

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CANDY M MARTINEZ
Claimant

APPEAL NO. 09A-UI-07487-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

BURGER SUBS & MORE
GURDEV SINGH
Employer

OC: 08/03/08
Claimant: Appellant (4-R)

Section 96.5-5-b – Temporary Workers' Compensation
Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant appealed a department representative's decision dated May 6, 2009, reference 03, that held she was disqualified from receiving benefits the week ending January 24, 2009, due to receiving temporary disability workers' compensation.

A telephone hearing was scheduled and held on June 8, 2009. The claimant, and her attorney, Jim Hamilton, participated. Casey Singh, Manager and Teresa Dilley, Cashier, participated for the employer.

ISSUES:

Whether the claimant received temporary workers' compensation.

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered all of the evidence in the record, finds that: The claimant began working as a full-time cook for the employer about November 8, 2008. The claimant suffered a job-related injury to her right hand on January 22, 2009, and was off work and under doctor's care for a period of time.

The claimant received temporary workers' compensation payments from the employer's insurance carrier from January 23, 2009 to February 11 and from March 13, 2009, to May 1, 2009. The claimant received about \$228.00 of compensation benefits each week. The claimant's weekly benefit amount is \$181.00.

The claimant attempted to return to work under a light-duty restriction of not using her right hand, but was unable to do so due to a work requirement of using both hands as to all jobs at the store.

The claimant was given an unrestricted release to return to work by her doctor on May 1, 2009 that she immediately reported to her employer. Prior to the job-related injury, the claimant had worked a schedule of about 7:00 a.m. to 11:00 p.m. on a daily basis. The claimant agreed to report to work on Wednesday, May 6. Prior to her work shift, the claimant called in and stated that she was sick and would be missing work for that reason. Manager Singh understood the reason for missing work and said it was okay.

Manager Singh advised the claimant that he expected her to report to work on Monday, May 11 for her regular shift starting at 7:00 a.m. Due to a misunderstanding, the claimant believed that she would receive a call on Monday as to whether she would be needed for work that day. When the claimant called around 9:00 a.m. on Monday, Manager Singh advised that he expected the claimant to report at the start of her work shift and took the issue of her employment under advisement. Manager Singh, after consulting with his father, made a decision to terminate the claimant's employment due to a failure to call in and report for scheduled work on Monday, May 11.

Department records shows that the claimant claimed for and received unemployment benefits from the week ending March 14, 2009 through the week ending May 2, 2009.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes that the claimant is disqualified from receiving unemployment benefits during the period from the week ending January 24, 2009 through May 2, 2009 due to receiving temporary workers' compensation benefits.

Iowa Code section 96.5-5 provides:

An individual shall be disqualified for benefits:

5. Other compensation. For any week with respect to which the individual is receiving or has received payment in the form of any of the following:

a. Wages in lieu of notice, separation allowance, severance pay, or dismissal pay.

b. Compensation for temporary disability under the workers' compensation law of any state or under a similar law of the United States.

c. A governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment made under a plan maintained or contributed to by a base period or chargeable employer where, except for benefits under the federal Social Security Act or the federal Railroad Retirement Act of 1974 or the corresponding provisions of prior law, the plan's eligibility requirements or benefit payments are affected by the base period employment or the remuneration for the base period employment. However, if an individual's benefits are reduced due to the receipt of a payment under this paragraph, the reduction shall be decreased by the same percentage as the percentage contribution of the individual to the plan under which the payment is made.

Provided, that if the remuneration is less than the benefits which would otherwise be due under this chapter, the individual is entitled to receive for the week, if otherwise eligible, benefits reduced by the amount of the remuneration. Provided further, if benefits were paid for any week under this chapter for a period when benefits, remuneration or compensation under paragraph "a", "b", or "c", were paid on a retroactive basis for the same period, or any part thereof, the department shall recover the excess amount of benefits paid by the department for the period, and no employer's account shall be charged with benefits so paid. However, compensation for service-connected disabilities or compensation for accrued leave based on military service, by the beneficiary, with the armed forces of the United States, irrespective of the amount of the benefit, does not disqualify any individual, otherwise qualified, from any of the benefits contemplated herein. A deduction shall not be made from the amount of benefits payable for a week for individuals receiving federal social security pensions to take into account the individuals' contributions to the pension program.

Since the claimant is disqualified from receiving benefits from the date of her job-related injury through May 2, 2009 due to receiving temporary workers' compensation, there is no need to make a ruling as to her ability and availability for work.

The issue of any overpayment of benefits by reason of this disqualification is remanded for determination.

The administrative law judge further concludes that the employer has failed to establish that the claimant was discharged for misconduct in connection with employment on May 11, 2009, for excessive unexcused absenteeism.

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.

The employer accepted the claimant's excuse from work due to being ill on May 6, 2009 and admitted in this hearing that she had not been subject to any prior discipline for this reason. One instance of failure to report for scheduled work does not constitute excessive unexcused absenteeism according to the Iowa Employment Security Law. Whether or not there was a misunderstanding as to whether the claimant was to report at 7:00 a.m. on May 11, this one-time occurrence is not job disqualifying.

DECISION:

The decision of the representative dated May 6, 2009, reference 03, is modified in favor of the claimant. The claimant is disqualified from receiving benefits from the week ending January 24, 2009, through May 2, 2009 due to receiving temporary workers' compensation. The issue of any overpayment is remanded for determination. The claimant was discharged for no act of misconduct in connection with employment on May 11, 2009, and is entitled to receive benefits, provided she is otherwise eligible.

R. L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

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