

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

CHRISTINA M RINCON

Claimant,

and

DES STAFFING SERVICES INC

Employer.

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HEARING NUMBER: 08B-UI-09094

**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 October 22, 2008. The administrative law judge's decision was issued October 23, 2008, which found the claimant quit without good cause attributable to the employer. She left her assignment due to concerns with standing long periods of time on her feet. However, whether the claimant was separated from her employment with the temporary agency was not addressed at the hearing. The administrative law judge's decision has been appealed to the Employment Appeal Board.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 10A.601(4) (2005) 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.

The Employment Appeal Board concludes that the record as it stands is insufficient for the Board to issue a decision on the merits of the case. The administrative law judge failed to establish whether the claimant was

separated from the temporary employment agency. According to the precepts of 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 presumed expertise. Here, this document appears to have been overlooked. For this reason, we remand this matter for further consideration.

DECISION:

The decision of the administrative law judge dated October 22, 2008, is not vacated at this time. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section, to reopen the record for the limited purpose of taking additional evidence on the issue of separation from DES Staffing. The administrative law judge shall conduct this limited hearing following due notice. After the hearing, the administrative law judge shall issue a new decision, which provides the parties appeal rights.

Elizabeth L. Seiser

Monique F. Kuester

AMG/ss

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge by finding that the claimant accepted an assignment in which she was on her feet for an extended period of time. I agree with the employer that the claimant quit this assignment and sought reassignment. However, there was no work available. It is clear that the claimant quit due illness or an injury, but there is nothing in this record to support that her quit the temporary employment agency. Thus, I would conclude that the claimant should be allowed benefits provided she is able and available for work.

In the event benefits were denied, I would remand the overpayment issue since an overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

John A. Peno

AMG/ss