

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NICHOLAS WILSON**  
Claimant

**APPEAL NO. 08A-UI-09069-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IOWA LOADING SERVICES LTD**  
Employer

**OC: 08-10-08 R: 03**  
**Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge/Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism  
Section 96.3-7 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the October 2, 2008, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 22, 2008. The claimant participated in the hearing. Clayton Fisk, Director of Safety, and Corey Vessley, Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five were admitted into evidence.

**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 load inspector for Iowa Loading Services from December 10, 2007 to June 29, 2008. The claimant was hired as a shag driver but received a DUI April 13, 2008, and was unable to perform his job. The employer moved him to a rail loader position April 21, 2008; but after approximately one week, he told the employer he hurt his shoulder in a non-work-related incident and as a result was unable to perform that job, either. The employer believed the claimant was dishonest on his employment application, because he indicated he was "physically capable of heavy manual work" (Employer's Exhibit One). The employer testified that the claimant balked at doing odd jobs it periodically asked him to perform. The employer was also concerned about the claimant's attendance because he had 16 unexcused absences and five absences due to properly reported illness accompanied by a doctor's excuse (Employer's Exhibit Four). The claimant testified that 15 of the other 16 unexcused absences were also due to illness but he did not see a doctor about those illnesses. His last absence occurred June 23, 2008, and was considered unexcused because he did not provide a doctor's excuse. The employer terminated the claimant's employment June 29, 2008, for excessive unexcused absenteeism and unacceptable job performance. The

claimant received verbal warnings about his attendance and job performance but no written warnings were issued.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

While the employer believes the claimant was dishonest on his employment application about his ability to perform heavy manual labor, the claimant offered a reasonable explanation indicating he sustained the shoulder injury after his employment with this employer began but that it was not work-related. The claimant believes the employer considered his DUI in making

the decision to terminate his employment. That argument is not persuasive, however, because the employer moved him to two other positions after the DUI, one of which he could not perform because of his shoulder injury, at which time the employer moved him to a third position, which he did not perform to the employer's satisfaction because he either did not do the small jobs it asked him to do or did not complete those jobs. The employer did not cite specific examples or dates when those incidents occurred and did not issue any written warnings to the claimant, although it did warn him verbally. The remaining issue is the claimant's attendance. 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). He was absent 21 times, including five incidents of properly reported illness, between January 14 and June 23, 2008. While he believes he was ill the remaining 16 days, he could not prove those absences were due to illness and was not particularly convincing on that issue. Sixteen unexcused absences in a six-month period is excessive. The employer has established that the claimant was verbally warned about his attendance and that the final absence was not excused. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Therefore, benefits must be denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

**DECISION:**

The October 2, 2008, reference 01, decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/kjw