A. Peno

_____

Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONQIUE 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 Kuester

RRA/fnv