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

ASHLEY S HUFF	:	
	:	HEARING NUMBER: 09B-UI-03950
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
JDM CONTRACTING COMPANY	:	
Employer.		

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 DEINED

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:

The representative's decision was mailed to the Ashley Huff's (Claimant) last known address of record on December 30, 2008. (Tran at p. 3-4; Decision of Claim's Representative; Ex. A-1). The Claimant did not receive the decision until March 7, 2009, as he had left Iowa approximately January 2, 2009 to attend a school program in Oklahoma. (Tran at p. 4-5; Ex. A-1). He had stopped his mail because he had not anticipated receiving any mail of importance. (Tran at p. 4). The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by January 9, 2009. (Decision of Claim's Representative). The appeal was not filed until it was hand-delivered to a local Agency office on March 12, 2009, which is after the date noticed on the disqualification decision. (Tran at p. 5; Ex. A-1).

The Claimant started working for JDM Contracting (Employer) on or about September 18, 2007. (Tran at p. 6; p. 10). He worked full time as a laborer in the Employer's concrete business. (Tran at p. 6). His last day of work was on or about October 30, 2008. (Tran at p. 6; p. 18). The Employer has a policy that three days' no call/no show is a quit. (Tran at p. 6).

On October 31, the Claimant called in and reported he would be off work sick. (Tran at p. 6). On November 3, he called in but did not speak to a manger; rather, he left a message indicating that he was severely sick, he was losing his voice, and would contact the employer when he felt well enough to return to work. (Tran at p. 7; p. 8-9; p. 14; p. 19; p. 20). The Employer tried to contact the Claimant that day to find out what was going on but the Claimant did not answer. (Tran at p. 9). The Employer considered the claimant to have voluntarily quit by job abandonment when he did not call or report for work for three days. (Tran at p. 6-7). The Claimant then did not contact the employer for about two weeks. (Tran at p. 6; p. 20). The Employer left the claimant a message around November 15 indicating that it needed him to turn in his keys to get his final paycheck. (Tran at p. 7; p. 15; p. 19-20). The Claimant did return his keys and pick up his check, explaining he was only then finally recovering from his illness.(Tran at p. 16).

REASONING AND CONCLUSIONS OF LAW:

Timeliness issue:

Iowa Code 96.6 provides:

> 2. *Initial determination.* ... 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.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive - but not conclusive - evidence of the date of mailing.

There is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and the Administrative Law Judge and this Board have no authority to change the decision of representative if a timely appeal is not filed. Franklin v. Iowa Dept. Job Service, 277 N.W.2d 877, 881 (Iowa 1979). The ten day period for appealing an initial determination concerning a claim for benefits has been described as jurisdictional. Messina v. Iowa Dept. of Job Service, 341 N.W.2d 52, 55 (Iowa 1983); Beardslee v. Iowa Dept. Job Service, 276 N.W.2d 373 (Iowa 1979). The only basis for changing the ten-day period would be where notice to the appealing party was constitutionally invalid. E.g. Beardslee v. Iowa Dept. Job Service, 276 N.W.2d 373, 377 (Iowa 1979). The question in such cases becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. Hendren v. Iowa Employment Sec. Commission, 217 N.W.2d 255 (Iowa 1974); Smith

v. Iowa Employment Sec. Commission, 212 N.W.2d 471 (Iowa 1973). The question of whether the Employer

has been denied a reasonable opportunity to assert an appeal is also informed by rule 871-24.35(2) which states that "the submission of any …appeal…not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service."
These principles govern this matter - not the good cause rule which applies to late appeals to the Board. C.f. Houlihan v. Employment Appeal Bd., 545 N.W.2d 863 (Iowa 1996)(15 day appeal deadline to Board extended for good cause under Board rule 3.1). The rules of Iowa Workforce Development do not give this Board the flexibility to extend the deadline for good cause. There is no indication that the delay in this case was caused by an error of Workforce or by the postal service. It is not an error of the post office for the post office to follow instructions given to it by the Claimant. Since the requirements of rule 24.35(2) are not satisfied the Board is obliged to apply the ten day period and to reverse the administrative law judge.

This conclusion is bolstered by the fact that the Claimant's excuse does not even strike us as satisfying good cause. People sometimes take vacations, people sometimes travel on business, and employers sometimes take furloughs. We expect such persons to make some sensible arrangement for handling of important mail while they are out. The absence is known in advance and for a predictable period of time. Arrangements to at least look for important mail can also be made in advance. Thus even if we were to apply a good cause standard, rather than the stricter jurisdictional one, still we would find the appeal untimely.

Quit Analysis: Even if we were to find that the Claimant filed a timely appeal we would still find that he is disqualified as a voluntary quit without good cause.

Iowa Code Section 96.5(1) states:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Administrative Code 871–24.25 further provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5.

More specifically, the rules of the Department address the situation of no call/ no show:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa

Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

...
(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

871 IAC 24.25(4). Under this regulation the Claimant is deemed to have quit by his utter failure to call in following the 3rd. We understand that he was sick. So are a lot of people who miss days of work. Unless he was incapacitated the law still expects the Claimant to call in. We have no reliable evidence that the Claimant was incapacitated enough that he was unable to call. Further, as far as the record shows, *some* arrangement for *someone* to call in could have been made. We think that a disqualifying quit under rule 24.25(4) has been shown.

Misconduct Analysis: Finally, in the alternative to our ruling on timeliness and quitting, we would also find the Claimant's conduct to be misconduct.

Iowa Code Section 96.5(2)(a) (2009) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

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).

The Claimant absences, following the one on the 3rd, are not properly reported and for that reason are not excused under our law. Unreported absences will be deemed excused absences if the employee's failure to report the absence was due to incapacity. See Roberts v. Iowa Dept. of Job Services, 356 N.W.2d 218 (Iowa 1984). Here no such incapacity is shown. Even if the Claimant could not have called in there is no reason he could not have made *some* arrangement to notify the Employer of the absences. *See generally, Armel v. EAB,* Case no 07-0463 (Iowa App. 11/15/2007)(misconduct shown by 3 days of absence despite lack of telephone to call). It is also plain that the unexcused absences are excessive. This being the case misconduct has also been established.

DECISION:

The administrative law judge's decision dated April 10, 2009 is **REVERSED**. The Employment Appeal Board concludes that the appeal to the Administrative Law Judge was untimely and that, as a result, there was no jurisdiction to entertain the Claimant's appeal. The Board also concludes that even if the appeal were timely the claimant was separated from employment in a manner that disqualifies the Claimant from benefits. Accordingly, he is denied benefits until such time the Claimant has worked in and was 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(1)(g); Iowa Code section 96.5(2)"a".

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

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Elizabeth L. Seiser

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Monique Kuester

RRA/fnv

PARTIALLY CONCURRING OPINION OF JOHN A. PENO:

I write separately because I concur in the determination that the appeal is untimely but not in the opinion that the Claimant's separation was disqualifying. Thus I join in the Board findings and conclusions only as they relate to the issue of timeliness.

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John A. Peno

RRA/fnv

A portion of the Employer'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 (handbook & records) 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.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv