June 24, 2002

Dianne Foxwell
P.O. Box 82
Laurel, DE 19956

Re: Foxwell v. Wal-Mart, C.A. No. 01A-08-007
Date Submitted: April 3, 2002

Dear Ms. Foxwell:

This is the Court's opinion in the *pro se* appeal of Diane Foxwell ("Claimant") from the decision of the Unemployment Insurance Appeals Board ("Board") dated August 8, 2001. The Appeals Referee denied the Claimant's request for unemployment benefits under 19 *Del. C.* § 3315(1) because she found that Claimant voluntarily resigned from her employment at Wal-Mart without good cause attributable to such work. The Board reversed and modified the Appeal Referee's decision, finding that she had just cause to voluntarily leave her employment, but denying her benefits nonetheless pursuant to 19 *Del. C.* § 3315(8) because she was medically unable to work.

I. FACTUAL HISTORY & PROCEDURAL POSTURE

The Claimant began working as a grocery stocker at Wal-Mart on September 15, 2000. She claimed she was injured while lifting a pallet at work on March 7, 2001. She went to see Dr. Sternberg at the end of March because she continued to experience pain. On April 10, 2001, Dr.

Sternberg put Claimant on bed rest. On May 4, 2001, he limited her to sedentary duty at work. He specified that the Claimant could only perform certain tasks, such as lifting less than ten pounds maximum, and occasionally lifting and/or carrying such articles as dockets, ledgers, and small tools, and sitting most of the time. He also informed her that she could not do her regular work duties as a grocery stocker as she described them to him. She was prohibited from prolonged standing. In fact, she could only stand for five minutes at a time for a total of thirty minutes per day. Dr. Sternberg also specified the Wal-Mart jobs that the Claimant could do with her new restrictions: markdown clerk, fitting room attendant, and telephone operator.

On May 9, 2001, the Claimant returned to work. Because of her restrictions, Wal-Mart gave her a new job of overnight clothing scanner with an electronic, hand-held scanner. She used an electric wheelchair to perform her job, and was able to complete the job. However, when she attempted the next night to use the electric wheelchair to scan items, the assistant manager informed her that she had to use a regular wheelchair instead. The reason for the change was that Wal-Mart needed to charge the electric wheelchair overnight for their customers to use the next day.

Although she felt it would be inconvenient for her, the Claimant switched to the regular wheelchair and tried to work for about an hour. She claimed she could not scan while using her arms to wheel the wheelchair around. She refused to use her feet to move the wheelchair because her doctor had not included foot movement in his list of permitted sedentary movements. The employer representative suggested that Wal-Mart could attach a basket to the regular wheelchair so that Claimant could leave the scanner in the basket while she moved around, and the Claimant agreed. However, she left work immediately thereafter.

The Claimant filed for unemployment benefits on May 27, 2001. The Claims Deputy

decided on June 8, 2001 that Claimant did not qualify for unemployment benefits, and Claimant appealed. On July 2, 2001, the Appeals Referee affirmed the decision of the Claims Deputy that the Claimant left her job voluntarily without good cause attributable to such work under 19 *Del. C.* § 3315(1), especially since the employer offered to accommodate her reasonably by giving her the regular wheelchair and the basket.[1]

On August 8, 2001, the Board reversed and modified the Referee's Decision:

> The Board accepts as credible claimant's testimony that she was not able to do the job, with the manual wheelchair, without great difficulty. Thus, the Board finds that, under the circumstances, claimant had just cause to voluntarily leave her employment. However, the Board also finds that, based upon the medical evidence and testimony, claimant was not medically able to do any of the positions available with the employer.
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> The Board concludes that claimant is disqualified from the receipt of benefits pursuant to 19 *Del. C.* § 3315(8), which provides that an individual shall be disqualified from benefits where unemployment is caused by the "individual's inability to work."

Pursuant to 19 *Del C.* § 3323, the Claimant submitted a *pro se* appeal to the Superior Court.

II. STANDARD OF REVIEW

The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence. *Johnson v. Chrysler Corporation*, 213 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*,

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[1] This statute provides that: "An individual shall be disqualified for benefits: (1) For the week in which the individual left work voluntarily without good cause attributable to such work."

636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. dism.*, 515 A.2d 397 (Del. 1986). The appellate court does not weigh the evidence, determine questions of credibility or make its own factual findings. *Johnson v. Chrysler*, 213 A.2d at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 19 *Del. C.* § 3323(a).

III. DISCUSSION OF LEGAL ISSUES

The Court must discern whether the Board had substantial evidence to find that Claimant was precluded from benefits because she was "unable to work" under 19 *Del C.* § 3315(8).[2] In *Petty v. University of Delaware*, 450 A.2d 392 (Del. 1982), the Supreme Court held that the Claimant, unable to perform her custodial duties because of her pregnancy, was disqualified from unemployment benefits because she was not able and available to work based on her medical restrictions and her relevant training and experience. Id. at 395. This remains true even if Claimant is medically able to do work she is not necessarily qualified by education or training to perform. See *Briddell v. Dart First State*, Del. Super., C. A. No. 01A-06-008, Vaughn, J., (ORDER)(March 28, 2002)(holding that a showing that a person is ready for sedentary, light duty work is not necessarily sufficient by itself to establish that the person is "available for work" for purposes of unemployment compensation).

The issue is whether any of the three jobs which the Claimant was permitted to do with her restrictions were available. The only one that was available was the "markdown clerk" (if the scanning job could be considered to be such) and Claimant was unable to perform this without

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[2] This statute provides: "An individual shall be disqualified for benefits. . . [i]f it shall be determined by the Department that total or partial unemployment is due to the individual's inability to work. Such disqualification to terminate when the individual becomes able to work and available for work as determined by a doctor's certificate and meets all other requirements under this title."

great difficulty. Thus, two of the jobs were unavailable and she was unable to perform the third. Consequently, the Claimant was unable to work, and the Board correctly concluded that the Claimant is therefore barred from receiving benefits under 19 *Del. C.* § 3315(8).

IV. CONCLUSION

In consideration of the foregoing, this Court affirms the Board's decision.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

oc: Prothonotary
cc: Unemployment Insurance Appeal Board
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