

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHAEL N SNELL**  
Claimant

**APPEAL NO. 08A-UI-00766-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GRAY TRANSPORTATION INC**  
Employer

**OC: 12/16/07 R: 03  
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism  
Iowa Code § 96.6(2) – Timeliness of Appeal

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the January 11, 2008, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on February 6, 2008. Claimant participated. Employer participated through Darrin Gray. Department's Exhibit D-1 was received.

**ISSUE:**

The issue is whether claimant's appeal was timely and if so, whether he was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to claimant's last-known address of record on January 11, 2008. Claimant received the decision on January 14, 2008. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by January 21, 2008, which was a state and federal holiday, thus giving claimant until January 22, 2008 to file a timely appeal. He went into the local office and completed his appeal on January 22 and presented it for the local office to mail. The local office representative did not indicate receipt on the face of the appeal where designated and simply mailed the appeal on January 23 as indicated by the postage meter mark. (Department's Exhibit D-1).

Claimant was employed as a full time shag driver from March 25, 2005 until December 17, 2007 when he was discharged. He was a no-call/no-show on December 17. Claimant apparently did not have his cell phone with him so looked up the number of the client Tyson in the phone book and reported his absence to it rather than the employer Gray Transportation. Employer attempted to reach him several times that morning and finally sent a text message he was terminated. Claimant did not respond to the text message. Employer had issued a written warning to claimant about attendance on August 7, 2007 in addition to earlier undocumented

verbal warnings for not reporting absences, tardiness and failure to return from lunch at all or on time.

**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 § 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, subsection 10, 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 filed an appeal in a timely manner at the local office, which did not mail it in a timely fashion or acknowledge receipt on the designated place on the appeal form on the date of submission to the local office. Therefore, the appeal shall be accepted as timely.

The remaining issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits. The administrative law judge concludes that he was.

Iowa Code § 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(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 Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

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. Claimant failed to properly notify employer of his last absence, which rendered it unexcused even though it was related to illness. Employer has established that the claimant was warned earlier that further unexcused absences could result in termination of employment. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

**DECISION:**

The January 11, 2008, reference 01, decision is affirmed. The claimant's appeal is timely and he 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.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/css