

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

68-0157 (7-97) – 3091078 - EI

**GARY A PAXTON
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**A OETZEL CONSTRUCTION INC
6318 W RIVER DR
DAVENPORT IA 52802**

**Appeal Number: 04A-UI-00292-H2
OC 11-30-03 R 04
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Leaving - Layoff
Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 5, 2004, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held in Davenport, Iowa on June 8, 2004. The claimant did participate and was represented by John Graupman, Paralegal with Iowa Legal. The employer did participate through Albert Oetzel, Vice President. Claimant's Exhibit A was received. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a truck driver on an as-needed basis beginning September 6, 2002

through December 30, 2003 when he was discharged. The claimant was hired to be a truck driver and generally hauled rock, gravel or sand. The claimant never told the employer he was quitting, although he did indicate that he was going to look for another job that provided full-time hours. During the slow period of construction season the claimant regularly was laid off due to lack of work. During the slow season beginning in late November 2003 the claimant was not working full time because of lack of work. The claimant would call in every morning at approximately 8:00 a.m. to find out if he would be assigned a load for the day. If he did not work that day, the claimant would call in at approximately 4:30 p.m. to find out if there was going to be a load for the morning. Often times the claimant would be told during the day that there would be an early load for him in the morning and the claimant would start early in the morning at around 6:00 a.m. or 6:30 a.m.

The claimant reported to work every day that he was told work was available for him. The only day that the claimant did not come in to work was when he had a job interview on December 30, 2003. When the claimant could not come in until after noon on December 30, 2003, he was discharged. The claimant had not received any warning that his job was in jeopardy if he failed to report work again without excuse.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was laid off due to a lack of work initially in late November 2003 and then discharged from employment on December 30, 2003 for no disqualifying reason.

Iowa Code Section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Code Section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct

that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The claimant missed work on the morning of December 30, 2003 because he had a job interview. The claimant had never been previously warned that his job was in jeopardy if he missed work without excuse. The only other two days that the employer alleges the claimant did not come to work were December 8, 2003 and December 9, 2003. The claimant denies that he was supposed to work on either December 8, 2003 or December 9, 2003. The majority of the claimant's previous missed workdays were due to medical illness where DOT regulations prevented him from working as a safety precaution. The employer admitted at hearing that it discharged the claimant due to the claimant's failure to come to work on the morning of December 30, 2003. The employer has not established that the claimant was ever issued a final written warning that his job was in jeopardy if he missed work again without excuse. Even if the undersigned were to assume that the claimant missed work without excuse on December 8, December 9, and December 30, 2003, the employer had not established that the claimant was given a final warning, or that the claimant had excessive absences. Thus, it is determined that the claimant was discharged for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The January 5, 2004, reference 02, decision is affirmed. The claimant was laid off due to a lack of work and then was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/b