BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

JASON A HANSON	:	
	:	**HEARING NUMBER:** 10B-UI-04350
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
INDUSTRIAL DESIGN FABRICATION &	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2A, 24.32-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Jason Hanson (Claimant) was employed as a full-time laborer/welder by Industrial Design Fabrication (Employer) from December 17, 2007 through February 1, 2010 when he was discharged. (Tran at p. 2; Ex. 1). The Claimant had been warned repeatedly about his attendance and his tardiness. (Tran at p. 3; p. 8-9; Ex. 1).

The Claimant was working out of town with a crew of coworkers. (Tran at p. 3; Ex. 1). They were all to meet at the front desk of the hotel at 6:00 a.m. on January 30 so they could all ride together in the company truck to the job site as they did every day. (Tran at p. 3-4; Ex. 1). The Claimant did not get up and was not at the front desk when the supervisor, Kory Biggerstaff, and the rest of the crew left for the job site at 6:00 a.m. (Tran at p. 3-4; Ex. 1). At approximately 6:45 a.m. the Claimant called Mr. Biggerstaff who had to drive back to the hotel to pick him up and bring him to the job site causing the whole crew to be late to the job site. (Tran at p. 4; Ex. 1). The Claimant was not terminated at this

time

only because they were out of town and Mr. Biggerstaff did not have authority to terminate. (Tran at p. 5; p. 7). Had no further incident subsequently taken place the Claimant would have been terminated on this incident alone. (Tran at p. 5-6; p. 8).

On the night of January 30, the Claimant fell in the shower stall at the hotel. (Tran at p. 3; Ex. 1). He reported to Mr. Biggerstaff that he was unable to work on January 31 due to the fall. (Ex. 1). That day Mr. Biggerstaff took him to the hospital for medical evaluation. (Tran at p. 8; Ex. 1). The Claimant was released by the doctor to return to work, but did not work the rest of the day, he sat in the truck. (Tran at p. 8; Ex. 1). On February 1, the Claimant was no call/no show. (Tran at p. 2; Ex. 1). The Claimant was notified on February 2nd or 3rd of his discharge for his poor attendance. (Tran at p. 6; Ex. 1).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

In the specific context of absenteeism the administrative code provides:

> 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 excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Higgins v. IDJS, 350 N.W.2d 187, 192 (Iowa 1984). Second the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds", *Higgins v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984), or because it was not "properly reported". *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982)(excused absences are those "with appropriate notice"). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused for reasonable grounds. *Higgins v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984).

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. *Higgins v. IDJS*, 350 N.W.2d 187, 190 (Iowa 1984).

As noted, the determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. In consonance with this, the law provides:

> *Past acts of misconduct*. While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(8); *accord Ray v. Iowa Dept. of Job Service*, 398 N.W2d 191, 194 (Iowa App. 1986); *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS*, 373 N.W.2d 509, 510 (Iowa App. 1985). Specifically, "[h]abitual tardiness, particularly after warning that a termination of services may result if the practice continues, is grounds for one's disqualification." *Higgins v. IDJS*, 350 N.W.2d 187, 192 (Iowa 1984)(quoting *Spence v. Unemployment Compensation Board of Review*, 48 Pa.Cmwlth. 204, 409 A.2d 500 (1979).

We have little trouble finding that this Claimant has a record of unexcused absences/tardiness. The Claimant had a history of missing work due to oversleeping. When he did this on January 30 this was the final straw. The Employer would have terminated the Claimant for this final incident alone, regardless of what happened the next two days. Thus had the Claimant done nothing but work as usual, until the supervisor could return to the office on the 2nd or 3rd he would have been discharged. And discharged for excessive absences and tardiness that is disqualifying. The fact that in the meantime the Claimant fell in the tub, missed a day, and then was no call/no show despite being released does not change this. The Claimant is still disqualified based on the January 30 tardiness in light of his record.

In addition, even if we found that the January 30 incident did not alone cause the discharge, we would disqualify the Claimant on the February 1 no call/no show. The record is clear that the fall took place on late night January 30, the hospital trip and release was January 31, and the Claimant then was no call/no show on February 1. This no call/no show is yet another unexcused absence, this time for failure to properly report the absence. Even if we assume the fall had something to do with this second day of absence, there is no reason to think that the Claimant, being released, was prevented by the *fall* from reporting the absence. This final absence is unexcused and, in light of the Claimants history (disregarding the legally excused absence of the 31st), the Claimant is disqualified for misconduct.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

DECISION:

The administrative law judge's decision dated May 5, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)(a).

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged

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John A. Peno

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Monique F. Kuester

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Elizabeth L. Seiser

RRA/fnv