

**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**

**SHAWN P FAHEY  
3604 ROLLINS AVE  
DES MOINES IA 50312**

**SHAW ELECTRIC INC  
930 E RIVER DRIVE  
DAVENPORT IA 52803-5737**

**Appeal Number: 05A-UI-08512-RT  
OC: 06-19-05 R: 02  
Claimant: Respondent (2)**

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting  
Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 - Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer in appeal number 05A-UI-07442-RT, Shaw Electric, Inc., filed a timely appeal, from a decision by an authorized representative of Iowa Workforce Development dated July 14, 2005, reference 02, allowing unemployment insurance benefits to the claimant, Shawn P. Fahey. However, Mr. Fahey left Shaw Electric, and immediately went to work for the employer, Light Expressions on or about January 1, 2005 and then separated from that employer. The claimant was allowed unemployment insurance benefits as a result of his separation from Light Expressions by decision dated July 14, 2005, reference 01. Because of statements by Iowa Workforce Development, Light Expressions did not appeal that decision, but rather Shaw Electric appealed the decision as set out above. After due notice was issued, a telephone hearing was held on August 18, 2005, for the appeal involving the employer, Shaw Electric, Inc.

The claimant participated in that hearing. Dan Freeman, Safety and Human Resources Manager for Shaw Electric, Inc., and Cynthia Carson, Manager of Light Expressions, participated in the hearing for Shaw Electric, Inc. The parties agreed to permit the administrative law judge to take evidence on and decide the separation from both employers, Shaw Electric, Inc., and Light Expressions. Because the separation from Light Expressions occurred later and a decision was issued on that separation, a new appeal was established for that separation, which is this appeal, 05A-UI-08512-RT. The hearing for this appeal is consolidated with the hearing for appeal number 05A-UI-07442-RT for the purposes of the hearing so the administrative law judge can address the separation from Light Expressions. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Claimant's Exhibit A was admitted into evidence. Leah Van Wauf, Human Resources and Benefits Manager, was available to testify for the employer, but not called because her testimony would have been repetitive and unnecessary.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer, Shaw Electric, Inc., from March 14, 2003, until he immediately went to work for a new business established by the employer, Light Expressions, on January 1, 2005. The claimant then worked for Light Expressions until he was separated from his employment on June 15, 2005. There was no lapse in the claimant's employment between Shaw Electric, Inc., the employer herein, and Light Expressions.

On June 9 and 10, 2005, the claimant was absent from work. He called and spoke to the manager of Light Expressions, Cynthia Carson, on June 9, 2005. The claimant explained that he was assigned to bed rest for two days, June 9 and 10, 2005, and that thereafter he would have to be on light duty for the following week. The claimant intimated that his absences were due to a work related injury. Ms. Carson told the claimant that she had at least a half a day of work on Monday, June 13 involving paperwork, which would be light duty. The claimant acknowledged this and indicated that he would come to work for that. Ms. Carson then called the employer's witness, Dan Freeman, Safety and Human Resources Manager, about the potential job related injury of the claimant. On Friday, June 10, 2005, Mr. Freeman called Light Expressions and the claimant was there delivering a doctor's excuse as shown at the first page of Claimant's Exhibit A. Mr. Freeman asked the claimant why he was absent on June 9 and 10, 2005. The claimant explained that he had a doctor's excuse for those two days. The claimant indicated that he was off work for a work related injury. Mr. Freeman explained to the claimant that he would have to go see an employer's physician and had already had an appointment set up for 4:00 p.m. on June 10, 2005. To accommodate the claimant, Mr. Freeman changed the location of the doctor's appointment, but it remained at 4:00 p.m. on June 10, 2005. The claimant indicated that he would go to the doctor's appointment. However, the claimant did not go to the doctor's appointment. Mr. Freeman was called by the employer's physician at 4:45 p.m., on June 10, 2005, and who told Mr. Freeman that the claimant had not shown up for his appointment. Mr. Freeman then attempted to call the claimant on June 10, 11, and 13, 2005, without success but left messages for the claimant. The claimant was out of town from June 11, 2005 through June 15, 2005, visiting his grandmother, who was ill. When the claimant returned his back was hurting. On June 17 or 20, 2005, the claimant called Mr. Freeman and left a voice mail message indicating that he had heard that he had been replaced and the claimant made certain threats. However, the claimant was not replaced by the employer until June 27, 2005. Sometime on or about June 18, 2005, the claimant left a note for Ms. Carson

indicating that he was out of town and told her that he did not have to go to see the company doctor. When the employer had not heard from the claimant during the week of June 13 through the 17, 2005, the employer treated the claimant as a voluntary quit. On June 20, 2005, the claimant returned to work and was told by Ms. Carson that since he was a no-call, no-show the prior week, he was considered as a voluntary quit and did not have a job.

Pursuant to his claim for unemployment insurance benefits filed effective June 19, 2005, the claimant has received unemployment insurance benefits in the amount of \$2,826.00 as follows: \$314.00 per week, for nine weeks, from benefit week ending June 25, 2005 to benefit week ending August 20, 2005.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from his employment with Light Expressions was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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.

The first issue to be resolved is the character of the separation from the employer, Light Expressions. The employer maintains that the claimant left his employment voluntarily when he failed to show up for work from June 9, 2005 through and including, June 17, 2005, and did not notify the employer. The claimant claims that he was discharged on June 16, 2005, when a co-worker informed him that he had been replaced. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant left his employment voluntarily effective June 15, 2005, when he failed to show up for work on and after June 9, 2005. The employer's witness, Dan Freeman, Safety and Human Resources Manager for Shaw Electric, Inc., so credibly testified. His testimony was confirmed by the employer's other witness, Cynthia Carson, Manager of Light Expressions. The claimant's testimony to the contrary is not credible for reasons set out below. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily on June 15, 2005. The issue then becomes whether the claimant left his employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that he has left his employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The claimant really gave no reasons for leaving his employer. The claimant conceded that he was absent from his employment on June 9, 2005 and hereafter, and seems to agree that he did not notify the employer from June 13, 2005 through and including, June 17, 2005 of his absences. This is not good cause attributable to the employer

The claimant testified that he was injured and was on bed rest for two days, June 9 and 10, 2005, and then was to be on light duty for a week, from June 13, 2005 to June 17, 2005. This is set out in the first page of Claimant's Exhibit A, which is a progress note from his physician. It may well be that the claimant's physician had prescribed such absences. However, the claimant's testimony is not credible. Although assigned to bed rest for two days, on June 10, 2005, the claimant went to the location of the employer to deliver the doctor's excuse, which is the first page of Claimant's Exhibit A. The claimant testified that he did not drive, but his wife drove. The claimant had no explanation as to why, if he was bed ridden, his wife could not

have taken the doctor's excuse for him and the claimant could have stayed in bed. It appears to the administrative law judge that the claimant was clearly not bed ridden. Although the claimant admitted that he was at the employer's location on June 10, 2005, he denied speaking to Mr. Freeman. However, Mr. Freeman's testimony is more credible than that of the claimant's and the administrative law judge concludes that the claimant did speak to Mr. Freeman. Mr. Freeman's testimony is confirmed by the testimony of Cynthia Carson, Manager of Light Expressions. She testified that Mr. Freeman told her that he had spoke to the claimant. She did not testify first hand but Ms. Carson is a "telling" witness meaning that Mr. Freeman told her that he had called the claimant and this supports Mr. Freeman's testimony and erodes the credibility of the claimant. The claimant's testimony about his physical condition is further eroded because the claimant testified that he was out of town from June 11 through the 15, 2005 to see his grandmother, who was supposed to be ill.

From June 11 through June 15, 2005, the claimant did not call the employer. The claimant testified that he called Mr. Freeman on June 16, 2005, but Mr. Freeman denied this and the administrative law judge concludes that the claimant did not make that telephone call. The first Mr. Freeman heard from the claimant was a telephone message that the claimant left on June 17, or 20, 2005, which Mr. Freeman received on June 20, 2005. At that time, the claimant was threatening Mr. Freeman because he had heard that he had been replaced. However, the claimant had not been replaced until June 27, 2005. All the parties seem to agree that the claimant came to work on June 20, 2005, and was informed that he was treated as a voluntary quit, because he was a no-call, no-show for the prior week.

The claimant did speak to Ms. Carson on June 9, 2005. The claimant testified that he told Ms. Carson he was going to be off work on June 9 and 10, 2005, and then on light duty the following week. The claimant testified that Ms. Carson told him that she had nothing for him and he did not need to come into work. This is not credible. Ms. Carson credibly testified that she specifically told the claimant that she had a half a day of paperwork to do on Monday, June 13, 2005, and that the claimant acknowledged that and indicated that he would be at work. The claimant then failed to show up for work that week. When the claimant spoke to Mr. Freeman on June 10, 2005, Mr. Freeman informed the claimant that he had an appointment with the employer's doctor, concerning his injury, which at that time the claimant indicated was job related. The claimant told Mr. Freeman that he would attend that doctor's appointment, but never did so. The claimant now denies this conversation, but the administrative law judge concludes that such conversation did occur and that the claimant had a doctor's appointment with the employer's physician at 4:00 p.m. on June 10, 2005, but simply failed to attend the appointment. Mr. Freeman remembers this well, because Mr. Freeman credibly testified that he changed the location of the claimant's appointment to accommodate the claimant, but the time of the appointment remained the same.

For all the reasons set out above, the administrative law judge concludes that the claimant's testimony is not credible and therefore, the administrative law judge is constrained to conclude that the claimant left his employment voluntarily on June 15, 2005, when he failed to report to work for three days in a row and did not notify the employer and that his quit was without good cause attributable to the employer. Therefore, the administrative law judge concludes that the claimant is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism and would still be disqualified to receive unemployment

insurance benefits. The claimant had seven absences from June 9, 2005 through June 17, 2005. As set out above, at least five of these absences were not properly reported to the employer and the administrative law judge is not convinced that these absences were for personal illness or injury. For two days the claimant was supposed to be bed ridden but didn't remain in bed. For five days, the claimant was supposed to be on light duty, but went to see his grandmother. Under the evidence here the administrative law judge is constrained to conclude that the claimant's absences were not for reasonable cause or personal illness or injury and not properly reported and would be excessive unexcused absenteeism and disqualifying misconduct. Therefore, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for excessive unexcused absenteeism, which is disqualifying misconduct and the claimant would still be disqualified to receive unemployment insurance benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,826.00 since separating from the employer herein on or about June 15, 2005 and filing for such benefits effective June 19, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

#### DECISION:

The representative's decision of July 14, 2005, reference 01, is reversed. The claimant, Shawn P. Fahey, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he left his employment voluntarily without good cause attributable to the employer. The claimant is overpaid unemployment insurance benefits in the amount of \$2,826.00.

dj/pjs