IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TIFFANY M BROWN Claimant **COPPER ELECTRIC COMPANY** Employer	**APPEAL 17A-UI-03546-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/12/17** **Claimant: Appellant (2)**

Iowa Code § 96.6(2)– Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the March 14, 2017 (reference 01) unemployment insurance decision that disallowed benefits based upon the claimant's separation from employment. The parties were properly notified of the hearing. A telephone hearing was held on April 25, 2017. The claimant, Tiffany M. Brown, participated personally and through witness Tammy Spaur. The employer, Copper Electric Company, participated through witness Vince Blom.

ISSUE:

Did the claimant file a timely appeal?
Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

A decision disallowing unemployment insurance benefits was mailed to claimant's last known address of record on March 14, 2017. The claimant did not receive the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by March 24, 2017; however, the claimant received the decision after the due date for an appeal had already passed. The appeal was filed on March 30, 2017 by online transmittal, which was one day after the claimant received the decision in the mail.

Claimant was employed full-time as a secretary from August 1, 2016 until February 18, 2017. Her job duties included answering telephone calls, drafting documents, and other tasks assigned by Mr. Blom, who was claimant's immediate supervisor. Claimant did not have a set schedule for reporting to work. Mr. Blom would let claimant know what time to report to work either the day before or the morning that she was to report to work each day.

The employer has a written policy in place regarding absenteeism, however, a copy was never provided to the claimant and one was never made available for her to review. A copy of the written attendance policy was not offered as an exhibit during the hearing in this matter. Mr. Blom testified that the policy provided that employees were allowed two absences and two incidents of tardiness prior to being subject to discharge from employment for absenteeism. Employees were also required to notify the employer prior to their scheduled shift beginning if they were going to be absent or late to work. However, claimant was never made aware of this policy or how many days she could take off from work. Claimant believed that if she did not come to work she would simply not be paid.

On February 8, 2017 claimant was late to work due to transportation issues related to a snow storm. She did properly report her tardiness prior to her scheduled shift start time. Claimant testified that she was twenty minutes late to work and Mr. Blom testified that claimant was five minutes late to work. However, claimant testified she worked until 5:30 p.m. on this date but Mr. Blom manually changed her timecard to reflect that she only worked until 5:15 p.m. that date. Mr. Blom agreed that her timecard was changed on several occasions based upon information he received from other staff members as to the correct time that claimant came in to work and left work. Presumably claimant's timecard reflected that she was only five minutes late to work because fifteen minutes were taken from the end of her shift that date. Mr. Blom had manually changed claimant's timecard on other numerous occasions to reflect that claimant did not work as long as she actually did. On February 6, 2017 claimant worked until 5:30 p.m. but Mr. Blom changed her timecard to reflect her end time to be 5:15 p.m. On February 7, 2017 claimant worked until 6:00 p.m. but her timecard was changed to reflect her end time to be 4:30 p.m.

On February 14, 2017 claimant took the day off to attend an event for her child. She did notify the employer prior to her absence that she would be gone that day.

Claimant was a no call no show on February 16, 2017 and February 17, 2017. Claimant went to a restaurant the night of February 15, 2017 and after eating and drinking at the restaurant claimant became incapacitated. Claimant believed that some chemical or drug was put into her drink at the restaurant. Claimant was incapacitated for two days and did not report to work for her scheduled shifts on these two days. She immediately reported to the employer the following morning, Saturday, February 18, 2017 and was discharged from employment. Claimant did go to her doctor and was told that any chemical substance or drug would not show on a test because it would have left her system already.

Claimant was not absent or tardy on any other dates. Claimant did not receive any previous discipline, verbal or written, regarding absenteeism prior to her discharge. Claimant was not aware that her job was in jeopardy or that she would be discharged for violation of any attendance policy because she was never given a copy of or made aware of any attendance policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

> Iowa Code § 96.6(2) provides:
>
> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly

> examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. *Gaskins v. Unempl. Comp. Bd. of Rev.*, 429 A.2d 138 (Pa. Comm. 1981); *Johnson v. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976). The appeal in this case was filed on April 30, 2017, which was one day after the claimant received the decision in the mail.

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to claimant not receiving the decision in the mail in a timely manner. See Iowa Admin. Code r. 871-24.35(2). The appellant's attempt to file an appeal in a timely manner was thwarted by the failure of the United States Postal Service to deliver the decision in a timely manner. The appeal was filed within a reasonable time after it was received, which was one day. Therefore, the appeal in this matter shall be accepted as timely.

The next issue is whether the claimant is eligible for benefits based upon her separation from employment. The administrative law judge finds that claimant is eligible based upon her

separation from employment. As a preliminary matter, the administrative law judge finds that the claimant did not voluntarily quit but was discharged from employment.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(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.

Iowa Admin. Code r. 871-24.32(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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id*. at 11. Excessive absences are not considered misconduct unless unexcused. *Id*. at 10. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Id.* at 558.

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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)…accurately states the law."

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper,* 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id*. at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id*. at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id*.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *See Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*,

2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant's testimony is more credible than Mr. Blom's testimony.

The incident of tardiness on February 8, 2017 was properly reported but was not for good cause as it was related to transportation. This incident of tardiness is unexcused.

The claimant properly reported her February 14, 2017 absence, however, it was not for good cause. This absence is unexcused.

Claimant's absences on February 16 and 17, 2017 were due to illness and claimant was incapacitated and unable to report her absences to the employer. This illness on February 16 and 17, 2017 was not self-induced and there is no credible evidence that establishes claimant acted in any way to create her illness on February 16 and 17, 2017 which would establish any volitional conduct on her behalf. The circumstances that led to claimant's absences must establish volitional acts of a nature sufficient to allow a fact finder to draw the conclusion that the employee, by his or her intentional acts, has purposively set in motion a chain of events leading to an absence from work and ultimate separation from employment. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016). These two absences on February 16 and 17, 2017 are excused. See *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992)(where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved); *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984)(where unreported absences are not misconduct if the failure to report is caused by mental incapacity); and *Floyd v. Iowa Dep't of Job Serv.*, 338 N.W.2d 536 (Iowa Ct. App. 1983)(where claimant was bedridden with scarlet fever and unable to telephone his employer his absences were considered excused).

The gravity of the incident, number of policy violations, and prior warnings are all factors to be considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989).

Inasmuch as the employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

Claimant had two instances of absenteeism that was considered unexcused absences for purposes of unemployment insurance benefits eligibility. Two incidents of absenteeism in more than a six-month time period is not excessive. The employer has failed to establish that the claimant was discharged for job-related misconduct that would disqualify her from receiving benefits. Benefits are allowed.

DECISION:

The claimant's appeal is timely. The March 14, 2017 (reference 01) unemployment insurance decision denying benefits is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Dawn R. Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/