

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHANE H HARVEY
Claimant

APPEAL NO. 15A-UI-01209-S2T

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

AMERICOLD LOGISTICS LLC
Employer

**OC: 12/14/14
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Shane Harvey (claimant) appealed a representative's January 5, 2015, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Americold Logistics (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 23, 2015. The claimant participated personally. The employer participated by Emily Yount, Human Resources Associate, and Patrick English, Operations Manager. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the appeal was filed in a timely manner and, if so, 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 October 16, 2013, as a full-time lift truck operator. The claimant signed for receipt of the employer's handbook on October 16, 2013. The handbook indicates an employee will be terminated if he is absent three times in a rolling eight-month period with no sick leave available. The employer issued the claimant warnings on March 19, May 13, June 13, October 7 and 21, 2014, for properly reported absences due to medical issues. On December 12, 2014, the claimant overslept and was late in reporting to work. The employer terminated the claimant on December 12, 2014, for excessive absenteeism.

A disqualification decision was mailed to claimant's last-known address of record on January 5, 2015. He did receive the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by January 15, 2015. The appeal was filed on January 15, 2015, but lost in transmission even though the claimant received a transmission report stating it was received. The claimant filed his appeal again on January 28, 2015, which is after the date noticed on the disqualification decision.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant faxed an appeal within the time period allowed by law. Therefore, the appeal shall be accepted as timely.

The next issue is whether the claimant was discharged for misconduct. The administrative law judge concludes he was not.

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.

Iowa Admin. Code r. 871-24.32(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). 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).

All of the claimant's absences were due to medical issues and properly reported except for the final occurrence. The medical absences are not volitional and are not job misconduct. The final absence was due to a personal issue. One absence due to a personal issue is not excessive and, therefore, does not rise to the level of job misconduct. Benefits are allowed.

DECISION:

The January 5, 2015, reference 01, decision is reversed. The claimant's appeal is timely. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs/pjs