**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**RUSSELL C STREETS**
Claimant

**CASCADE LUMBER COMPANY**
Employer

**APPEAL NO. 11A-UI-07800-S2T**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 02/13/11**
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Cascade Lumber Company (employer) appealed a representative's June 6, 2011 decision (reference 01) that concluded Russell Streets (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 11, 2011. The claimant participated personally. The employer participated by Will Noonan, human resources manager.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on July 7, 1992, as a full-time production worker. The claimant signed for receipt of the employer's handbook. The employer did not issue the claimant any warnings until the claimant's last month of employment. The claimant had a back injury in 1990. He worked driving a fork truck and his back injury was unaffected.

On or about April 11, 2011, the claimant was called back to work after a layoff. The employer discontinued the fork truck position and put the claimant at a table as a builder. The claimant told the plant manager that his back could not stand the heavy lifting required of a builder. The plant manager told the claimant that the employer would work with the claimant and put him at a table building lighter items. When the plant manager left for the day, the employer moved the claimant to a table building heavier items. The claimant properly reported absences due to back pain on April 19 and 20, 2011. The employer issued the claimant a written warning for each day. The employer did not send the claimant to a company doctor or complete an accident report for the aggravation of his previous injury.

The claimant took some muscle relaxers prescribed to him from a previous injury because he was in so much pain he could not get out of bed. On April 27, 2011, he overslept. On April 28,

2011, the employer issued the claimant a written warning for his absence. On May 2, 2011, the claimant was again in pain and took a muscle relaxer. He slept through the start of his shift. On May 3, 2011, the employer called the claimant and terminated him for excessive absenteeism.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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(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.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Unreported absences do not constitute job misconduct if the failure to report is caused by mental incapacity. Roberts v. Iowa Department of Job Service,

356 N.W.2d 218 (Iowa 1984). The employer must establish not only misconduct, but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was an improperly reported work-related injury. The claimant's absence does not amount to job misconduct, because the claimant could not properly report his absence due to mental incapacity from the pain. The claimant did report the work-related aggravation of his previous injury. The employer has failed to provide any evidence of willful and deliberate misconduct that would be a final incident leading to the discharge. The claimant was discharged, but there was no misconduct.

**DECISION:**

The representative's June 6, 2011 decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw