

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIEL J ASHBY
Claimant

APPEAL NO. 08A-UI-02408-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

E & K OF OMAHA INC
Employer

**OC: 01/20/08 R: 01
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

E & K of Omaha, Inc. filed an appeal from a representative's decision dated March 6, 2008, reference 01, which held that no disqualification would be imposed regarding Daniel Ashby's separation from employment. After due notice was issued, a hearing was held by telephone on March 26, 2008. The employer participated by Daiva Pozela, Accounting/Payroll Clerk. Exhibits One through Nine were admitted on the employer's behalf. Mr. Ashby responded to the notice of hearing but was not available at the number provided at the scheduled time of the hearing.

ISSUE:

At issue in this matter is whether Mr. Ashby was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Ashby began working for E & K of Omaha, Inc. on August 16, 2007 as a full-time laborer. On December 18, he sustained a work-related injury to his right arm. He was diagnosed as having a right bicep strain and placed on light duty. He was told by the safety director to report for work at the Fremont Area Medical Center project on December 19 at 7:00 a.m. He did not report for work on December 19 but did notify the employer that he would not be at work because of pain in his arm. He was advised to put ice on the injury, take his medication, and report for work the following day at 7:00 a.m.

Mr. Ashby called the employer on December 20 and indicated he wanted to see the doctor again because he was still experiencing pain. When he saw the doctor on the afternoon of December 20, he was diagnosed as having a tissue "clump" on his bicep. The doctor did not alter the original recommendation that Mr. Ashby have limited use of his right arm. The employer gave Mr. Ashby a written warning on December 20 because of his failure to report to work on December 18 and December 19. He was told to report to the work site at 7:00 a.m. on December 21.

Mr. Ashby did not report for work or contact the employer on December 21. The employer next saw him on December 24 at his doctor's appointment. He received new restrictions, which limited his lifting, pushing, and pulling to no more than 15 pounds. He received another warning on December 24 due to his failure to come to work or call on December 21. He was told to report for work at 7:00 a.m. on December 26. When Mr. Ashby failed to report for work or contact the employer on December 26, the decision was made to discharge him. He did call the employer at 11:08 a.m. that day but only in response to a message left for him by the employer at 9:27 a.m. that day. Attendance was the sole reason for the separation.

Mr. Ashby filed a claim for job insurance benefits effective January 20, 2008. He has received a total of \$1,590.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from receiving benefits if he was excessively absent on an unexcused basis. Properly reported absences that are for reasonable cause are considered excused absences. The administrative law judge is not bound by an employer's designation of an absence as unexcused.

The warning given to Mr. Ashby on December 20 cited December 18 and 19 as the dates of occurrence. The administrative law judge considers both absences excused. He was at work on December 18 when the injury occurred and he went home after receiving medical attention. Although he was released for light-duty work, he was still experiencing pain in his arm and properly reported the intent to be absent on December 19. It is not unreasonable that he would still have pain as a result of the injury, the doctor's release notwithstanding. Since both absences were the result of injury and both were properly reported, both are excused.

The evidence does not establish the reason for Mr. Ashby's absences of December 21 and December 26. He may well have been experiencing pain from his injury. However, this would not explain his failure to notify the employer that he would not be at work. He knew on December 24 that he would be receiving a warning for his "no call/no show" of December 21. Therefore, he was clearly on notice that the employer expected him to call when he was not going to be at work. In spite of the warning, he failed to come to work or call the employer on December 26.

Because Mr. Ashby did not call the employer to report the absences of December 21 and 26, and failed to establish justification for not doing so, both absences are unexcused. He had two unexcused absences during a period of less than one week, one of which was two days after he was warned about his attendance. The administrative law judge finds this sufficient to establish a substantial disregard of the standards the employer had the right to expect. For the reasons cited herein, benefits are denied.

Mr. Ashby has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment and must be repaid. Iowa Code section 96.3(7).

DECISION:

The representative's decision dated March 6, 2008, reference 01, is hereby reversed. Mr. Ashby was discharged for misconduct in connection with his employment. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility. Mr. Ashby has been overpaid \$1,590.00 in job insurance benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw