IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHANE NICHOLSON
Claimant

PIONEER HI-BRED INTERNATIONAL INC
Employer

APPEAL NO: 13A-UI-04985-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03-24-13
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 26, 2013, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 4, 2013. The claimant participated in the hearing. Adam Anderson, Production Location Manager; Dan Dehrkoop, Plant Operations Manager; Scott Proctor, Production Supervisor; and Steven Brooks, Production Coordinator; participated in the hearing on behalf of the employer. Employer's Exhibits One through Five were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time production technician for Pioneer Hi-Bred International from May 26, 2002 to March 25, 2013. He was discharged from employment for failing to properly report his absences after being warned.

The claimant worked from 6:00 a.m. to 2:30 p.m. The employer's attendance policy requires employees to call in to report any absence or incident of tardiness at least 30 minutes before the start time of their shift (Employer's Exhibit One). The policy further states, "If a pattern develops where you are habitually late or absent for your shift without approval, your PMD coach and/or direct supervisor/coordinator may initiate Pioneer's progressive discipline policy" (Employer's Exhibit One).

On November 19, 2012, the claimant received a performance improvement plan (PIP) stating the employer's attendance policy expectations and reiterating the employer's concerns about the claimant's attendance (Employer's Exhibit Two). On October 15, 2012, the claimant did not notify the employer he would be tardy until 7:30 a.m. He indicated his phone was turned off and

his alarm did not go off. He stated he understood the employer's policy requiring employees to call in 30 minutes before the start of their shift. On October 16, 2012, the claimant called in at 8:05 a.m. to report he was ill and would not be at work. On November 10, 2012, the claimant was ten minutes late without calling in to report his tardiness. On November 16, 2012, the claimant called the employer at 6:30 a.m. to state he was ill and would not be at work. On November 17, 2012, the claimant called the employer at 7:15 a.m. to report he was ill and would not be at work. On November 19, 2012, the employer issued the claimant the PIP and after discussing the claimant's late calls the claimant apologized and stated he "knew he was in the wrong" and explained he had "some things at home that have been bothering him (Employer's Exhibit Two). The claimant stated he had been drinking again and acknowledged that needed to change (Employer's Exhibit Two). He indicated he would call 30 minutes prior to the start of his shift and improve his attendance (Employer's Exhibit Two). The employer mentioned the Pioneer Employee Assistance Program (EAP) and printed the number for the claimant (Employer's Exhibit Two).

On March 1, 2013, the claimant received a written warning regarding his attendance and failure to properly report his absences (Employer's Exhibit Three). On January 2, 2013, the employer discussed with the claimant the fact he had not requested paid time off (PTO) through the employer's system for December 26, 27 and 28, 2012 (Employer's Exhibit Three). The claimant stated he thought the week was covered by the administrative staff and the employer said that only December 24 and 25, 2012, were covered by the office and that had been explained to employees during a plant update (Employer's Exhibit Three). On February 4, 2013, the claimant called in at 8:00 a.m. for a PIL day (Employer's Exhibit Three). On February 5, 2013, the employer spoke to the claimant again regarding its concerns about the claimant's attendance and asked the claimant if he clearly understood the policy (Employer's Exhibit Three). He indicated he did (Employer's Exhibit Three). On February 22, 2013, the claimant called in at 7:08 a.m. to ask if he could take a PIL day (Employer's Exhibit Three). The employer issued the written warning March 1, 2013, and listed its performance expectations including that the claimant accurately enter all hours worked at the end of each shift on a daily basis and that he would properly notify the employer of any absences or incidents of tardiness (Employer's Exhibit Three). The warning also informed the claimant of the employer's Employee Assistance Program (EAP). The claimant signed the warning (Employer's Exhibit Three).

The claimant received a final written warning March 13, 2013. On March 6, 2013, the claimant was absent and did not call the employer. Production Coordinator Steve Brooks called the claimant at 8:45 a.m. and the claimant called the employer back much later in the day to state he would not be at work that day. On March 7, 2013, the claimant called after 8:30 a.m. to say he would not be at work. Plant Operations Manager Dan Dehrkoop talked to the claimant and he stated he was not in a position to call until after 8:30 a.m. but did not provide any further detail. On March 13, 2013, the employer met with the claimant and told him attendance and properly reporting his absences was a condition of employment. He was also told if he did not show sustained improvement it could lead to termination. The employer reviewed the employer's call-in expectations. Additionally, the warning stated if the claimant believed his absences were due to personal illness he might qualify for benefits under the Family Medical Leave Act and/or Short Term Disability and reminded him of the availability of EAP.

After the claimant received the final written warning Production Location Manager Adam Anderson met with the claimant outlining the employer's concerns and asked him if there was anything the employer could do to help him. They discussed alarm clock issues and the EAP. The claimant stated his attendance and call-in procedures would improve.

On March 20, 2013, the claimant was considered a no-call no-show because he failed to call the employer and report his absence until 3:30 or 4:00 p.m. The employer documented 11 occurrences between October 15, 2012 and March 20, 2013, when the claimant failed to properly report his absences. The employer terminated the claimant's employment March 25, 2013.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 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 Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982).

The issue in this case is the claimant's failure to properly report his absences to the employer in a timely manner. (Emphasis added). The employer requires that employees call the employer at least 30 minutes prior to the start of their shift to report they will be absent or tardy. That is not an unreasonable policy as the employer has to allocate its workforce for each day. The claimant was repeatedly told and received a PIP, written warning and final written warning, regarding his failure to call in to report his absence or incidents of tardiness at least 30 minutes before the start time of his shift, but despite those warnings the claimant's behavior did not improve. After receiving the final written warning March 13, 2013, the claimant was a no-call no-show March 20, 2013, as he did not call the employer to report his absence until

approximately 3:30 p.m. The claimant had been warned but still had 11 improperly reported absences, including his last absence March 20, 2013. The employer has 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, in combination with the claimant's history of improperly reported absenteeism, is considered excessive. Consequently, the administrative law judge concludes the claimant's actions rise to the level of intentional, disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The April 26, 2013, reference 01, decision is reversed. The claimant was discharged from employment due to excessive, unexcused, improperly reported, absenteeism. 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 has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/pjs