

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEPHEN M PICKET
Claimant

APPEAL NO. 10A-UI-04174-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

JELD-WEN INC
Employer

OC: 09/13/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.6-2 – Timeliness of Appeal
871 IAC 24.35(2) – Appeal Delay

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated October 2, 2009, reference 01, that held the claimant was discharged but not for misconduct on September 14, 2009, and benefits are allowed. A telephone hearing was held on April 30, 2010. The claimant participated. Chris Juni, Safety/HR Manager, Eric Pederson, Interior Production Manager, and Jill Poole, Attorney, participated for the employer. Department Exhibit 1 and Employer Exhibits 1 – 6, were received as evidence.

ISSUE:

Whether the appeal is timely.

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having considered the evidence in the record, finds that: The department issued and mailed its decision on October 2, 2009 with an appeal deadline of October 12. Although the employer faxed its appeal to UI Appeals on October 12 with a confirmation it was received, the department did not acknowledge an appeal at that time. On or about March 10, 2010, the employer inquired about its appeal, and it learned that it had not been processed.

The claimant was employed as a full-time production worker from June 9, 2008 to September 15, 2009. The claimant received the employer “no-fault” attendance policy. The policy provides that incurring #8 points within a twelve-month period may result in termination. The employer does not care about the reason for absence.

The claimant received final warnings for attendance issues on July 27, and September 14, 2009 letting him know that he was at the threshold for termination based on #8 or more points. From

September 14, 2008 to termination, more than half of the absences included illness or for excusable reasons. The claimant called in an absence on September 11 due to shoulder pain. The claimant called in an absence on September 14 due to a transportation problem in getting from Des Moines to Newton. His fiancée had a domestic issue in getting her children from their father, and she was claimant's ride to work. The claimant was to report to his shift at 11:00 p.m.

The employer discharged the claimant on September 15, 2009 for excessive occurrences in violation of the attendance policy.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides in pertinent part:

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. . . . 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.

871 IAC 24.35(2) provides:

(2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The department shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

The administrative law judge concludes the employer filed a timely appeal on October 12, 2009 that was not processed due to department error until March 12, 2010. The employer evidence shows it filed a timely appeal, and the department failed to handle it in a timely manner.

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 administrative law judge further concludes that the employer failed to establish misconduct in the discharge of the claimant on September 15, 2009, because the absences do not constitute excessive "unexcused" absenteeism.

The employer has a no-fault attendance policy that does not consider the reason for absence when issuing discipline. The department is required by law to consider the reason for absence in determining whether it is misconduct, and whether the sum of all absences (occurrences) is excessive "unexcused" absenteeism. When reviewing the claimant's occurrences (Exhibit #2), more than half are for personal illness or for excusable reasons, and some reasons are not recorded because the employer does not consider it in issuing discipline.

DECISION:

The decision of the representative dated October 2, 2009, reference 01, is affirmed. The employer filed a timely appeal. The claimant was not discharged for misconduct in connection with employment on September 15, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs