IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DALE SAFFEELS
Claimant

STECKER CONCRETE INC
Employer

APPEAL NO: 13A-UI-13026-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/20/13
Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 19, 2013, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 17, 2013. The claimant participated in the hearing. Chad Stecker, President, participated in the hearing on behalf of the employer.

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 concrete finisher for Stecker Concrete from May 17, 2013 to October 22, 2013. He was discharged for attendance issues.

The claimant was absent 10 full days, mostly for illness, and five partial days, due to illness, family issues, and building management issues, although the employer concedes the claimant may have been sent home sometimes due to a lack of work. The claimant was absent May 28, June 3, June 12, July 8, July 16, August 30, September 17, October 1, October 9 and October 21, 2013, and missed partial days June 27, August 12, August 27, September 3, September 10 and October 4, 2013.

The claimant agrees he had several absences but stated his wife had surgery April 11, 2013, and he had to take her to Iowa City for appointments, which took all day, at least four times, was ill on other occasions, injured his elbow and had to see a doctor in Des Moines, which took all day, and had one no-call no-show where he overslept and failed to call the employer. The employer does not have an attendance policy but makes a decision when he feels the employee has missed too much work. The claimant did not receive any written warnings. The employer did talk to the claimant regarding his attendance in early August 2013 and told him he had to have perfect attendance for 35 to 40 days before he would receive a raise.

On October 21, 2013, the claimant sent the employer a text message stating he had been out of town for the weekend helping his son and when he went to leave he had a flat tire. He did not find out about the tire until late at night on Sunday, October 20, 2013, and could not get the tire fixed until later in the day October 21, 2013. He told the employer he would not be at work that day but reported for work October 22, 2013. When he arrived at his usual start time the employer was arguing with another employee. The claimant waited and after the other employee left the employer stated to the claimant, "I can't do this anymore." The claimant, believing the employer was referring to him and his employment status, asked him if he needed to grab his things and leave and the employer said yes. The employer testified he did not plan to discharge the claimant that day but it annoyed him when the claimant asked if he should get his belongings and go home.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

Iowa Code section 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 employer has the burden of proving disqualifying misconduct. 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 N.W.2d 661, 665 (Iowa 2000).

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 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).

The claimant was absent at least 10 full days, within a five-month period, and had other partial day absences, but the employer cannot say whether those were the result of a lack of work or because the claimant asked to leave. The employer does not utilize an attendance policy so neither the employees nor the administrative law judge have a system to measure an employee's attendance against. Obviously, ten full day absences in 23 weeks is a large number. The employer does not record the reasons for an employee's absences but stated he believed most were due to illness. With the exception of two absences, the claimant's absences were due to the medical issues of either he or his wife and the employer did not refute that testimony but neither did the claimant provide any documentation of his or his wife's medical appointments to the employer or for this hearing. Additionally, the employer never issued any documented warnings of any kind to the claimant about his attendance beyond telling him he had to sustain perfect attendance for 35 to 40 days in order to receive a raise.

That said, however, the claimant had two unexcused absences: one was a no-call no-show where he overslept and then chose not to call the employer to report he would not be in and the final absence where he had a flat tire, overslept and called the employer to report he would not be in October 22, 2013. After weighing all factors, including the claimant's absences due to purported illness and the employer's failure to maintain an attendance policy or issue documented warnings, the administrative law judge concludes those two unexcused absences, one of which was a no-call no-show and the other where the claimant overslept and reported his absence at least one and one-half hours after the scheduled start time of his shift, combined with the claimant's history of absenteeism during his short tenure with the employer, rise to the level of excessive unexcused absenteeism as that term is defined by Iowa law. Therefore, benefits must be denied.

DECISION:

The November 19, 2013, reference 02, decision is affirmed. 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.

_____
Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

je/pjs