IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

JAMES D NELL
Claimant

JELD-WEN INC
Employer

APPEAL NO. 17A-UI-13295-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/19/17
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Jeld-Wen (employer) appealed a representative's December 13, 2017, decision (reference 01) that concluded James Nell (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 18, 2018. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Mark Shaw, Human Resources Manager. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on November 6, 2017, as a full-time production worker working third shift. The claimant signed for receipt of the employer's handbook when he was hired. The claimant knew he was not supposed to step on rollers that were on the floor because he could be injured.

On November 10, 2017, the claimant was working one of his first nights after orientation. His trainer was an older woman. A pallet became stuck in the rollers and the claimant tried to pull the pallet loose with a bar. The bar slipped and the claimant fell. When he fell, the claimant's feet hit the rollers. The claimant suffered a cut over his elbow. The employer told the claimant to drive himself to the emergency room in Grinnell, Iowa. The claimant received six staples for a cut near his elbow on his left arm. The emergency room sent the claimant home.

On November 11, 2017, the claimant woke up and could not move his left arm. He went to the hospital in Newton, Iowa, were the claimant lives. The doctor restricted the claimant's activity. The claimant notified his lead worker. The lead worker sent the claimant home on November 12, 2017, because there was no light duty work for the claimant. The lead worker did not tell the employer this information. The claimant was next scheduled to work on November 13, 2017. The claimant went to work for an hour before he went home. The claimant saw his physician on November 14, 2017. He provided the employer with work

restrictions for his work injury from November 13 to November 15, 2017. The employer asked the claimant to return to work for various reasons during this time period but the claimant was restricted from working.

On November 16 and 17, 2017, the claimant returned to work. On November 20, 2017, the employer terminated the claimant. On dismissal form indicates the claimant was terminated for walking on the rollers and falsifying information. Another form states, "[d]ue to James violating a safety rule, lying about work restrictions, failing to come to work as promised, and actually missing 3 days of work, his employment is being terminated at this time".

The claimant filed for unemployment insurance benefits with an effective date of November 19, 2017. The employer provided the name and number of Tamakia Hall, a representative from Thomas & Thorngren, as the person who would participate in the fact-finding interview on December 8, 2017. In fact, the employer intended to participate by Mark Shaw, Human Resources Manager. The fact finder called Ms. Hall but she was not available. The fact finder left a voice message with the fact finder's name, number, and the employer's appeal rights. Neither the employer nor the representative responded to the message. The employer provided some documents for the fact finding interview. The employer did not submit the specific rule or policy that the claimant violated which caused the separation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> 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 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 definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred in November 2017. The claimant's absence does not amount to job misconduct because it was properly reported with a doctor's note.

The employer also terminated the claimant for lying about his work restrictions. The employer agrees that the claimant was probably released from the emergency room on November 10, 2017, with work restrictions. It also acknowledges that the claimant was restricted from working from November 13 to 15, 2017. Showing up at work for an accident investigation when the claimant's doctor ordered him to rest and ice the injury would have been a violation of his restrictions. The employer's testimony confirms that the claimant did have work restrictions and, therefore, was not lying about having them.

Lastly, the employer indicated it terminated the claimant for violating a safety rule. Repeatedly the employer states the claimant "walked" on the rollers. The employer has still not investigated the accident by questioning the older woman who was working with the claimant. The claimant stated at the fact finding that he slipped and fell. His actions were not intentional. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's December 13, 2017, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs