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

WILLIAM L COOPER Claimant, and JELD-WEN INC Employer.	:	HEARING NUMBER: 08B-UI-08809 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: 96.5-2-a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

William Cooper (Claimant) was employed as a full-time general laborer by Jeld-Wen, Inc. (Employer) from December 10, 2007 until the date of his discharge on September 1, 2008. (Tran at p. 1; p. 12). The Employer tracks attendance on a point system. (Tran at p. 2). An individual is subject to discharge when he accumulates more than eight attendance points. (Tran at p. 2; Ex. 1). Employees are to call and report any absence as soon as possible. (Ex. 1). Claimant had in excess of eight points at the time of separation. (Tran at p. 2; p. 3).

Claimant had periods of absenteeism on February 29, March 10, April 9, April 11, May 1, and May 7, 2008. (Tran at p. 5-6; p. 12). He was absent the full day on some occasions. (Tran at p. 5-6). On other occasions, he either reported to work late or left work early. (Tran at p. 5-6). The Claimant did not provide the Employer with a reason for these absences. (Tran at p. 5-6). They could not, of course, have been occasioned by the subsequent July 18 injury. (Tran at p. 9). At hearing the Claimant could not give an explanation for his absences on February 29, April 9, April 11, May 1, or May 7. (Tran at p. 12-13). He testified his absence on March 10 was due to his birthday celebration. (Tran at p. 12). He also testified that one of the April absences was due to his need to care for his son, a matter or purely personal responsibility. (Tran at p. 13; p. 19). Generally, if the Claimant was ill he would tell the Employer this when he called in. (Tran at p. 19).

Claimant sustained a work-related injury to his left wrist on July 18, 2008. (Tran at p. 8-9; p. 21). He had four absences between May 7 and August 20 but they were all excused by the Employer. (Tran at p. 6). As of August 13, 2008, Claimant was limited in the use of his left arm but had unlimited use of his right arm. (Tran at p. 8; p. 10-11; Ex. 4). The Claimant at no time presented any different restrictions to the Employer. (Tran at p. 10-11).

For approximately two weeks, the Claimant attempted to work on the specialty line where he could work on doors at a slower pace. (Tran at p. 22). He told the Employer that he was unable to perform the job because it required two hands. (Tran at p. 22-23). He missed time from work on August 20 and August 22 because of pain in his arm. (Tran at p. 14).

The Claimant was absent on August 25 but did not call to report the absence. (Tran at p. 4). Claimant reported to work on August 26 and was assigned to watch safety videos. (Tran at p. 9; p. 10). He told the Employer that watching the monitor caused discomfort in his left arm and neck. (Tran at p. 9; p. 10; p. 16). The Employer then assigned him to pick up trash outside. (Tran at p. 9; p. 10). He complained that this task also caused pain. (Tran at p. 9; p. 10; p. 16). Therefore, he was sent home for the remainder of his shift. (Tran at p. 9; p. 10; p. 16). On August 27, he was again assigned to watch safety videos. (Tran at p. 9; p. 10; p. 16-17). The Employer had made adjustments in the monitor in an effort to eliminate the cause of Claimant's claimed discomfort. (Tran at p. 10; p. 17). When the Claimant still complained of pain, he was again sent home by the supervisor. (Tran at p. 9; p. 10; p. 17).

Claimant was given a written warning on August 28 which advised that he had ten attendance points. (Ex. 2). He was told he would be discharged if he missed any further time from work before December 10, 2008. (Ex. 2).

On August 29, the Employer again assigned Claimant to watching safety videos. (Tran at p. 4). He was at work approximately 45 minutes before coming to his supervisor and saying "if that's all I'm going to be doing, I'm just going to go home." (Tran at p. 4; p. 9; p. 18). He was told he would accumulate points if he left but he left anyway. (Tran at p. 4-5; p. 7; p. 18). As a result of the absence of August 29, he was notified of his discharge when he reported to work on September 1, 2008. (Tran at p. 5).

REASONING AND CONCLUSIONS OF LAW:

Legal Standards: Iowa Code Section 96.5(2)(a) (2007) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 NW2d 661 (Iowa 2000).

In the specific context of absenteeism the administrative code 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.

871 IAC 24.32(7); See Higgins v. IDJS, 350 N.W.2d 187, 190 n. 1 (Iowa 1984)("rule [2]4.32(7)… accurately states the law").

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. Sallis v. Employment Appeal Bd, 437 N.W.2d 895, 897 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Higgins v. IDJS, 350 N.W.2d 187, 192 (Iowa 1984). Second the absences must be unexcused. Cosper v. IDJS, 321 N.W.2d 6, 10(Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds", Higgins v. IDJS, 350 N.W.2d 187, 191 (Iowa 1984), or because it was not "properly reported". Cosper v. IDJS, 321 N.W.2d 6, 10(Iowa 1982)(excused absences are those "with appropriate notice"). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused for reasonable grounds. Higgins v. IDJS, 350 N.W.2d 187, 191 (Iowa 1984).

As noted, the determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. In consonance with this, the law provides:

> *Past acts of misconduct.* While past acts and warning 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.

871 IAC 24.32(8); accord Ray v. Iowa Dept. of Job Service, 398 N.W2d 191, 194 (Iowa App. 1986); Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988); Myers v. IDJS, 373 N.W.2d 509, 510 (Iowa App. 1985). A final warning or last chance agreement may operate to reduce the protections of a claimant as compared to other employees. Warrell v. Iowa Department of Job Service, 356 N.W.2d 587 (Iowa App. 1984). Specifically, "[h]abitual tardiness, particularly after warning that a termination of services may result if the practice continues, is grounds for one's disqualification." Higgins v. IDJS, 350 N.W.2d 187, 192 (Iowa 1984)(quoting Spence v. Unemployment Compensation Board of Review, 48 Pa.Cmwlth. 204, 409 A.2d 500 (1979).

Application of Standards: We do not disqualify the Claimant merely because he exceeded the Employer's point system. The only inquiry for us is whether the legally unexcused absences were also excessive under the law. Looking to the absences prior to the injury we conclude that at least two were

not excused. Obviously the absence due to the birthday celebration is not an excused absence. Similarly

absence due to matter of purely personal concerns is not excused. Higgins v. IDJS, 350 N.W.2d 187, 191 (Iowa 1984). On the remaining absences the Claimant provided no explanation to the Employer although he would do so if they were due to illness. They were not excused due to illness, and the Claimant does not even allege some other excuse. We conclude that these absences have also been shown by the Employer not to be excused. Even if we were to conclude that these remaining absences were excused that would not, however, alter our decision to disqualify the Claimant.

On the absences following the injury we find at least two not excused. First the absence of August 25 was not properly reported and cannot be excused. Second, we find the August 29 absence to not be excused. We are willing to consider the absences of 26th and 27th to be excused since the Employer seems to have approved the Claimant's departure. The 29th is a different matter. We just do not find the Claimant's asserted incapacity to be credible. By the 29th the Employer had assigned the Claimant to do perhaps as light a duty as we have seen any employer assign: to sit and watch videos. The Claimant provides no medical evidence of being unable to do this, and the medical evidence actually supports the contrary conclusion. We are able to use common sense when assessing the evidence. City of Cedar Rapids v. Board of Trs., 572 N.W.2d 919, 922 (Iowa 1998). Given the remarkably light nature of the imposed job duty, given the lack of any medical information supporting the Claimant, and given the obvious unpleasantly boring nature of watching safety videos we find credible the Employer's testimony that the Claimant said "if that's all I'm going to be doing, I'm just going to go home." We find the final absence to be unexcused. Given the Claimant's prior unexcused absences, even treating the unexplained ones as excused, we find that the Employer has proven excessive unexcused absenteeism of the Claimant.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question.

DECISION:

The administrative law judge's decision dated October 29, 2008 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety but would remand the matter on the question of the Claimant's availability to work. I note that had this Claimant simply not come into work and explained he was in too much pain he very likely would get benefits. He is not, after all, required to present a physician's excuse under Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa App. 2007). He says he was in too much pain to work and there is no reason not to believe him. His final absence was for properly reported personal illness and by law is excused.

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John A. Peno

RRA/fnv