

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

---

TRACI A WAGNER

Claimant,

and

GRANDVIEW HEIGHTS INC

Employer.

:  
:  
:  
:  
:  
:  
:  
:  
:

HEARING NUMBER: 08B-UI-07070

EMPLOYMENT APPEAL BOARD  
DECISION

N O T I C E

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION: 96.4(3)**

D E C I S I O N

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The claimant, Traci A. Wagner, worked for Grandview Heights, Inc. beginning June 14, 2002 as a full-time restorative aide (Tr. 2, 5, 10-11) until her last day of work on June 24, 2008. (Tr. 4-5, 10-11) Her primary responsibilities included ambulating the residents and doing range of motion rehabilitative activities as directed by an RN or licensed therapist. (Tr. 6)

Ms. Wagner experienced three episodes of losing consciousness while on the job (June 10<sup>th</sup>, 17<sup>th</sup>, and the 24<sup>th</sup>). (Tr. 4-5, 7, 11) Each time, she was ambulated to a nearby ER where she was ultimately released to return to regular duty at work. (Tr. 4, 5, 10, 15) The last episode occurred on June 24<sup>th</sup> at which time

she returned to work with no diagnosis for her losses of consciousness and the employer placed her on a medical leave of absence. (Tr. 8)

The claimant sought medical attention from a neurologist whom she'd been seeing since January of 2008 for blood pressure. (Tr. 12) Her neurologist, however, "... did not see it necessary to fill [FMLA papers] out," which were sent by the employer. (Tr. 17, 18) The specialist referred her to her family doctor who determined that it was her medications that caused her blackouts, i.e., the 'clashing' of two heart medications. (Tr. 12-13) The claimant was immediately taken off all medications. (Tr. 13, 15)

Ms. Wagner told the employer she was able to perform range of motion activities, "... wheel residents to and from the dining room, exercise class, fold laundry, work in dietary, serve trays... reception (Tr. 17); however, the employer did not trust her ability to continue ambulating the residents. (Tr. 9) The claimant offered to perform other duties, even offered to work part-time, but the employer preferred to receive a diagnosis before allowing her to return. (Tr. 10) She had no further episodes after June 24<sup>th</sup>. (Tr. 15, 16) Ms. Wagner continues to maintain employment at Grandview Heights pending a full medical release to return to work with a diagnosis. (Tr. 10)

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.4(3) (2001) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds:

The individual is able to work, is available for work, and is earnestly and actively seeking work...

871 IAC 24.22(1)" b" provides:

*Interpretation of ability to work.* The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides.

The record establishes that the claimant was placed on an involuntary leave of absence for which she has yet to receive a full medical release (with a diagnosis) to return to work so that she may fully be able to fulfill her job responsibilities as a restorative aide. Out of four pages of the claimant's job description (FMLA papers) sent to the doctor by the employer, the only function the claimant was unable to perform involved ambulating the residents. (Tr. 18, lines 6-14) Although no documentation was submitted at the hearing, testimony reveals that in all three instances in which the claimant returned from the ER, she was given a medical release to return to work. (Tr. 13)

The burden is on the claimant to establish she is able and available to perform some type of work. See, Geiken v. Lutheran Home for the Aged Association, 468 N.W.2d 223 (Iowa 1991) Ms. Wagner

Page 3  
08B-UI-07070

provided unrefuted testimony that she was able to perform range of motion activities as well as numerous other functions. (Tr. 17) Thus, the employer's only concern lie with her ability to ambulate the residents given the unpredictability of her undiagnosed medical condition. (Tr. 8-9) Ms. Wagner testified that she experienced no loss of consciousness episodes after June 24<sup>th</sup>, the day she was placed on leave. While the Board can certainly appreciate the employer's concern, all the law requires is that Ms. Wagner show that she is capable of working "... in some reasonably suitable, comparable, gainful, full-time endeavor..." See. 871 IAC 24.22(1)" b", *supra*. Based on the claimant's testimony and the fact that she was released to return to work on three occasions, we conclude that substantial evidence supports she is able and available to work.

#### **DECISION:**

The administrative law judge's decision dated August 20, 2008 is **REVERSED**. The claimant was involuntarily separated from her employment; however, she is able and available for work, albeit the employer has no work available for her. Accordingly, she is allowed benefits so long as she continues to maintain her work searches.

---

John A. Peno

---

Elizabeth L. Seiser

#### **DISSENTING OPINION OF MONIQUE F. KUESTER:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

---

Monique F. Kuester

AMG/kjo