

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIMOTHY HANSEN
Claimant

APPEAL NO: 150-UI-13586-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DECKER TRUCK LINE INC
Employer

OC: 08/30/15
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 18, 2015, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 8, 2016. The claimant participated in the hearing with Attorney Siobhan Schneider. Jennifer Lawler, Claims and Risk Manager, participated in the hearing on behalf of the employer and was represented by Attorney Erick Fisk. Claimant's Exhibits A, B and C and Employer's Exhibits Three and Four were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time over-the-road truck driver for Decker Truck Lines from October 17, 2002 to August 25, 2015. He was discharged for not being able to return to work after a work-related, and then a personal, injury.

The claimant suffered a work-related injury September 10, 2014, and was granted Family and Medical Leave (FML). After he exhausted his FML December 4, 2014, he was placed on light duty work effective December 22, 2014 through August 25, 2015. While the claimant was on light duty he was treated by a nurse practitioner until being discharged March 25, 2015. The nurse could not provide an impairment rating at the time of discharge from that treatment. On May 15, 2015, Dr. Jetzer conducted an independent medical examination of the claimant and on August 10, 2015, Dr. Jetzer gave the claimant a zero impairment rating and stated he could return to work without restrictions (Employer's Exhibit Three). Dr. Jetzer stated the September 10, 2014, work injury "did not result in any change of the pre-existing degenerative changes in his spine and as such he does not merit a permanent disability rating, as his condition was entirely pre-existing" (Employer's Exhibit Three). On August 12, 2015, Dr. Abernathy stated the claimant's work injury was a "temporary aggravation of his pre-existing condition" and that the claimant "reached maximum medial improvement" March 10,

2015 (Employer's Exhibit Four). On August 25, 2015, the employer contacted the claimant to notify him of the results of the independent medical examination stating he could return to work without restrictions and provided him with his options in returning to work. The claimant indicated he was not comfortable returning to work and did not feel capable of working as a driver any longer. Consequently the employer terminated the claimant's employment because he did not return to work (Claimant's Exhibit B).

On March 26, 2015, the claimant was released from occupational medicine by nurse practitioner, Kim Wangen, because he had reached his maximum medical improvement with "permanent disability" (Claimant's Exhibit A). He continues to suffer pain in his back, hips and legs from degenerative disc issues in his back and was unable to return to work as a truck driver without further injuring himself or causing a great deal of pain.

On November 13, 2015, the claimant saw Ms. Wangen again and she completed a Report of Work Ability. The claimant has "ongoing" work restrictions with regard to standing/walking, sitting, kneeling/squatting/climbing, twisting/bending, as well as lifting restrictions (Claimant's Exhibit C). With regard to his upper extremities, the claimant is limited in twisting/torque and cannot operate power tools or drive work vehicles (Claimant's Exhibit C). He is able to use a keyboard and write (Claimant's Exhibit C). He can work up to eight hours per day as tolerated (Claimant's Exhibit C).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The standard in attendance cases is whether the claimant had an excessive unexcused absenteeism record. (Emphasis added). While the employer's policy may count absences accompanied by doctor's notes as unexcused, for the purposes of unemployment insurance benefits those absences are considered excused.

The claimant sustained a work-related injury September 10, 2014, which aggravated a pre-existing back problem. While he was released by the worker's compensation physicians to return to work, his own medical provider still has him under restrictions, which include not being able to drive work vehicles. The claimant was unable to return to work August 25, 2015, but does not have a permanent disability rating. Consequently, while he could no longer drive a truck, he is able to perform other work. He is not required to be able to perform the functions of his previous position in order to be considered able and available for work.

The final absence was related to properly reported illness/injury which prevented the claimant from returning to his position as an over-the-road truck driver. No final or current incident of unexcused absenteeism has been established. Not being able to perform the essential functions of his job also is not misconduct. Therefore, benefits must be allowed.

DECISION:

The September 18, 2015, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. The claimant is able and available for work. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs