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

MEGAN A EDWARDS	:	
	:	HEARING NUMBER: 07B-UI-08874
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
TYSON FRESH MEATS INC	:	
Employer.		

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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Megan Edwards (Claimant) worked for Tyson Fresh Meat (Employer) until August 3, 2007. (Tran at p. 2). The Claimant had an allergic reaction, a breakout on her skin, due to working with fecal matter at the Employer. (Tran at p. 3). Her physician restricted her from working with fecal matter during the duration of her pregnancy. (Tran at p. 3). The Employer would not accommodate the Claimant's restriction from working with fecal matter and chose to place her on leave. (Tran at p. 2). During the period of the Claimant's pregnancy she was restricted from working with fecal matter. (Tran at p. 3).

REASONING AND CONCLUSIONS OF LAW:

The Notice of Hearing in this matter concerned only whether the Claimant requested a leave of absence and whether the Claimant was able and available for work. We address these issues in turn.

Leave of Absence:

Iowa Administrative Code 871 IAC 24.22(2) states:

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

Similarly, rule 871 IAC 24.23(10) states:

> 24.23 Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
> …
> (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.

As we have found the evidence does not show that the Claimant requested a leave of absence. The Claimant merely provided the Employer with restrictions and, against her will, was placed on leave. This is not a leave "negotiated with the consent of both parties" and was not "claimant requested". It was an involuntary leave of absence and thus an involuntary period of unemployment. We emphasize that we do not find this to be involuntary merely because the Claimant did not voluntarily have work restrictions. Under White v. Employment Appeal Board, 487 N.W.2d 342 (Iowa 1992) an injury that forced an employee to ask for leave would not negate the fact that the employee consented to the leave and was voluntarily unemployed. It was the fact that the Employer – not the condition – forced the leave upon the Claimant that makes the period of unemployment involuntary.

We also note that the condition is work-related. Even a pre-existing health condition that is aggravated by the job is attributed to the Employer under White. See Rooney v. Employment Appeal Bd., 448 N.W.2d 313, 315-16 (Iowa 1989)(noting that a recovering alcoholic who terminates employment with bar and liquor store may do so without disqualifying himself for unemployment benefits to the extent

that the

employment is found to have "aggravated" his condition); Ellis v. Iowa Dep't of Job Serv., 285 N.W.2d 153, 156-57 (Iowa 1979) (claimant's showing that recently installed Christmas tree would aggravate her pre-existing allergies was sufficient to constitute a "quit" that was attributable to her employer). Ellis is similar to this case in that the Claimant had a condition which was not work related that nevertheless was aggravated by conditions at work. Ellis also had non-work related allergies that were aggravated by the presence of the Christmas tree. Just like Ellis the Claimant thus suffered from a work-aggravated condition. Unlike Ellis, however, the Claimant did not quit. Thus we cite the fact that the Claimant's condition was job-aggravated only to note that if the Claimant had quit with notice she would receive benefits for having quit for good cause attributable to the Employer. Under these circumstances we do not see how the Claimant by presenting a restriction resulting from a work-aggravated condition (the notice required before quitting) creates "voluntary unemployment" justifying a denial of benefits.

Able & Available:

Iowa Code section 96.4(3) (2007) 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 expounds on this:

> 871–24.22 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.
>
> 24.22(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.
>
> b. 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.

…

24.22(2) Available for work…

m. Restrictions and reasonable expectation of securing employment. An individual may not be eligible for benefits if the individual has imposed restrictions which leave the individual no reasonable expectation of securing employment. Restrictions may relate to type of work, hours, wages, location of work, etc., or may be physical restrictions.

The reasons that can render an individual no longer available to work include:

24.23(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

871 IAC 24.23(34)-(35).

"An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." Sierra v. Employment Appeal Board, 508 N.W.2d 719, 723 (Iowa 1993).

The burden is on the claimant to establish that she is able and available for work within the meaning of the statute. 871 IAC 24.22; Davoren v. Iowa Employment Sec. Comm'n, 277 N.W.2d 602, 603 (Iowa 1979). It is not required that the Claimant be released to work in her previous employment. All that is required is that the Claimant be 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". 871 IAC 24.22(1). Here the record shows that the Claimant was able to work while pregnant but not with dung. We do not think this restriction is sufficient to restrict the Claimant so that she cannot work in "some gainful activity." Furthermore we do not think the restriction is such that the Claimant has "no reasonable expectation of securing employment." 871 IAC 24.22(2). Frankly, most jobs do not entail working with feces, at least literally, and we find that the Claimant has established that she remains able and available for work.

DECISION:

The administrative law judge's decision dated October 3, 2007 is **REVERSED**. The Employment Appeal Board concludes that the claimant was able and available for benefits as of August 5, 2007. Accordingly, the Claimant is allowed benefits, as of that date, provided the Claimant is otherwise eligible.

_____
Elizabeth L. Seiser

_____
John A. Peno

RRA/fnv

DISSENTING OPINION OF MARY ANN SPICER:

I respectfully dissent from the majority of the Employment Appeal Board and accept the new and additional as presented by the claimant. After careful review of the Administrative Law Judge's decision and the administrative record I would affirm this decision in its entirety. The medical documentation submitted by the claimant stated she could not perform the paramount of her job due to a possible infection, which could be a risk to her during the pregnancy. At issue is not the rash but the mere fact that while dealing with the bowels of animals she might contract an infection, which might cause harm to the baby, and the doctor did not want her to take the chance. Claimant stated in testimony if she were not pregnant that working with fecal matter as a paramount part of her job would be okay. The claimant admitted that the restriction would continue until after her pregnancy (Testimony page 2 Lines 8 – 34 and page 3 Lines 1 – 5). Ms. Edwards was employed and doing the same job prior to her pregnancy and it was speculation on the doctor's part that due to the rash she could be subject to infection based on her job handling fecal matter which could present a problem during her pregnancy. This very situation placed Ms. Edwards in an Able and Available determination mode where she was not able to accept suitable work during her pregnancy. The restrictions imposed were unreasonable for the employer to make reasonable accommodations based on the type of work and an inference by the claimant's doctor. Thus, the decision denying the claimant benefits based on her condition, which placed a limit on reasonable accommodations, and her being able and available is correct. The decision of the Administrative Law Judge should be upheld.

_____
Mary Ann Spicer

RRA/fnv

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 (physician statements) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

_____
Elizabeth L. Seiser

_____

John A. Peno

RRA/fnv