ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on November 1, 2004. He worked full time as a material handler in the employer's cabinetry manufacturing business. His last day of work was September 22, 2005. The employer discharged him on that date. The reason asserted for the discharge was attendance.

The claimant has received a coaching on attendance on February 25, 2005; a written warning on attendance on March 24, 2005, and a final warning on attendance on April 11, 2005; the final warning indicated that the claimant could have no further occurrences until February 9, 2006 or he would be discharged. The claimant did have a further absence in mid-August relating to a hospitalization; however, other than requiring the claimant to use his last two hours of personal time for coming in late on August 17 and requiring him to work the rest of that day despite his protest of being ill (the claimant was not hospitalized until after completing work that day), the employer took no other action at that time.

The prior disciplines had been based on the claimant calling in sick on February 9 and February 18, 2005. There were two more occurrences on March 18 and March 29, 2005, but neither the employer nor the claimant could provide information as to what those incidents were. There may have been other times the claimant missed all or parts of days that were covered by personal time or the three "free tardies" the employer allows per year.

The final incident occurred on September 22, 2005. The claimant has a seizure disorder, and is not permitted to drive. Most days the claimant got a ride from another employee. On September 22, his normal avenues of transportation were not available to him, and his father drove him to work. However, his father was pulled over for speeding. The claimant punched in between three and six minutes late. As a result, he was discharged.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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(1)a provides:

> Discharge for misconduct.
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> (1) Definition.
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> 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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Here it is not possible to determine whether the prior occurrences relied upon by the employer in determining to discharge the claimant were unexcused for purposes of unemployment insurance law. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline for the absence under its attendance policy, so clearly the February 9 and February 18, 2005 absences are excused. Cosper, supra.

While the employer may choose to follow a "no-fault" attendance policy for good business reasons, for purposes of establishing a discharge for misconduct, the employer must be able to show that the remaining occurrences on March 18 and March 29, 2005 were not for illness or some other reason that would be excused under unemployment insurance law; the employer cannot meet this burden. Further, under the circumstances of this case, the claimant's final tardy was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's October 13, 2005 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/pjs