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

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Appeal Number: 04A-UI-07222-SWT
OC: 01/04/04 R: 03
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 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated June 21, 2004, reference 02, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on August 19, 2004. The parties were properly notified about the hearing. The claimant participated in the hearing with his representative, William Bribriesco, and with an interpreter, Susana Jaquez. Richard Sojka participated in the hearing on behalf of the employer with witnesses, Bob Linge and Mary Nebel.

FINDINGS OF FACT:

The claimant worked full time as a laborer on the bridge construction crew for the employer from February 7, 2003 to May 10, 2004. Richard Sojka is the chief executive officer of the business. The claimant had returned to work on February 7, 2003, after being off work due to a work-related injury that occurred in 2001. The claimant was informed and understood that

under the employer's work rules, employees were required to notify the employer if they were not able to work as scheduled.

The claimant sustained other work-related injury after he twisted his ankle on March 8, 2004, and was treated by Dr. Buck, the employer's workers' compensation doctor. He returned to work on March 19, 2004, with lifting restrictions of no more than 60 pounds from Dr. Buck. He continued to work on the bridge construction crew but started experiencing pain in his back.

On May 13, 2004, the claimant had an appointment to see Dr. Buck. Dr. Buck referred the claimant to see an orthopedic specialist for his back problems. After the appointment, Dr. Buck released the claimant to return to work with the same restrictions as he had before. On May 14, the claimant was unable to work due to back pain. He called and notified the employer that he would not be at work. Sojka went to the claimant's house and asked the claimant what the doctor had said. The claimant told Sojka that he had been released to work with restrictions, but the doctor had referred him to a specialist because of his back pain.

On May 17, the claimant was unable to work due to back pain. He called and informed the employer that he would not be at work because his back hurt. Sojka called the claimant and asked why he was not at work. The claimant explained that he was not able to work because his back hurt. Sojka asked the claimant if he had a doctor's excuse. The claimant again explained that he had been referred to a specialist for his back. Sojka told the claimant that he would need a doctor's excuse or come back to work.

The claimant was absent from work without notice on May 18, 19, 20, and 21. The claimant did not call in because he believed he had told Sojka that he was not able to work and was waiting to see the specialist to obtain a work excuse. The claimant did not intend to quit his employment.

On May 24, 2004, Sojka sent the claimant a letter stating that the employer assumed the claimant to have quit work due to his being absent from work without notice. The letter also stated that if he had not quit, he was discharged for unexcused absenteeism.

Later, when the claimant saw the orthopedic specialist, a problem was discovered with his back and the claimant was restricted to lifting no more than ten pounds.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law provides for a disqualification for claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code Sections 96.5-1 and 96.5-2-a. To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship and chooses to leave employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989); Peck v. Employment Appeal Board, 492 N.W.2d 438, 440 (Iowa App. 1992). The evidence fails to establish that the claimant intended to quit his job.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. The claimant was absent from work due to legitimate medical reasons. He stopped calling in each day after he had informed the employer about his back problems and that he had been referred to specialist for his condition. His employer told him that he would have to have a doctor's excuse to return to work and believed that the doctor, to whom he was referred, would provide that excuse. No willful and substantial misconduct has been proven.

The claimant is directed to report the receipt of any temporary total disability benefits he receives from the employer's workers' compensation carrier that cover the same period as his unemployment insurance benefits since those benefits would be deductible from his unemployment insurance benefits under Iowa Code Section 96.5-5-b.

DECISION:

The unemployment insurance decision dated June 21, 2004, reference 02, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

saw/kjf