Appeal Number: **04A-UI-10733-DWT**
OC: 09/05/04   R: 01
Claimant: Respondent (2)

SOMSAK PHIAKHAM
514 SUPERIOR ST
STORM LAKE IA 50588

TYSON FRESH MEATS INC
^C/_O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166 0283

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(Administrative Law Judge)

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(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (employer) appealed a representative's September 28, 2004 decision (reference 01) that concluded Somsak Phiakham (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 2, 2004. The claimant failed to respond to the hearing notice by contacting the Appeals Section prior to the hearing and providing the phone number at which he could be contacted to participate in the hearing. As a result, no one represented the claimant. Jim Petzoldt, the human resource manager for the Storm Lake complex, appeared on the employer's behalf. During the hearing, Employer's Exhibit One was offered and admitted as evidence. 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.

ISSUES:

Did the employer discharge the claimant for work-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer on October 10, 2000. He worked as a full–time hourly worker on the day shift. The claimant knew the employer could discharge an employee if the employee accumulated more than 14 attendance points in a rolling calendar year.

On October 10, 2003, the claimant received a written warning because of the number of attendance points he had accumulated. The claimant also had failed to notify the employer that he was unable to work as scheduled.

On April 5, 2004, the claimant had more than 14 attendance points. The employer, however, talked to the claimant about his attendance and decided to give the claimant another opportunity to continue his employment.

On August 31, 2004, the claimant called in sick. The claimant only received a point for this absence. As of August 31 after he had called in sick, the claimant had accumulated 12 attendance points. The claimant worked as scheduled until September 3. On September 3, the claimant was scheduled to work but did not call or report to work. As a result of this absence, the employer assessed the claimant three-attendance points. The claimant was not scheduled to work again until September 7. When the claimant reported to work on September 7, the employer suspended the claimant for excessive absenteeism. The claimant acknowledged he had too many absences. After reviewing the claimant's attendance record and verifying he had 15 attendance points in a rolling calendar year, the employer discharged the claimant on September 8, 2004.

The claimant established a claim for unemployment insurance benefits during the week of September 5, 2004. He filed claims for the weeks ending September 11 through October 23, 2004. He received his maximum weekly benefit amount of $310.00 for each of these weeks.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

The claimant knew or should have known his job was in jeopardy when the employer gave him a second chance and did not terminate him in April 2004 for accumulating more than 14 attendance points. Since the claimant had accumulated 12 attendance points as of August 31, 2004, his failure to report to work or call the employer on September 3 amounts to an intentional disregard of his duty to work as scheduled. If the claimant had notified the employer on September 3, he may not have had three attendance points accessed against him. Since the claimant did not participate in the hearing, it is not known why he did not report to work or call the employer on September 3. The evidence establishes that the employer discharged the claimant for violating the employer's attendance policy and for committing a current act of work-connected misconduct on September 3, 2002. As of September 5, 2004, the claimant is not qualified to receive unemployment insurance benefits.

If an individual receives benefits he is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code §96.3-7. The claimant is not legally entitled to receive unemployment insurance benefits during the weeks ending September 11 through October 23, 2004. The claimant has been overpaid $2,170.00 in benefits he received for these weeks.

DECISION:

The representative's September 28, 2004 decision (reference 01) is reversed. The employer discharged the claimant for reasons constituting work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of September 5, 2004. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The claimant is not legally entitled to receive unemployment insurance benefits during the weeks ending September 11 through October 23, 2004. The claimant has been overpaid and must repay $2,170,00 in benefits he received for these weeks.

dlw/pjs