

CONCURRING OPINION OF MONIQUE F. KUESTER:

I agree that the administrative law judge's decision should be affirmed; however, I would also note that a portion of the claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (documents) were reviewed, I would find that the admission of the additional evidence is not warranted in reaching today's decision.

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. I, on the other hand, would accept the claimant's new and additional evidence based on its relevance and materiality to this case. The record establishes that the claimant was hired after he answered a newspaper ad that the employer placed, looking for a foreman and service technician. The claimant went on medical leave of absence due to a work-related injury. The doctor released the claimant to return to work without restrictions on July 9th. On July 14th, the employer assigned the claimant to a job requiring the claimant to work as a roofer tearing off roofing. The claimant had not previously done this type of work for the employer. The claimant informed the employer that he could not physically work for the employer as a roofer. The claimant informed the employer that he was going back to his doctor for a re-evaluation of his injury.

Prior to the claimant's return to work, he had worked as a technician and, at times, had a laborer ride with him. The claimant's testimony is credible that the doctor released him to return to work as a tech. (Tr. 13) A reasonable person would conclude that a roofer's duties would be more physical than a roofing technician's duties. I agree that the employer has the right to direct the workforce. In this case, however, the employer placed the claimant in a position where, due to the claimant's sudden change in job duties, the claimant could potentially risk re-injury to his already existing work-related injury.

The claimant put the employer on notice that he could not perform the assigned work on July 14th. The claimant, again, notified the employer on July 16th that he was going back to the doctor to be re-evaluated. Although the claimant didn't strictly follow procedures, the employer had notice and should

have known that the claimant was returning to the doctor assigned by the employer. Thus, I would conclude that his quit was for good cause attributable to the employer based on what I would consider to be detrimental and intolerable working conditions. In the alternative, if this case were analyzed as a discharge, I would conclude that misconduct was not established.

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Lastly, I would accept the claimant's new and additional evidence from Dr. Mark Kirkland because the evidence was not available at the time of the hearing, and is both material and relevant to the issue to be determined.

John A. Peno

AMG/ss