

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOHN J UNLAND**  
Claimant

**APPEAL NO: 14A-UI-08602-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MENARD INC**  
Employer

**OC: 07/20/14**

**Claimant: Respondent (2)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Recovery of Overpayment of Benefits  
871 IAC 24.10 – Employer Participation

**STATEMENT OF THE CASE:**

Menard, Inc. (employer) appealed a representative's August 11, 2014 decision (reference 01) that concluded John J. Unland (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 9, 2014. A review of the Appeals Section's conference call system indicates that the claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Troy Franke appeared on the employer's behalf. 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:**

Was the claimant discharged for work-connected misconduct? Was the claimant overpaid unemployment insurance benefits, and if so, is that overpayment subject to recovery based upon whether the employer participated in the fact-finding interview?

**OUTCOME:**

Reversed. Benefits denied. Overpayment not subject to recovery.

**FINDINGS OF FACT:**

The claimant started working for the employer on June 3, 2013. He worked full time as a forklift driver in the employer's Shell Rock, Iowa concrete plant. His last day of work was July 23, 2014. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The employer's attendance policy provides for discharge if an employee reaches ten attendance points or is issued three nine-point suspensions for attendance. Prior to July 22 the claimant had been given a suspension for attendance on June 12, 2014 and July 1, 2014. These were

for occurrences which included four tardies, two late returns from lunch, four absences due to illness, and one absence for no reason given. The July 1 suspension document warned the claimant that if he received another suspension he would be discharged. On July 22 the claimant was again tardy, resulting in the issuance of a point which again took the claimant to nine points, resulting in a suspension. Since this was the third suspension, the claimant was discharged.

The claimant established an unemployment insurance benefit year effective July 20, 2014. A fact-finding interview was scheduled for August 7, 2014 at 8:40 a.m. The employer was notified in advance of the scheduled interview, but when the Agency representative called the employer's representative, no one was available, and no one participated in the fact-finding interview on behalf of the employer. The claimant received unemployment insurance benefits after the separation.

### **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); Iowa Code § 96.5-2-a.

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. Rule 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). Tardies are treated as absences for purposes of unemployment insurance law. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). The presumption is that tardiness is generally within an employee's control. *Higgins*, supra. The claimant's final tardy was not excused and was not due to illness or other reasonable grounds. The claimant had previously been warned that future occurrences could result in termination. *Higgins*, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b; Rule 871 IAC 24.10.

The employer did not participate in the fact-finding interview. There has been no showing that the claimant received benefits due to fraud or willful misrepresentation; therefore, since the employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

**DECISION:**

The representative's August 11, 2014 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of July 23, 2014. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The claimant was overpaid unemployment insurance benefits, but he is not required to repay the overpayment and the employer is charged for the amount of the overpayment because the employer failed to participate in the fact-finding interview.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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