

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID TOEPFER
Claimant

APPEAL NO. 11A-UI-13196-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CUSTOM-PAK INC – LP2
Employer

OC: 09-18-11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 5, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 1, 2011. The claimant participated in the hearing. The employer did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

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 machine operator for Custom-Pak from March 17, 2011 to September 13, 2011.

The claimant broke the middle finger of his right hand helping a friend with a home maintenance project July 31, 2011, and went to the emergency room, where he received several stitches and was referred to an orthopedic surgeon. He provided a medical excuse to the employer excusing him from work until he saw the surgeon. His finger had to be reconstructed and consequently he underwent surgery August 4, 2011, and notified the employer he could not work for the next two weeks, as stated in his medical excuse. The claimant attended physical therapy several times per week and was scheduled to see his surgeon every two weeks. He maintained contact with the employer throughout this period of time, each week when he went in to pay his insurance premium and every two weeks following his appointments with his surgeon, and provided doctor's excuses for each day of his absence. The employer notified the claimant he had to return to work by September 13, 2011, or his employment would be terminated.

On September 8, 2011, he went to physical therapy and his therapist indicated his grip was good and he would like to return to work the following week. On September 12, 2011, the claimant had an appointment with his surgeon, anticipating he would be allowed to return to work September 13, 2011, but his surgeon did not believe he was sufficiently healed and, consequently, he wrote another note stating the claimant could not return to work until September 20, 2011. The employer terminated his employment September 13, 2011, because he could not return to work by that date. The claimant had a final appointment with his surgeon September 20, 2011, at which time he received a full release to return to work. He did not return to the employer to offer his services at that time, because his employment was terminated and he knew that under the employer's policy he had to wait six months before he would be eligible for rehire.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

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 claimant sustained a severe, non-work related injury to his right middle finger July 31, 2011, and was unable to work pursuant to the advice of his surgeon until he received a full release to return to work September 20, 2011. He maintained contact with the employer, and provided doctor's excuses for his absence every two weeks after the initial note from the emergency room personnel, in addition to going in each week to pay for his health insurance, but the employer terminated the claimant's employment September 13, 2011, because he could not yet return to work. Because the final absence was related to properly reported injury, no final or current incident of unexcused absenteeism has been established. Therefore, benefits are allowed.

DECISION:

The October 5, 2011, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw