IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

TYRONE D SMITH
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 18A-UI-00203-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/03/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment
Section 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

Tyrone Smith (claimant) appealed a representative's December 20, 2017, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Tyson Fresh Meats (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 25, 2018. The claimant participated personally. The employer participated by Katie Schoepske, Associate Human Resources Administrator. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the appeal was filed in a timely manner and, if so, whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on July 25, 2016, as a full-time production worker. He worked from 6:00 p.m. to 6:00 a.m. The claimant signed for receipt of the employer's handbook when he was hired. He understood that if he accumulated ten attendance points in a rolling twelve-month period, he could be terminated. He also understood the employer would issue him a written warning, a two-day suspension, and a three-day suspension before it would terminate him. On March 31, 2017, the employer issued the claimant a written warning for having accumulated six attendance points.

The claimant was absent due to illness on December 16, 23, 2016, March 2, March 30, and November 1, 2017. The employer assessed the claimant one point for each day the claimant was absent. The claimant always clocked in to work on time but once, on April 21, 2017, he arrived at his start up meeting one minute late. His supervisor assessed the claimant 0.5 point. Other employees arrived later but were not assessed points. The claimant was on time to his meeting on July 25, 2017, but the supervisor assessed the claimant 0.5 point for being late. On

July 6, 2017, the claimant was absent due to personal family business. The claimant had accumulated a total of seven attendance points.

On November 29, 2017, the claimant injured his finger at work. He immediately reported to his supervisor that he thought he broke his finger. The supervisor asked him questions about the injury and noted the swelling but did not send the claimant to the nurse or fill out a first report of injury. After work the claimant was in pain and took hydrocodone pills he had at home from an old injury. The claimant reported his absence due to a work-related injury on November 30, 2017. The call was late because the pills caused him to sleep longer. The employer assessed the claimant three points for his absence on November 30, 2017, because of the late call.

On December 2, 2017, the employer terminated the claimant. The claimant complained that he was terminated for absence related to a work-related injury. The supervisor admitted he did not report the injury and the employer's policy was to take an injured employee to the nurse. The employer did not reverse the claimant's termination.

A disqualification decision was mailed to the claimant's last known address of record on December 20, 207. He did receive the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by December 30, 2017. The claimant went to the agency to file an appeal on December 22, 2017. The appeal did not transmit. The claimant attempted another appeal on January 5, 2018, when he learned the appeal did not go through. The appeal was not filed until January 5, 2018, which is after the date noticed on the disqualification decision.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of

> the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant timely appealed the decision with the help of the agency on December 22, 2017, but the appeal was not transmitted properly. The January 5, 2018 appeal shall be accepted as timely.

The next issue is whether the claimant was discharged for misconduct. The administrative law judge concludes he was not.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Unreported absences do not constitute job misconduct if the failure to report is caused by mental incapacity. *Roberts v. Iowa Department of Job Service*, 356 N.W.2d 218 (Iowa 1984). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was reported late. The claimant's absence does not amount to job misconduct because the claimant could not properly report his absence. He was trying to treat himself for an injury for which the employer's nurse or doctor should have supplied treatment. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The December 20, 2017, reference 01, decision is reversed. The appeal in this case was timely. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs