

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

WALTER I LONG

Claimant,

and

**MILLARD REFRIGERATED SERVICES
INC**

Employer.

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HEARING NUMBER: 10B-UI-05058

**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: 96.5-2A, 24.32-7

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. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Walter I. Long, worked for Millard Refrigerated Services, Inc. from December 1, 2008 through February 11, 2010 as a full-time checker. (Tr. unnumbered p. 1-2) At the start of his employment, Mr. Long signed off in acknowledgement of receipt of employer's handbook. (Tr. 2, Exhibit 6) This handbook contains information regarding the employer's point system attendance policy. (Tr. 2, Exhibit 7) The attendance policy also provides that if an employee is absent the day after a vacation, that employee is charged with two attendance points. (Tr. 3)

The claimant received a verbal counseling on June 25, 2009 for having acquired excessive absences, all of which involved his personal illness. (Tr. 2, Exhibit 5) On September 22, 2009, the employer issued a Corrective Action Report for attendance issues that mainly involved his illness or that of his daughter. (Tr. 2, Exhibit 4)

Mr. Long was not scheduled to work Saturday, February 13, 2010. He took a vacation day on February 15th to have a long weekend. He was scheduled to return to work Tuesday, February 16th. There was a snowstorm over the weekend. He contacted the employer on the day he was supposed to return to inform him that he was stranded in Kirksville, Missouri because of the storm. (Tr. 3) The employer assessed him two attendance points which placed him beyond the maximum points (10) allowed. (Tr. 3)

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.32(7) provides:

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. (Emphasis added.)

Substantial evidence supports that the majority of the claimant's absences were attributable to the claimant's personal illness for which he properly reported. The final act, however, caused him to surpass the maximum points allowed in the employer's point-system attendance policy. Exceeding the allotted number of points in a no-fault attendance policy is not dispositive of misconduct. We look to the claimant's last few absences to determine if those absences were excused. In this case, those absences according to unemployment compensation law would be excusable. In addition, the court in Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982) held that absences due to illness, which are properly reported, are excused and not misconduct. See also, Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007) wherein the court held an absence can be excused for purposes of unemployment insurance eligibility even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy.

As for the final act, it is clear from the record that the employer accepted his excuse. But for the attendance policy, Mr. Long would have remained employed. The fact that Mr. Long was unable to get to work was due to circumstances clearly beyond his control, i.e., snowstorm for which the employer acknowledged occurred. The employer also acknowledged that the claimant timely reported his absence (shift starts at 9:00 a.m., called 7:05 a.m.). (Tr. 3) Thus, we can reasonably assume that Mr. Long was conscientious and acted in good faith. Under these circumstances, we would conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated May 18, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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 (documents) 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.

John A. Peno

Elizabeth L. Seiser

AMG/fnv