IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JONATHAN R COWELL
Claimant

ELITE STONE FABRICATIONS LLC
Employer

APPEAL NO. 13A-UI-13674-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/03/13
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed an appeal from the December 4, 2013 (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 6, 2014. Claimant participated. Employer participated through CEO William DeJong and operations manager Ronald Humbert. Supervisor Hudson Whitney and Dustin Guitierrez were not available to participate. Employer's Exhibits 1 through 5 were received. Claimant's Exhibit A was received.

ISSUES:

Was the claimant discharged for disqualifying job related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a granite shop polisher February 25, 2013, and was separated from employment on October 25, 2013. On October 24, he reported for work. Whitney was absent that day. After an hour or two he told acting supervisor Gutierrez he had to leave because his 12-year-old cousin with Down Syndrome ran away from home. Gutierrez said he could leave. Humbert called claimant a couple of hours later. Claimant told him he did not know if he would be able to make it back to work that day. Humbert told him they needed him at work but did not tell him he would be fired if he did not report or that he was being issued a warning about attendance. (Employer's Exhibit 3) Claimant testified he was willing to accept a suspension because had to find his cousin. Later that day he told Humbert he was at the hospital in Davenport with his cousin but anticipated being at work the following day. On October 25, Humbert got a message from claimant saying he had been at the hospital until 11 p.m. the night before arriving home about 1 a.m. and was "worn down" but would be in later. Humbert called him and left him a voice mail to go to work or more serious disciplinary action would be taken. Claimant called Humbert later in the day to say he was unable to report because he was still

tired from the day before but would report on Monday. Humbert told him he did not need to report to work on Monday as he was discharged.

He had been warned in writing on August 29, 2013, about being two and a half hours tardy for work due to oversleeping. (Employer's Exhibit 2) On September 16, 2013, he was warned about missing work on September 12, to get his girlfriend out of jail (rather than making her wait until he was done with work at 4 or 5 p.m.). (Employer's Exhibit 3) The claimant did not provide the employer with medical excuses or notes from absences on April 29, June 10 and 11, June 25, August 15, or October 7, 2013, when he claimed to be absent or tardy for medical reasons. Whitney allowed him to leave early due to illness on June 10. On June 25 he was tardy because of an MRI, but the employer had not received a copy of the note. (Claimant's Exhibit A) Whitney approved him leaving early the same day for his parents' anniversary and sister's birthday celebration. On August 26, he was late 3 hours 45 minutes for an hour early start and he was 2 hours 30 minutes late for another early shift start on August 29. The employer did receive a medical note for October 10 and 11. Claimant brought a medical excuse for his first absence on March 11, without having been asked to do so. He had other verbal counseling about missing work to take his mother to the doctor, rather than having someone else handle that for him so he could work.

The administrative record reflects that claimant has received unemployment benefits in the amount of $4,030.00, since filing a claim with an effective date of November 3, 2013, for the 13 weeks ending February 1, 2014. The administrative record also establishes that the employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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 Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits.

An employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. While the claimant's absence to help find his cousin was an excusable absence due to the emergency nature of the situation, his last absence the following day because he was "worn down" and tired from the search and visiting his cousin at the hospital into the late evening, was not an excusable absence, since the fatigue was of his own making as he could have returned home earlier. 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 unexcused absenteeism, is considered excessive. Benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
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> a. 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.
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> b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.
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> (2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

871 IAC 24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
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> (1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.
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> (2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.
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> (3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.
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> (4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. 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 if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The December 4, 2013, (reference 02) decision is reversed. Claimant was discharged from employment due to excessive, unexcused 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 been overpaid unemployment insurance benefits in the amount of $4,030.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs