

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JEFFERY JOHNSON**  
Claimant

**APPEAL NO: 13A-UI-04924-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OMAHA STANDARD INC**  
Employer

**OC: 03/31/13**  
**Claimant: Respondent (2R)**

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 April 17, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 3, 2013. The claimant participated in the hearing. Karen Diggs, Human Resources Manager and Tom Kuiper, Employer Representative participated in the hearing on behalf of the employer. David Williams, Employer's Representative was present as an observer. Employer's Exhibits One through Four 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 welder for Omaha Standard from November 8, 2011 to March 26, 2013. He was discharged from employment due to a final incident of absenteeism that occurred on March 20, 2013.

The employer's attendance policy allows employees to miss 48 hours between June 1 and May 31 per year. If an employee returns to work with a doctor's excuse his absence is excused. Employees receive a written warning at 24 hours of unexcused absenteeism and a final written warning at 32 hours of unexcused absenteeism.

The claimant left three hours early June 7, 2012; he called in and took a personal day for eight hours June 8, 2012; he left 5.53 hours early June 27, 2012; he called in and took the day off for six hours June 28 2012; he was one minute tardy July 3, 2012; he left three hours early July 6, 2012; he left one and one-half hours early July 17, 2012; he left one hour and three minutes early July 20, 2012; he left three hours early July 27, 2012; he left four hour and 53 minutes early August 6, 2012; he left early two hours and 38 minutes August 22, 2012; he left one hour

early August 24, 2012; he left four hours and 19 minutes early August 27 2012; he left four hours and 34 minutes early September 12, 2012; he left one hour early September 28, 2012; he left 30 minutes early October 5, 2012; he left 30 minutes early November 2 2012; he was nine minutes tardy because he overslept November 16; he was 20 minutes tardy due to car problems November 30, 2012; he left 53 minutes early December 13, 2012; he was three minutes tardy December 28, 2012; he left 29 minutes early January 15, 2013; he left one hour and 28 minutes early February 21, 2013; he left one hour and 29 minutes early February 26, 2013; he left one hour early March 13, 2013; and he was one minute tardy and left one hour and 28 minutes early March 20, 2013. The claimant told his supervisor he was leaving early to attend a medical appointment and would provide a doctor's excuse for his absence but the employer gave him four days to do so and never received a doctor's note from the claimant. Consequently, the employer terminated the claimant's employment after a review of his attendance record showed he had accumulated 56 hours of unexcused hours (Employer's Exhibit Three). The claimant received a written warning July 26, 2012, upon reaching 24.25 hours and a final written warning August 14, 2012, upon reaching 33.16 hours (Employer's Exhibits One and Two). He signed an acknowledgement that he received a copy of the attendance policy, tardiness policy and call-in policy June 1, 2012 (Employer's Exhibit Four). There is no evidence that these absences were related to illness.

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(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 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). The claimant left early on 20 occasions between June 7, 2012 and March 20, 2013, was tardy on five occasions;

and absent on two occasions. The claimant was aware of the employer's attendance policy but did not offer explanations for these many unexcused absences. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and 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 April 17, 2013, 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. 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.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

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