IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TRENT G BLAIR Claimant **LENNOX INDUSTRIES INC** Employer	**APPEAL 17A-UI-00728-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/18/16** **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 filed an appeal from the January 9, 2017, (reference 01) unemployment insurance decision that denied benefits based upon his voluntary quit. The parties were properly notified of the hearing. A telephone hearing was held on February 10, 2017. The claimant participated and was represented by attorney Joanie Grife. The employer participated through Hearing Representative Jackie Boudreaux and witness Brent McDowell. Employer's Exhibits 1 through 6 were received into evidence.

ISSUES:

Is the appeal timely?

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as an assembler from June 24, 2015, until this employment ended on December 5, 2016, when he was discharged.

In May 2016 claimant went on short term disability leave due to a back injury. On August 17, 2016, the short term disability carrier sent a letter stating that claimant's short term disability claim was being closed. The carrier gave claimant 180 days to appeal this decision. At the time, claimant still had not been released to return to work by his doctor. The employer sent claimant a letter on September 29, 2016, advising him that he had been accumulating attendance points for the days he was absent since August 18, 2016. (Exhibit 1). Claimant was advised he needed to appeal the short term disability carriers' decision within ten days and that if the issue was not resolved he would be terminated. The employer testified that had claimant

tried to return to work upon receipt of the September 29 letter, he would not have been allowed to. Claimant was sent a second letter on November 15, 2016, stating he had accumulated more than 50 attendance points and was being suspended indefinitely. (Exhibit 2). Claimant was terminated via letter on December 5, 2016.

During the time claimant was off work from August 18 through December 5, 2016, he had regular contact with the employer, though no one could recall exactly what dates this contact occurred. It was explained to claimant that because he was no longer on short-term disability he was expected to call in and report his daily absences. Claimant explained to McDowell that without his short term disability payments, he could no longer pay a phone bill and did not have daily access to a phone. No other reporting options were offered to claimant. No date was set for claimant to return to work. Claimant still has not been cleared to return to work by his doctor.

The unemployment insurance decision was mailed to claimant on January 9, 2017. Around the time the decision was mailed the claimant changed his address. The decision was initially sent to claimant's old address. The claimant did not receive the decision at his new address until January 20, 2017. Claimant immediately contacted his attorney who filed an appeal of the fact-finding decision the same day.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

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 appellant did not have an opportunity to appeal the fact-finder's decision because the decision was not received until one day after the appeal was due. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant filed an appeal immediately upon discovering the disqualification. Therefore, the appeal shall be accepted as timely.

The next issue to be decided involves claimant's separation from employment. For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit but was discharged from employment for no disqualifying reason.

Iowa Code §96.5(1) provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Claimant did not tell the employer he intended on quitting; rather he was out on medical leave. No return date was set for claimant and he remained in contact with the employer throughout his medical leave. Claimant's regular contact with the employer shows he did not intend to quit, but instead was discharged.

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 has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job*

Serv., 425 N.W.2d 679 (Iowa Ct. App. 1988). Excessive absences are not considered misconduct unless unexcused. 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007).

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* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

All of claimant's absences were due to an injury he sustained in May 2016. While claimant may not have been covered by short term disability as of August 18, 2016, the employer was on notice that he was still unable to return to work. The claimant had regular contact with the employer while he was off work regarding his situation. While the claimant may not have reported his absences on a daily basis in accordance with the employer's policies, the employer was still aware that claimant would not be into work and the notice was appropriate under the circumstances. Because his absences were related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed.

It is further noted, that while the employer did not officially terminated claimant until December 5, 2016, the testimony suggests he was effectively terminated as of the September 29, 2016 letter, as McDowell testified claimant would not have been permitted to return to work at that time. There was no evidence provided to indicate that claimant was warned his job was in jeopardy prior to the September 29 letter.

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. Inasmuch as 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. Benefits are allowed, provided claimant is otherwise eligible.

During the hearing additional information was provided regarding claimant's ability to and availability for work, thus the matter must be remanded for a determination on this issue.

DECISION:

The claimant's appeal is timely. The January 9, 2016, (reference 01) unemployment insurance decision is reversed. The claimant did not voluntarily quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.

REMAND:

The issue of whether or not claimant is able and available for work shall be remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

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