IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JACOB D SHAW Claimant **WIESE INDUSTRIES INC** Employer	**APPEAL 17A-UI-03254-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/26/17** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 13, 2017, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on April 17, 2017. The claimant participated personally. The employer participated through Donna James, human resources. Alan Lenz and Lino Pence attended but did not testify. Employer Exhibits 1 through 6 and Claimant Exhibit A were received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Is the claimant able to work and available for work effective February 26, 2017?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as production support and was separated from employment on February 27, 2017, when he was discharged for excessive absenteeism.

The employer uses a no fault point attendance policy which designates point values in response to attendance infractions and upon receipt of 9 points in a rolling one year period, an employee is discharged. An employee is not given points for absences related to worker's compensation or if a doctor's note is furnished.

The undisputed evidence is the claimant incurred a work related injury on January 12, 2017 when his left finger hit a grinder, requiring stitches and a surgery. The claimant was on light

duty at the time of separation. The claimant's final absences occurred on February 22, 23 and 27, 2017. On February 22, 2017, the claimant left early, citing to his stomach hurting from antibiotics related to his finger. He then properly reported his absence on February 23, 2017, stating he would not work due to feeling ill. Concerned about attendance points, Ms. James called him and advised him he needed to obtain some sort of documentation to support the absence. The claimant went to the emergency room, where he told them he had just jammed his thumb, and the ER doctor offered to schedule the claimant an appointment that day with his specialist but the claimant refused to go, and left the emergency room against the advice of the treating physician. Thinking he was discharged based on his conversation, the claimant did not show up to work or report his absence on February 27, 2017. Instead he showed up several hours late to collect his paycheck. Had the claimant shown up on February 27, 2017, the employer would have attempted to work with him to preserve employment or accept any information he had available to support his absences. Ms. James stated she never told the claimant he was or would be fired on February 23, 2017, and in fact, lacked the authority to fire him.

The employer also considered absences on August 5, 2016, September 13, 2016, October 1, 2016 when the claimant left early or was absent for personal reasons and properly reported his absences. The claimant was also sick on January 30, 2017, unrelated to worker's compensation, and did not furnish a doctor's note, so he incurred a point. On February 14, 2016, the claimant had a meeting with the employer and union representatives to discuss his absences. The claimant was aware his job was potentially in jeopardy. The claimant had court the next day for personal matters. He clocked in to his shift at 6:00 a.m. that morning, clocked out at 6:15 a.m. for his 9:00 a.m. court hearing and did not return to work, stating he decided to take the whole day off because he knew he was going to incur an attendance point anyway, so he didn't try to return to work. As a result he was informed on February 21, 2017, that he would be suspended for five days at date the employer picked, in response to his absence. The claimant did not actually serve the suspension because he was discharged a week later.

The claimant is currently searching for jobs within walking distance of Perry, due to a lack of transportation. The claimant is unaware of the status of his light duty or medical restrictions but has stopped going to his scheduled medical appointments and physical therapy related to his worker's compensation injury, citing the walk to be "inconvenient", even though the employer/employer's vendor had previously offered him transportation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 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.

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

Discharge for misconduct.

(1) Definition.

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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

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 appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In the specific context of absenteeism the administrative code provides:

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.

871 IAC 24.32(7); *See Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984)("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 unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). The administrative law judge is persuaded the claimant was aware of the employer's policies, which required supporting documentation or sufficient information to support excusing an absence related to worker's compensation or personal illness. The administrative law judge would note that for purposes of unemployment eligibility, "medical documentation is not essential to a determination that an absence due to illness should be treated as excused." *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007).

In this case, the claimant had a history of attendance infractions including three due to personal reasons on August 5, 2016, September 13, 2016, October 1, 2016. These absences were properly reported but unexcused. The claimant's properly reported absence on January 30, 2017 would be considered excused for unemployment purposes because it was properly reported and related to illness, even if the employer did not excuse the absence. The claimant's absence on February 15, 2017, due to his personal court date would not be excused, and the administrative law judge cannot ignore that just the day prior, the employer met with the claimant to warn him about his attendance situation and his response was to not even attempt to work because he assumed he would incur an entire attendance point whether he worked part of the day or fifteen minutes. This is not indicative of a person acting in good faith to preserve their employment. The claimant's absences attributed to his finger and/or stomach were properly reported and therefore would be excused on February 22 and 23, 2017. The administrative law judge is not persuaded that Ms. James' urging the claimant to get supporting documentation about his medical condition was the equivalent of telling the claimant he was fired or would be fired, but rather, under the employer's policies, Ms. James was trying to help the claimant preserve his employment. The claimant's refusal of medical treatment on February 23, 2017, without good reason by a specialist, or attempt to furnish a doctor's note as requested (although not required for unemployment insurance eligibility) further support the claimant's lack of efforts to preserve his employment in light of knowing his job was in jeopardy. The claimant was not told he was discharged but assumed he was and therefore was a no call/no show on February 27, 2017. This final absence was not properly reported or excused for unemployment insurance purposes.

Even if the claimant thought he could be fired for his absences on February 22 and 23, 2017, based on his communications with Ms. James, it is unclear why he made no efforts to present her requested documentation or even to show up on February 27, 2017 and try to plead his case as to why he should not be discharged. Instead, he incorrectly assumed he had been fired and showed up to collect his paycheck.

Based on the evidence presented, the employer has credibly established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, on February 27, 2017, in combination with claimant's history of unexcused absenteeism, (based upon absences on August 5, 2016, September 13, 2016, October 1, 2016, and February 15, 2017) is considered excessive. Benefits are withheld.

The administrative law judge further concludes the claimant is not able to and available for work, effective February 26, 2017, until he receives a medical release to return to some type of work of which he is capable of performing given any medical restrictions.

Iowa Code § 96.4(3) provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> (1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.
>
> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.23(35) provides:

> Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
>
> (35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

Since the employment ended on February 27, 2017, the claimant's ability to work is not measured by the job he held most recently, but by standards of his education, training, and work

history. The claimant acknowledged his job search is limited by his lack of transportation, as he must walk to and from positions, and is limited to the geographical vicinity of Perry, Iowa. He could not furnish work search contacts in prior weeks that were within existing medical limitations. At the time of separation, the claimant had a five pound lifting restriction due to his injury and did not know the extent of his medical imposed restrictions to employability.

The evidence further supports the claimant has voluntarily discontinued advised medical treatments, stating it was "inconvenient" to walk to his appointment, even though he previously declined transportation offers by the employer/employer's vendor. Therefore, benefits are withheld until such time as the claimant obtains a medical release to return to some type of work of which he is capable of performing given any medical restrictions since he is refusing to comply with his medical care plan.

DECISION:

The March 13, 2017, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The claimant is not able and available for work, effective February 27, 2017. Benefits are denied until he obtains a medical release to return to some type of work of which he is capable of performing given any medical restrictions

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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