

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

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NORMA M SALAZAR

Claimant,

and

TITAN TIRE CORPORATION

Employer.

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HEARING NUMBER: 08B-UI-08813

EMPLOYMENT APPEAL BOARD  
DECISION

**SECTION:** 10A.601 Employment Appeal Board Review

**FINDINGS OF FACT:**

A hearing in the above matter was held October 17, 2008. The administrative law judge's decision was issued October 24, 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 the issue of what the Claimant actually did that might have disqualified her from benefits. In Marzetti Frozen Pasta, Inc. v. Employment Appeal Bd., 2008 WL 4725151, (Iowa App. October 29, 2008)(publication decision pending) the Court affirmed a Board finding that a Claimant had not committed misconduct when he failed to obtain renewal of his work authorization card. The fact is these cases are very fact intensive. In Marzetti it was important that the government was responsible for the delay, and that the Claimant had applied for renewal at a time when he had done so, with success, in the past. The Court also noted "that the United State Citizens and Immigration Services website inform aliens that one cannot file for a renewal "more than 120 days before your

original EAD [employment authorization document] expires.” Slip op. at 8.

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Turning to the issues on remand we note that under Marzetti the mere fact of failure to be authorized, while relevant to being able and available, does not establish per se misconduct. Relevant information that is lacking includes when the Claimant applied for renewal, when was the earliest she could have applied, when had she applied in the past, and who was responsible for the delay in approval. We also note, as did Marzetti, that a Claimant may not collect benefits while not authorized and that a Claimant can be disqualified for working while not authorized. Given a claim date of August 31, and an authorization of August 30, neither seems to be applicable here.

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 for a supplemental hearing on the issue of the timing of the Claimant’s application for renewal, whether the claimant took longer to apply than she had in the past, and what was responsible for the delay in approval (the Claimant or the INS). It might also be advisable, given the discussion in Marzetti, to address the possibility that this claimant also is on protected status from El Salvador, which is now a notoriously slow process of approval. See <http://www.whitehouse.gov/news/releases/2008/09/20080924-2.html>(“ President Bush and President Saca of El Salvador Discuss Temporary Protected Status”). In fairness to the learned Administrative Law Judge we note that Marzetti was decided 5 days after he issued his decision in this case.

**DECISION:**

The decision of the administrative law judge dated October 24, 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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Monique Kuester

RRA/ss