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

ERIC R LIDGETT	:	
	:	**HEARING NUMBER:** 11B-UI-03202
Claimant,	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
TOM'S ELECTRIC & GRAIN EQUIP	:	

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: 96.5-2-A, 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:

Eric Lidgett (Claimant) worked for Tom's Electric & Grain Equipment (Employer) as a full-time laborer on from May 9, 2005 until he was fired on of January 31, 2011. (Tran at p. 2-3; p. 4; p. 13).

In 2010. the Claimant was late 27 times in between January and September 2010. (Ex. 1). Over this same period he was absent, excluding absences for illness, five times. (Ex. 1). In August 12, 2010 the Claimant was warned for personal use of his cell phone, and for excessive absenteeism. (Ex. 4). On October 4, 2010 the Claimant received a written warning over his attendance. (Ex. 3).

The Claimant suffered a job-related injury on October 5, 2010, and he was off work until his return on November 29. (Tran at p. 3; p. 13). Claimant was restricted by his doctor to light-duty, sit-down work. (Tran at p. 2).

In December, 2010, the Claimant was absent eight times (at least). (Ex. 1). Three of these absences were in the first week of December, 2010. (Ex 1). On December 7, 2010, the Claimant received a written warning for not showing up for work and not being truthful about appointments. (Tran at p. 9; p. 10 [untruthful about therapy]; p. 18; Ex. 2). He was warned that if he kept missing work he could be fired. (Tran at p. 9). The Employer's records show Claimant was absent (gone), reported to work late, or left early on 16 occasions after the warning leading up to January 25. (Ex. 1). Of these, seven were absences. (Ex. 1). This attendance figures do not include absences due to illness or bad weather. (Tran at p. 9-10).

The Claimant clocked out early on January 25, 2011 without completing his assigned tasks, and without required permission. (Tran at p. 6-7; p. 11; p. 18; Ex. 1). On January 26 and 27, 2011 the Claimant was absent because he had no ride to work. (Tran at p. 5; p. 7; p. 15; Ex. 1). He did not call in these absences. (Tran at p. 11; p. 18).

On January 31, the Claimant was to attend the annual employee meeting and his evaluation on January 31. (Tran at p. 7). He received permission to arrive at work at 7 a.m., but leave at 9 a.m. to go to court. (Tran at p. 7; p. 8; p. 12; p. 13). The Claimant did not, however, come to work because he had no ride. (Tran at p. 7; p. 12). At about 7:05 a.m. President Muenchrath called the Claimant to confront him about missing work. (Tran at p. 2). During this conversation, Mr. Muenchrath gave the Claimant the opportunity to quit. (Tran at p. 4; p. 17). The Claimant refused. (Tran at p. 17). Mr. Muenchrath then fired the Claimant for his poor attendance. (Tran at p. 4, ll. 33-34).

REASONING AND CONCLUSIONS OF LAW:

Legal Framework: Iowa Code Section 96.5(2)(a) (2011) 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 determination of whether an absence is unexcused because not based on reasonable grounds does not turn on requirements imposed by the employer. *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007). For example, an employer may not deem an absence unexcused because the employee fails to produce a physician's excuse. *Id.*

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). A final warning or last chance agreement may operate to reduce the protections of a claimant as compared to other employees. *Warrell v. Iowa Department of Job Service*, 356 N.W.2d 587 (Iowa App. 1984). 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).

Effect of Refusing To Quit: As we have found the Claimant was fired for his attendance record. The Claimant was not fired for refusing to quit. He was given the opportunity to quit precisely because of his dismal attendance record. He refused and then, of course, was fired for the same reason he had been asked to quit. Under the rules, if "[t]he claimant was compelled to resign when given the choice of resigning or being discharged", then "[t]his shall not be considered a voluntary leaving." 871 IAC 24.26(21). In such cases, the issue of misconduct is addressed. *Flesher v IDJS,* 372 N.W.2d 230 (Iowa 1985). But if misconduct is the issue when a Claimant does quit when given the option, then misconduct is still the issue if a Claimant refuses to quit and opts to be fired instead. The fact that the Claimant refused to quit does not turn this termination into a termination over not quitting. The offer to quit or be fired was made because of the attendance, thus a separation resulting from either option would be because of attendance. Either way the question is whether the Employer can show misconduct.

Unexcused: The first step in our analysis is to identify which of the absences were unexcused. We must also determine whether the final tardiness which caused the absence was unexcused. Again an absence can be unexcused because not for reasonable grounds or because not properly reported.

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We have found credible the Employer's testimony that the Claimant did not call in on the 26th and 27th, and that the Claimant did not finish his assigned work before leaving on the 25th. We also find credible the evidence that the Claimant was supposed to come in on the 31st, and only had permission to be off at 9:00 – which is all that was required for court. Since the Claimant did not properly report these incidents, they are not excused. Furthermore, the court has found unexcused "personal problems or predicaments", other than sickness or injury. Those include oversleeping, delays caused by tardy babysitters, **car trouble**, and **no excuse**." *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984)(emphasis added). Generally lack of transportation is not reasonable grounds for missing work. Accordingly, we find the absences for the 25th, 26th, 27th, and 31st to be unexcused.

We also find the unexplained absences in the Employer's Exhibit One to be unexcused. The Employer testified that weather and illness would not be reported as an absence or a tardy. This being the case, the record supports that all these absences are unexcused. *Spragg v. Becker-Underwood*, Inc. 672 N.W.2d 333, 2003 WL 22339237*3 (Iowa App. 2003); *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984)("no excuse" not an excused absence).

Excessiveness: Having identified the unexcused absences, including the final one, we now ask whether the attendance problems were excessive. The Claimant had one unexcused early departure, followed by three unexcused absences in four days. This alone is excessive. The Courts have found lesser absenteeism to be excessive. In *Higgins v. IDJS*, 350 N.W.2d 187, 192 (Iowa 1984), Ms. Higgins had seven unexcused absences in five months. In *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984), the record showed five absences and three instances of tardiness – the last two being for three minutes and one minute late - over eight months. *Infante* at 264, p. 267. This was "sufficient evidence of excessive unexcused absenteeism...to constitute misconduct." *Infante* at 267. In *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007) the Court was faced with a claimant who had eight absences over a eight-month period. The claimant argued that of her eight absences most were excused under the law. The Court of Appeal found it unnecessary to address this argument, since three of the absences, over a period of eight months, were unexcused. "[W]e find the three absences constitute excessive unexcused absenteeism." *Armel* slip op. at 5. The Claimant had more absences in a single week than Ms. Armel had over the entire 8 months. These were excessive even without considering the Claimant's history.

When the Claimant's dismal attendance record is added in, misconduct is even more clearly shown. Here the Petitioner's history, worse than that of *Infante*, *Higgins*, and *Armel* shows repeated absences, tardiness, and early departure followed by warnings. Since his absences far exceed those of in any of these cases, we feel confident in concluding that the Claimant's unexcused absences were excessive. This is so even excusing all the "left early" incidents.

Nor does our opinion change because the owner was unaware of the court date when the Claimant was fired. We have found credible that the Claimant was *not* excused from his meeting, and that he was expected to be at work at 7:00. When he was not there, as required, he was fired. He was fired for not being there at 7:00. It is of no moment that he was excused to leave at 9:00 – he was not fired for leaving at 9:00, he was fired for not coming at 7:00 in the context of his bad attendance record. The Claimant is disqualified for excessive absenteeism.

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.

b. However, if the decision is subsequently reversed by higher authority:

(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 April 6, 2011 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/kk