

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSH J SCOTT

Claimant

APPEAL NO. 100-UI-15705-H2T

**ADMINISTRATIVE LAW JUDGE
NUNC PRO TUNC DECISION**

PHILIPPSON MASONRY & CONCRETE INC

Employer

OC: 12-14-08

Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 10, 2009, reference 03, decision that allowed benefits. After due notice was issued a hearing was scheduled to be held on December 22, 2009 in front of administrative law judge Ackerman. No hearing was held as the employer/appellant did not provide a telephone number where they could be reached for the hearing. Judge Ackerman issued a decision affirming the representative's decision awarding benefits on December 23, 2009. The employer appealed to the Employment Appeal Board (EAB) who on March 3, 2010 reversed the decision awarding benefits to the claimant. The claimant appealed to the Iowa District Court. On October 11, 2010 Judge Mitchell E. Turner remanded the case to the EAB for a hearing on the merits. On November 10, 2010 the EAB remanded to the unemployment Appeals Section of Iowa Workforce Development for a hearing on the merits. After due notice was issued, a hearing was held on January 10, 2011. The claimant did participate along with Mary Grolmus, his girlfriend and was represented by David Willems, Attorney at Law. The employer did participate through Tonya Hawker, Secretary and Ray Philippson, Owner.

ISSUES:

Was the claimant discharged due to job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a laborer full time beginning June 23, 2008 through October 20, 2009 when he was discharged.

The claimant was to be to work October 16, 2009 at 7:00 a.m. He did not show up for work, nor did he call before his work shift started or have anyone else call on his behalf to tell the employer that he was too ill to come to work. Later at approximately 6:00 p.m. that same day the claimant called the employer's answering machine and left a voice mail message indicating

that he had not come to work that day because he was ill. The claimant was in a work release program and was released from the requirement that he live in the half-way house on October 15. Prior to calling the employer at 6:00 p.m. on October 16 the claimant called two of his coworkers, Ryan Philipppson and Chris Hein and told each of them that he missed work because he was too hung over from the night before when he had been released from the half-way house. Mr. Philipppson and Mr. Hein reported what the claimant told them to Mr. Ray Philipppson.

The evening of October 16, the claimant went into the shop to pick up his paycheck as it was a Friday payday. Attached to his paycheck was a written warning for misusing the company cell phone. The claimant tore it off his paycheck envelope, wadded it up and threw it in the trash basket where Ms. Hawker later found it. The claimant was seen wadding it up and throwing it away by his other coworkers who were still in the shop.

The claimant had been warned about his attendance previously and on October 28, 2008 was told that if had one more instance of unexcused absenteeism he would be let go. On July 16, 2009 the claimant was a no-call/no-show for work and Mr. Ray Philipppson agreed to give him one more chance.

Ms. Grolmus lived with the claimant on October 15 and 16 and had no explanation for why she did not call the claimant employer or wake up the claimant so that he could do so to properly report his absence.

Mr. Philipppson told the claimant he was discharged for his continuing attendance problems and for his failure to report to work on October 16 because he was either still drunk or too hung over to do so.

The claimant has received unemployment benefits after the separation on a claim with an effective date of December 14, 2008.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

871 IAC 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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Absences due to **properly** reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). An employer’s point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits.

An employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant’s history of unexcused absenteeism, is considered excessive. Benefits are withheld.

The administrative law judge further concludes claimant has been overpaid benefits.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer’s account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual’s separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The November 10, 2009 (reference 03) decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

REMAND: The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css/kjw