IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DAVID L PARIZEK JR
Claimant

YOUNG INDUSTRIES INC
Employer

APPEAL NO. 08A-UI-01289-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/23/07 R: 02
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.5(1)d – Voluntary Leaving/Illness or Injury

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 29, 2008, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on February 20, 2008. Claimant participated with his spouse, Nanci Parizek. Employer participated through Leon Young, president, and Steve Young, vice president.

ISSUE:

The issue is whether claimant quit the employment without good cause attributable to the employer or if he was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full time laborer, operator, and crew leader from 2000 until October 1, 2007, when he was discharged. He was severely burned at home on August 25, 2007 and was hospitalized in the burn unit of University of Iowa Hospital through September 4, 2007. He was released to go home with continued physical therapy, skin graft treatment, and related surgeries. Leon Young, president, visited claimant in the hospital and again at home on September 27, when claimant told him he intended to return to work but it would likely be a while before he would be medically allowed to work. There was no indication employer would not hold his job for him and no request for additional information. Employer pays medical insurance premiums on a quarterly basis and paid for the fourth quarter 2007 insurance in September. Steve Young, vice president, was unable to visit claimant due to work responsibilities and did not call him to find out an estimated return date or request any information. Claimant's spouse, Nanci, called Mary Lou Young on August 26 to discuss continuation of claimant's health insurance and suggested they could work out some kind of payment when he returned to work. Mrs. Young told her not to worry about it. Mrs. Parizek also called Mrs. Young on September 4 when claimant was released from the hospital and told her it would be an indefinite period of time before he could return to work. There was no additional communication by either party after September 27 until employer wrote a letter to claimant on December 20, 2007 cancelling his insurance effective December 31, 2007. This prompted claimant to call and ask about the status of his employment. When he was finally able to reach

Steve Young, employer told him he did not foresee claimant returning to work. Claimant was released to return to work without restriction on January 7, 2008.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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.

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.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

Claimant may not have kept in regular communication with employer as would be ideal, but given the serious nature of his injuries (extensive burns, skin grafts, and related surgeries), a reasonable person or employer would understand that a return to work within a month and a half was unlikely. Furthermore, claimant and his wife both told employer it would be a significant period of time before he could return to work. Employer did not advise claimant or his wife that they must submit regular

medical reports or estimate when he would be able to return to work. Thus, employer's decision to end claimant's employment was a discharge, not a voluntary leaving of employment.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Employer initially reported the separation date as August 27 (the last day worked was August 24 or 25 and the injury occurred on August 26) and then as sometime between September 27 and October 1 after Leon Young visited claimant at home, and finally wrote a letter dated December 20, 2007 cancelling insurance benefits effective December 31, 2007. At hearing, employer finally settled on October 1 as the separation date. Regardless of when the actual separation occurred, on October 1 or December 20, employer was reasonably aware that claimant was not working due to serious, long-term medical issues and elected to end the employment before claimant was medically released to return to work. Furthermore, it did not place claimant on notice, either verbal or written, that he must maintain a certain level of communication with employer or provide medical documentation to justify his continued absence. No evidence of misconduct has been established and no disqualification is imposed.

DECISION:

The January 29, 2008, reference 01, decision is reversed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw