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

BURDETTE R DANIELSON	:	
	:	**HEARING NUMBER:** 10B-UI-04001
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
TEMP ASSOCIATES - MARSHALLTOWN	:	
Employer.		

SECTION: 10A.601 Employment Appeal Board Review

FINDINGS OF FACT:

A hearing in the above matter was held May 14, 2010. The Administrative Law Judge's decision was issued May 14, 2010. The Administrative Law Judge found that the Employer's appeal was timely and remanded the matter to the Claims Section on the merits. The administrative law judge's decision on timeliness alone has been appealed to the Employment Appeal Board. The Board finds there are not enough facts to make a decision at this time.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 10A.601(4) (2009) 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.

Although the Administrative Law Judge found the appeal from the claims representative decision timely, there is no evidence other than the Employer's testimony that the fax in question was sent when the Employer claims. Yet the Employer did mention a fax report. (Tran at p. 3). Where someone claims to have faxed a timely appeal, but Workforce says that it does not have a copy, a fax report is a critical piece of evidence. In such cases the appellant normally is unaware, until the hearing, that Workforce is saying

that it did not get the fax. For this reason the Administrative Law Judges ordinarily leave the record open to receive claimed fax cover reports in these type of cases. Here the Administrative Law Judge believed the Employer's testimony alone and did not receive the report as evidence. The Employer should have the opportunity to produce the transmission report before we decide whether we can affirm on its testimony alone. Moreover, the record strongly suggests that several different issues bearing on qualification for benefits may have occurred in a short time frame. The Employer is a temporary employer and we may have issues of separation from one assignment, as well as, assignment to a second one that both bear on this case.

As the Iowa Court of Appeals noted in *Baker v. Employment Appeal Board*, 551 N.W. 2d 646 (Iowa App. 1996), where the parties are unrepresented by counsel, 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. Since the Employment Appeal Board is unable to adequately make a decision based on the record now before it, this matter must be remanded for a hearing in order that additional evidence bearing on timeliness may be obtained from the parties. This hearing may be combined with a hearing on the merits, if any.

Finally, we address some oddities in this case. The Administrative Law Judge, understandably, was confused by the Employer's reading from the Notice giving it until February 16 to appeal. The Administrative Law Judge knows the deadline is 10 days and that the notice was sent on February 3. This puts the deadline at Saturday, February 13 and, the Administrative Law Judge knew, the weekend extends the deadline to Monday, February 15. February, however, is a tricky month in Iowa. Under Iowa Code §4.1(34) "the twelfth day of February [and] the third Monday in February" are treated as filing-day holidays. This is so even though all state offices are open. The Claims Section apparently has programmed this into its system and so extended the deadline from February 15 (the third Monday) until February 16. There was not, as the Administrative Law Judge feared, a typo or other error by the Claims Section. The second oddity in this case is why we have this appeal. The Administrative Law Judge issued an appealable decision in a case in which no dispositive decision has been made. The Claimant has, understandably, chosen to appeal the timeliness issue. Thus we find ourselves taking up an appeal from a party who may yet prevail on the merits even if we find against her. This does not strike us as a particularly good use of anyone's time, and this is why such interlocutory appeals are very rare even in court. Perhaps a better practice in future is to remand to claims, or proceeding with the hearing if the issues have been noticed, to take up the merits without issuing a separate appealable order finding an appeal *timely*. We note the double affirm rule applies even when the Claims decision is based on timeliness of protest rather than on the merits.

DECISION:

The decision of the administrative law judge dated May 14, 2010, 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 developing the record consistent with Board's concerns, namely, what documentation is there of the timely protest asserted by the Employer. The administrative law judge shall conduct a hearing following due notice. The hearing may be combined with the heairing on the merits, if any. After the hearing, the administrative law judge shall issue a new decision in consideration of any new evidence, as well as any evidence on the merits, which provides the parties appeal rights.

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John A. Peno

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Elizabeth L. Seiser

RRA/ss