

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**HAROLD L BREUKLANDER JR
114 S L ST
OSKALOOSA IA 52577**

**ENGINEERED PLASTIC COMPONENTS
1408 ZIMMERMAN DR S
GRINNELL IA 50112**

**Appeal Number: 05A-UI-08764-D
OC: 07/24/05 R: 02
Claimant: Appellant (4)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge
Section 96.4-3 - Able and Available
Sections: 96.5-5(b) – Workers’ Compensation Temporary Disability Benefits
871 IAC 24.13(3)d – Workers’ Compensation Temporary Disability Benefits

STATEMENT OF THE CASE:

Harold L. Breuklander, Jr. (claimant) appealed a representative’s August 16, 2005 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Engineered Plastic Components, Inc. (employer). After hearing notices were mailed to the parties’ last-known addresses of record, an in-person was held on September 20, 2005. The claimant participated in the hearing. Mark Fosnaught appeared on the employer’s behalf and presented testimony from one other witness, Steve Koch. During the hearing, Employer’s Exhibits One, Two, and Three were entered into

evidence. 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.

ISSUES:

Was the claimant discharged for work-connected misconduct? Is the claimant eligible for unemployment insurance benefits by being able and available for work? Is the claimant's eligibility affected by the receipt of workers' compensation benefits?

FINDINGS OF FACT:

The claimant started working for the employer on January 16, 2003. He worked full time as a press operator in the employer's plastic injection molding business on a Monday through Friday, 7:00 a.m. to 3:00 p.m. shift. His last day of work was March 24, 2005. The employer discharged him on May 24, 2005. The reason asserted for the discharge was excessive absenteeism.

The claimant had an initial surgery on March 10, 2005 for a work-related condition on his left hand. The claimant is left-handed. His doctor had the claimant attempt to work for two weeks thereafter doing one-handed work; however, when that proved to be a problem, the doctor took him off work completely as of March 24, 2005. The claimant had a second surgery in approximately mid-April 2005. On April 18, 2005, the claimant's doctor gave him a work restriction of "no work for 1 month." (Employer's Exhibit One.) This was provided to the employer either directly by the claimant or through the employer's workers' compensation carrier's caseworker. The employer therefore concluded that the claimant would be returning to work on May 19, 2005.

The employer has a seven-point attendance policy. The claimant had missed work on January 11, 2005 due to weather, and had also missed work on January 13, February 21, and March 8, 2005 due to illness. He was assessed one point for each of these absences, bringing him to four points. The claimant did not report for work on May 19, and the employer assessed him two points as a no-call, no-show, which would have brought him to six points. However, the employer's workers' compensation carrier's caseworker knew that the claimant would not be at work on May 19 because he had his 30-day follow-up examination with the doctor scheduled for that day. On May 19, the doctor released the claimant to return to work on May 23 for one-handed work for two weeks. (Employer's Exhibit Three.) This release was provided to the employer either directly or through the caseworker.

On May 23, the claimant called a third-shift supervisor at approximately 5:00 a.m. to report that he would not be in to work that day due to childcare issues. He followed up by calling Mr. Fosnaught at approximately 10:00 a.m. to make sure that the message had been forwarded. Mr. Fosnaught did not inform the claimant that he was considered to be at six points as of May 19 and that if he were absent on May 23 he would be at seven points and subject to discharge. The employer did assess one point for May 23, and when the claimant sought to report for work on May 24, he was discharged.

The claimant has been receiving workers' compensation benefits and as of the date of the hearing had not been released by his doctor for work without restriction; there was no work the claimant was able to do without using his left hand.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right 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 decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 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(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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. 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 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 for the absence under its attendance policy. Cosper, supra. While the final absence on May 23, 2005 was not related to properly reported illness or other reasonable grounds, the claimant's prior absences had been almost exclusively due to illness or injury; while the employer considered the absence on May 19 to be an unexcused no-call, no-show, the employer knew or should have known, and at least its agent, the workers' compensation carrier did know, that the claimant would be absent that day for medical reasons. 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.

The next issue in this case is whether the claimant is currently eligible for unemployment insurance benefits by being able and available for employment.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

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".

871 IAC 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 medical practitioner and has not been released as being able to work.

The claimant is not currently eligible as being able and available for work.

The final issue in this case is whether the claimant is eligible to receive unemployment insurance benefits due to receipt of workers' compensation temporary disability benefits.

Iowa Code section 96.5-5 provides:

An individual shall be disqualified for benefits:

5. Other compensation. For any week with respect to which the individual is receiving or has received payment in the form of any of the following:

a. Wages in lieu of notice, separation allowance, severance pay, or dismissal pay.

b. Compensation for temporary disability under the workers' compensation law of any state or under a similar law of the United States.

c. A governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment made under a plan maintained or contributed to by a base period or chargeable employer where, except for benefits under the federal Social Security Act or the federal Railroad Retirement Act of 1974 or the corresponding provisions of prior law, the plan's eligibility requirements or benefit payments are affected by the base period employment or the remuneration for the base period employment. However, if an individual's benefits are reduced due to the receipt of a payment under this paragraph, the reduction shall be decreased by the same percentage as the percentage contribution of the individual to the plan under which the payment is made.

Provided, that if the remuneration is less than the benefits which would otherwise be due under this chapter, the individual is entitled to receive for the week, if otherwise eligible, benefits reduced by the amount of the remuneration. Provided further, if benefits were paid for any week under this chapter for a period when benefits, remuneration or compensation under paragraphs "a", "b", or "c", were paid on a retroactive basis for the same period, or any part thereof, the department shall recover the excess amount of benefits paid by the department for the period, and no employer's account shall be charged with benefits so paid. However, compensation for service-connected disabilities or compensation for accrued leave based on military service, by the beneficiary, with the armed forces of the United States, irrespective of the amount of the benefit, does not disqualify any individual, otherwise qualified, from any of the benefits contemplated herein.

871 IAC 24.13(3)d provides:

(3) Fully deductible payments from benefits. The following payments are considered as wages; however, such payments are fully deductible from benefits on a dollar-for-dollar basis:

d. Workers' compensation, temporary disability only. The payment shall be fully deductible with respect to the week in which the individual is entitled to the workers' compensation for temporary disability, and not to the week in which the payment is paid.

The claimant's current workers' compensation benefits are such as to eliminate any residual eligibility for unemployment insurance benefits .

DECISION:

The representative's August 16, 2005 decision (reference 01) is modified in favor of the claimant. 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. The claimant is not qualified to receive unemployment insurance benefits as he is not able to work and available for work effective May 24, 2005 and due to the receipt of workers' compensation benefits. If and when those conditions change, he may present competent evidence of such fact change to the Agency either to the Claims Section or to a representative at a local Agency office for a review of his eligibility at that time.

ld/pjs