IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

STEVEN D STONEHOUSE Claimant **TEAM STAFFING SOLUTIONS INC** Employer	**APPEAL 16A-UI-09352-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/24/16** **Claimant: Appellant (2)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.6(1) – Filing Claims
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.5(1)d – Voluntary Quitting/Illness or Injury
Iowa Admin. Code r. 871-24.25(35) – Separation Due to Illness or Injury

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 10, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on September 14, 2016. The claimant participated personally. The employer participated through human resources generalist Sarah Fiedler. Claimant exhibit A and Employer exhibit 1 were received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the appeal timely?
Did the claimant voluntarily quit the employment with good cause attributable to the employer or was he discharged for reasons that would constitute misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The unemployment insurance decision was mailed to the appellant's address of record on August 10, 2016. The claimant/appellant then attempted to electronically file his appeal on the final day to appeal, Saturday, August 20, 2016 (Claimant exhibit A). When he did not receive a confirmation email, he contacted IWD in Fort Madison on Monday, August 22, 2016 and was advised by the representative to wait a day since it had been submitted over the weekend. The claimant still did not receive a confirmation email and called back the following day. After investigating the matter, the claimant was advised to resubmit his appeal as it did not go through. He resubmitted his appeal on August 26, 2016 (Claimant exhibit A).

The claimant was last employed on assignment from August 6, 2014 until July 21, 2016 at Siemens, where he performed full-time work as a general laborer. The claimant had prior absences on March 14, and 15, April 14 for an eye issue, May 17, 2016 for an unknown reason and was late on June 16, 2016. The claimant also missed work on July 5, 2016 due to a family emergency. In addition, the claimant also had missed work due to a worker's compensation issue involving his arm, but the claim was closed on May 2, 2016.

On July 20, 2016, the claimant visited his treating physician and was issued a doctor's note to be off work July 20 and 21 (Employer exhibit 1). The evidence is disputed as to whether the claimant was seeing the doctor due to personal or a work-related injury. The undisputed evidence is that the claimant left his shift early on July 21, 2016. Before leaving, the claimant spoke to Mike Deere, his supervisor, and indicated he was in pain needing to leave. The claimant was told if he left early, he would point out. Mr. Deere told the claimant he had previously miscalculated the claimant's points.

The employer reported that had the claimant missed work due to a work-related injury, he would not have incurred a point, to point out, and contends he did not inform the employer of a possible work-related injury. However, the claimant indicated he notified Mr. Deere via voicemail on July 8, 2016, and emailed him on July 18, 2016 about his possible injury. Mr. Deere did not attend the hearing.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the

> administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The appellant made a good faith effort to electronically file his appeal in a timely manner on August 20, 2016, within the appeal period, but it was not received. The claimant then contacted the Fort Madison office on Monday, August 22, 2016, when he had not received a confirmation email of his appeal. He was advised to wait another day due to delay from the weekend. The claimant followed up again on August 23, 2016, with his local office, and investigation ensued. The claimant was advised on August 24, 2016 that he needed to resubmit his appeal, and did so on August 26, 2016. The appeal was filed within a reasonable time thereafter learning his appeal had failed. Therefore, the appeal shall be accepted as timely.

The next issue is whether the claimant quit or was discharged for reasons that would constitute misconduct.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). In this case, the final communications with the employer involved the claimant's supervisor, Mike Deere. He did not attend the hearing to refute the claimant's credible testimony. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

In this case, the claimant did not have the option of remaining employed nor did he express intent to terminate the employment relationship. The credible evidence presented was the claimant did not voluntarily quit, but that he was informed by Michael Deere that if he left early from work on July 21, 2016, that he would be discharged for pointing out per the attendance policy. The claimant had seen a physician on July 20, 2016, and was excused from work through July 21, 2016. The claimant has credibly testified that it was Mr. Deere who initiated the

separation from assignment when the claimant notified him of the absence due to his injury. Because Mr. Deere initiated the separation, the claimant did not voluntarily quit. Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

A reported absence related to illness or injury, whether personal or work-related, is excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of

misconduct. The claimant had prior absences on March 14, and 15, April 14 for an eye issue, May 17, 2016 for an unknown reason and was late on June 16, 2016. The claimant also missed work on July 5, 2016 due to a family emergency. The final absence was due to the claimant leaving work early due injury on July 21, 2016. The claimant properly notified the employer by way of Mike Deere of his needing to leave and his injury was supporting by a medical note which excused him from work through July 21, 2016 (Employer exhibit 1).

If the claimant had reported the absence as a possible worker's compensation injury, he should not have received points for his absence on July 21, 2016, which triggered him pointing out. Even if the claimant had left work early solely because of a personal injury, the claimant's final absence would still be excused in the context of the Iowa Employment Security Act. Based on the evidence presented, the administrative law judge concludes the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

DECISION:

The August 10, 2016, (reference 01) unemployment insurance decision is reversed. The claimant filed a timely appeal. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/pjs