IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JASON M STONEKING
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO: 14A-UI-09504-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/03/14
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jason M. Stoneking (claimant) appealed a representative's September 3, 2014 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on December 3, 2014. This appeal was consolidated for hearing with one related appeal, 14A-UI-09505-DT. The claimant participated in the hearing. Prior to the hearing, on November 24, 2014 the employer's third party representative contacted the Appeals Bureau, acknowledging that it had received the notice of the in-person hearing, and requesting that the employer be allowed to participate by phone, as the employer's location is about 65 miles from the hearing site in Cedar Rapids. The administrative law judge denied the employer's request[1.]

[1] Iowa Code § 96.6-3-a provides in pertinent part:

> Before the hearing is scheduled, the parties shall be afforded the opportunity to choose either a telephone hearing or an in-person hearing. A request for an in-person hearing shall be approved unless the in-person hearing would be impractical because of the distance between the parties to the hearing.

Rule 871 IAC 26.6(4) provides in pertinent part:

> A request for an in-person hearing may be denied if factors such as the distance between the parties, the number of parties or the health of any party makes it impractical or impossible to conduct a fair hearing in person. … The party requesting an in-person hearing will ordinarily be required to travel the greater distance if all parties are not located near the same hearing site. … In the discretion of the presiding officer to whom the contested case is assigned, witnesses or representatives may be allowed to participate via telephone in an in-person hearing, provided that each party has at least one witness present at the hearing site.

[Emphasis added.]

The distance the employer would have had to have driven, about 65 miles, about an hour's drive, is not an unusual expectation for in-person hearings, nor is it such an extreme distance so as to make it "impractical or impossible" for the employer to have participated in the hearing. The administrative law judge did advise the employer's representative that if there was a particular witness who would be less

The employer then failed to respond to the hearing notice and appear at the time and place set for the hearing, and therefore did not participate in the hearing. Based on the evidence, the arguments of the parties, 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?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on November 5, 2013. He worked full time as a building maintenance employee at the employer's Columbus Junction, Iowa pork processing facility. His last day of work was July 18, 2014. The employer discharged him on August 1, 2014. The reason asserted for the discharge was excessive absenteeism.

The employer has a 14-point attendance policy. Prior to about July 10, 2014 the claimant only had about three or four points. On or about July 10 the claimant suffered a back injury in a bike accident and missed about a day of work, which was properly reported to the employer. On about July 14 the employer's superintendent told the claimant that he should be sure to report any further back pain. On about July 18, after seeing a posting that there would be additional overtime hours required, the claimant commented to the superintendent that his back was already hurting and he was not sure he could handle the additional hours. The superintendent then sent the claimant to the nurse's office and told him to go home for the day, and indicated that he should not return until he could see his doctor again and get a note indicating that he was able to return to work.

The claimant had assumed he could get in to see the doctor on July 21, but on that day he learned that the doctor would not be in that week. He promptly informed the superintendent, who advised him to follow the normal call-in procedure, which the claimant proceeded to do each day. The claimant did see the doctor on July 28, who gave him a note that he could return to work as of August 1, but that he should then be on light duty for two weeks. The claimant immediately informed the employer about the doctor's note. When the claimant came in on August 1, however, the employer informed the claimant that he was discharged because of his absences since July 18.

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). The question is not whether the employer was right

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able to participate in person than other witnesses, an arrangement could be made for that particular witness to participate via phone, so long as there was at least one witness at the hearing site, but the employer's representative did not further pursue that option with the administrative law judge.

to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

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. Rule 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. Rule 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).

Excessive unexcused absenteeism can constitute misconduct. Rule 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness or injury 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. Rule 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). Here, the employer knew or should have known that the claimant would be absent for an extended period of time after July 18 and substantially knew the reason why he would be absent. *Floyd v. Iowa Dept. of Job Service*, 338 N.W.2d 536 (Iowa App. 1986). Because the final absence was 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. The employer has failed to meet its burden to establish misconduct. *Cosper*, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 3, 2014 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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