IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

CLYDE B ROBY
Claimant

TYSON PREPARED FOODS INC
Employer

APPEAL NO: 07A-UI-04733-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/23/06 R: 03
Claimant: Appellant (2)

Section 96.4-3 - Able and Available
871 IAC 24.22(2)j – Leave of Absence

STATEMENT OF THE CASE:

Clyde B. Roby (claimant) appealed a representative's May 7, 2007 decision (reference 03) that concluded he was not qualified to receive unemployment insurance benefits in connection with his employment with Tyson Prepared Foods, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 1, 2007. This appeal was consolidated for hearing with one related appeal, 07A-UI-04734-DT. The claimant participated in the hearing and was represented by Terra Wood, attorney at law. Ron Wood appeared on the employer's behalf. During the hearing, Claimant's Exhibits A and B were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The claimant started working for the employer on September 1, 2005. He worked full time as a second shift production team member in the employer's Waterloo, Iowa meat final finishing facility. He most recently worked on March 23, 2007. At that time he was performing light duty functions as a lab technician doing meat testing.

The claimant had a history of lower back problems. On September 18, 2006 the claimant was lifting a bag of spice and heard a pop in his back. He did not feel pain until several days later. He reported the incident to the employer on October 9, 2006. He was seen by the employer's workers' compensation care provider who diagnosed a lumbar strain with some left lower extremity paresthesias (burning, prickling, itching, or tingling). Physical therapy and pain and muscle-relaxer medication was prescribed, and he was placed on light duty.

On January 24, 2007, a doctor who had seen the claimant on behalf of the employer, responded to questions regarding the claimant propounded by the employer. One of the questions (Question 4) was whether the claimant had reached maximum medical improvement (MMI) "for the 09-18-06 work injury?" to which the doctor responded by marking, "Yes." Another question (Question 1) asked, "Did work activities cause or physically worsen the low back and left lower extremity condition?" to which the doctor also responded by marking, "Yes." Question 2 asked, "If yes, was the low back and left lower extremity pain a temporary aggravation or permanent aggravation by his work at Tyson Foods, Inc.?" to which the doctor initially responded by marking and then striking, "Temporary," and then marked "No Aggravation." Question 3 then asked, "If the answer to #2 is temporary or no aggravation, we assume you are saying that the condition was progressive in nature and would have become symptomatic regardless of activity level. Is this correct?" The doctor marked "Yes" as his answer.

Undocumented in the materials presented in the hearing, while the claimant was apparently deemed at MMI, he was also placed on work restrictions which may have been permanent of limited use of movement of the back and a ten-pound lifting restriction. On March 27, 2007 since the doctor had concluded that the claimant was at MMI and that the claimant's low back and left lower extremity pain was not due to aggravation by his work with the employer (under question #2), the employer denied further workers' compensation coverage and light duty accommodation. It indicated that it therefore did not have a regular position available for the claimant at that time which would accommodate his restrictions. The claimant entered into FMLA (Family Medical Leave) status as of March 27 until such time as he could return to work without restriction. He then filed an additional claim effective March 25 to an original claim for unemployment insurance benefits he has established July 23, 2006.

The claimant is physically capable of performing some forms of work with or without restriction outside of the work with the employer.

REASONING AND CONCLUSIONS OF LAW:

A claimant must be able and available for work in order to be eligible for unemployment insurance benefits.

Iowa Code § 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(2)j(1)(2)(3) provides:

> Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly

and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

(3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

871 IAC 24.23(10) provides:

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

When a period of voluntary unemployment such as the leave of absence is due to a non-work-related injury, the employer can require that in order to return the claimant must have fully "recovered," meaning a complete recovery without restriction. Hedges v. Iowa Department of Job Service, 368 N.W.2d 862 (Iowa App. 1985). The question here is whether the period of unemployment is due to a work-related or non-work-related injury. The test for determining work-connectedness is not the same for unemployment insurance benefit eligibility as it is for workers' compensation benefit eligibility. For unemployment insurance benefit eligibility the health condition which causes the unemployment must be "attributable to the employment" by being due to "[f]actors and circumstances directly connected with the employment which caused or aggravated" the condition. 871 IAC 24.26(6)b.

Therefore, it is irrelevant for purposes of unemployment insurance benefit eligibility whether the claimant is at MMI. In resolving the necessary question in the context of unemployment insurance, however, the doctor's answers are conflicting. The doctor responded that yes, work activities did at least physically worsen the claimant's lower back and left lower extremity condition, but then responded essentially that there was no aggravation by his work. No testimony was presented by the employer to resolve this apparent conflict. The only apparent distinction in the questions appears to be that the first question focused on whether the condition was physically worsened (yes) and the second question focused on whether there was an aggravation of the pain (no). For purposes of unemployment insurance, there is no significant distinction between whether it was the condition or the symptom (pain) which was physically worsened or aggravated. As to the assumption concurred to by the doctor in question three that the condition "was progressive in nature and would have become symptomatic regardless of activity level," it is again unclear as to how that is reconciled with the finding that the work activities did at least "physically worsen the . . . condition." Does this mean that the condition would have deteriorated to the present point at some later point regardless of the work activities, but because of the work activities did worsen at the point they did worsen? Again, no testimony was presented by the employer to resolve this apparent

conflict. It is not pertinent to an unemployment insurance determination as to whether the condition might have eventually worsened on its own, the question for unemployment insurance is whether the current period of unemployment is directly related to the work activities. The administrative law judge finds most pertinent and most persuasive the doctor's initial response that yes, work activities did at least physically worsen (i.e. aggravate) the condition.

Also unaddressed is the question of how the claimant's current work restrictions relate to his condition prior to and after the September 18, 2006 incident. The available evidence indicates that the claimant did not have such restrictions prior to the incident, and that these are the resulting restrictions imposed due to the incident and after the claimant reached MMI. While the employer is not required to provide work to meet those restrictions, as the restrictions were imposed as a consequence of a physical worsening of his condition caused by work activities, the period of employment caused by the lack of accommodation is attributable to the employer. 871 IAC 24.26(6)b.

871 IAC 24.22(1)a provides:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
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> (1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.
>
> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

See also, Sierra v. Employment Appeal Board, 508 N.W.2d 719, 721 (Iowa 1993); Geiken v. Lutheran Home for the Aged, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). The claimant has demonstrated that he is able to work in some gainful employment. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's May 7, 2007 decision (reference 03) is reversed. The claimant is able to work and available for work effective March 27, 2007. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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