

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUVENAL NAVARRO
Claimant

APPEAL NO: 13A-UI-11723-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JELD-WEN INC
Employer

OC: 09/15/13

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Jeld-Wen, Inc. (employer) appealed a representative's October 7, 2013 decision (reference 01) that concluded Juvenal Navarro (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 12, 2013. A review of the Appeals Section's conference call system indicates that the claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Gayle Kingery appeared on the employer's behalf and presented testimony from one other witness, Nelson Watson. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on February 8, 2013. He worked full time as a general laborer glazing sashes on the second shift in the employer's Grinnell, Iowa window manufacturing facility. His last day of work was September 13, 2013. The employer discharged him on September 17, 2013. The reason asserted for the discharge was excessive absenteeism.

The employer's attendance policy allowed an employee with the claimant's seniority to miss only 40 hours of work within the first year. As of September 10, 2013 he had already used 36 of his available hours. At about 7:00 p.m. that evening he was arrested on the employer's premises and taken to jail, thereby missing four more hours of work, bringing him to 40 hours. He then missed eight hours of required overtime on September 14, presumably because he was still in jail; the overtime shift had been posted on or before September 11. The employer then determined to discharge him for exceeding the allowable hours of absence.

The hours previously missed by the claimant had been: eight hours due to personal injury, eight hours for an unknown reason, 16 hours for two no-call, no-shows, and four hours for personal business. He had been verbally warned by his supervisor on or about August 30 that he had reached the 32-hour mark and that he was approaching the 40-hour maximum. As the claimant was being taken away by law enforcement on September 13 Watson, the group manager, advised him that if the absence took him over 40 hours that it could result in his discharge.

Agency records indicate that no first-hand witness participated in the fact-finding interview in this matter. A Stephanie Cash, a third party representative with Thomas & Thorngren, was to participate in the fact finding, but did not, relying on documentation previously submitted to the Claims section.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). The claimant's final absence was not excused and was not due to illness or other reasonable grounds. The claimant had previously been warned that future absences that could take him beyond 40 hours could result in termination. *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the

employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The matter of deciding the amount of the overpayment and whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

In this case it does not appear that the employer participated directly in the initial fact-finding interview, but only submitted written materials for consideration. The rule which implements the statute does consider submission of written materials to be "participation" under some circumstances. However, there was not a preliminary determination by the Claims representative that the documentation did or did not meet the criteria for "participation," and those written materials were not distributed prior to the hearing in this case so that the administrative law judge can properly make that determination in this proceeding. Also, there is a question as to whether the employer complied with the requirement of the rule which specifies, "If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal." Therefore, the matter of deciding the amount of the overpayment and whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The representative's October 7, 2013 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of September 17, 2013. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issues and whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs