IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JESSE P HANSEN
304 – 3RD AVE W
ALBIA IA 52531-2314

CARGILL MEAT SOLUTIONS CORPORATION
C/O FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166

Appeal Number: 06A-UI-05485-S2T
OC: 04/30/06 R: 03
Claimant: Appellant (4)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Jesse Hansen (claimant) appealed a representative's May 18, 2006 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he had voluntarily quit employment with Cargill Meat Solutions (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 13, 2006. The claimant participated personally and through his girlfriend and former co-worker, Stacy Decker. The employer participated by Erica Bleck, Human Resources Associate.

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 January 18, 2000, as a full-time loin scaler. In November 2005, the claimant reported on the employer's computer system that he had moved. He gave the employer his new address. The employer knew the claimant was living with a co-worker and the employer knew the co-worker's address.

The claimant began having stomach problems and worked until January 3, 2006. He talked to the employer's nurse and went in for a colonoscopy. The claimant properly reported that he was ill and would not be able to work due to his doctor's orders. He properly reported his absence each day on the employer's absenteeism telephone line.

The employer sent the claimant letters to the claimant's old address on March 2, April 1 and 5, 2006. The claimant did not receive the letters. The letters asked the claimant to respond immediately.

On May 4, 2006, the claimant received a release to return to work without restriction from his physician. The claimant telephoned the employer and told them he was released. The employer told the claimant he had been terminated. The claimant filed for unemployment insurance benefits with an effective date of April 30, 2006.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons, the administrative law judge concludes he was not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred from January 5 to May 4, 2006. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

The next issue is whether the claimant was able and available for work. For the following reasons, the administrative law judge concludes he was not.

871 IAC 24.23(1) provides:

> Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
>
> (1) An individual who is ill and presently not able to perform work due to illness.

When an employee is ill and unable to perform work due to that illness he is considered to be unavailable for work. The claimant was ill and unable to work until May 4, 2006. He is considered to be unavailable for work until May 4, 2006. The claimant is disqualified from receiving unemployment insurance benefits until May 4, 2006, due to his unavailability for work.

DECISION:

The representative's May 18, 2006 decision (reference 01) is modified in favor of the appellant. The claimant was discharged. Misconduct has not been established. The claimant was

unavailable for work until May 4, 2006. Benefits are allowed after May 4, 2006, provided the claimant is otherwise eligible.

bas/kkf