

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN W SHAW
Claimant

APPEAL NO. 09A-UI-17349-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA LOADING SERVICES LTD
Employer

**Original Claim: 10/11/09
Claimant: Respondent (1-R)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Iowa Loading Services Ltd. (Iowa Loading), filed an appeal from a decision dated November 6, 2009, reference 01. The decision allowed benefits to the claimant, Justin Shaw. After due notice was issued, a hearing was held by telephone conference call on December 23, 2009. The claimant participated on his own behalf. The employer participated by Vice President Clayton Fisk, Shop Supervisor John Shaw, and Supervisor of Operations Corey Vesely.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Justin Shaw was employed by Iowa Loading from November 17, 2008 until October 14, 2009 as a full-time laborer. From the beginning of his employment until October 13, 2009, he missed 56 days of work. Nine of those days were for funeral leave for family members. The rest were due to personal illness and sick children.

On August 3, 2009, President Robert Molinaro met with the claimant's department and discussed attendance. He said the employees needed to be where they were supposed to be; but, for reasons that are not clear, the claimant did not think it was being addressed to him. Mr. Shaw had never received any formal disciplinary action, though a few undocumented verbal warnings were given by Supervisor of Operations Corey Vesely. The employer does not know the dates these counselings were given or the exact number.

The claimant was absent from work beginning Monday, October 9, 2009, through Tuesday, October 13, 2009. He was excused from work for five days by a doctor's statement, which he faxed to his supervisor. After the five days ended, he did not return to work but did go to the doctor again and got another excuse. This was not submitted to the employer, as he intended to bring it when he returned to work, which he hoped would be October 14, 2009.

He called in and spoke with Supervisor John Shaw on October 13, 2009, and was told at that time he was fired for excessive absenteeism. He had missed 18 days since the general warning was given at the meeting on August 3, 2009.

REASONING AND CONCLUSIONS OF LAW:

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(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.

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 claimant does not appear to have been cognizant of the fact his job was in jeopardy as a result of his excessive absenteeism. For reasons that are not overly convincing, he thought the warning at the August 3, 2009, department meeting was not directed at him, although he had missed a great deal of work prior to that time. The employer did not explain why the claimant was not discharged sooner after the general warning on August 3, 2009, but allowed absences to occur before finally firing him.

The final absence was due to illness and was properly reported. A properly reported illness cannot be considered misconduct, as it is not volitional. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Before disqualification may be imposed, there must be a current, final act of misconduct that precipitates the discharge. In the present case, the final absences were due to a medical problem and the claimant reported each absence as required. As there was no current, final act of misconduct, disqualification may not be imposed.

The issue of whether the claimant is able and available for work given his medical condition of a herniated disc, should be remanded for determination. It is to be determined whether the claimant is able to work in the labor market generally given his medical condition, any work restrictions, education, work experience and training.

DECISION:

The representative's decision of November 6, 2009, reference 01, is affirmed. Justin Shaw is qualified for benefits, provided he is otherwise eligible.

The issue of whether the claimant is able and available for work given his medical condition is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw