**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**JOEL GONZALEZ**
Claimant

**CNH AMERICA LLC**
Employer

**APPEAL NO: 16A-UI-07449-JE-T**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 01/03/16**
**Claimant: Respondent (2)**

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the June 28, 2016, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 26, 2016. The claimant participated in the hearing. Joyce Stimpson, Human Resources Representative, participated in the hearing on behalf of the employer. Employer's Exhibit One was admitted into evidence.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time assembly repairman for CNH America from January 10, 2011 to June 7, 2016. He was discharged from employment due to a final incident of absenteeism that occurred on June 6, 2016.

The employer uses a no-fault, point based attendance policy and employees are discharged upon reaching eight points within a 12-month rolling calendar year. Each full-day absence is assessed one point if the employee calls in at least 30 minutes prior to the start of his shift. If he fails to call within that time frame an additional .50 points is added to his total. Consecutive days absences due to illness that are properly reported are assessed one point for the total number of days missed.

The claimant's absences spanned two union contracts. The new contract went into effect May 23, 2016. Previously, an employee received a verbal written warning upon reaching four attendance points; a written warning upon reaching five attendance points; a final written warning upon reaching six attendance points; a five-day suspension upon reaching seven attendance points; and a termination notice upon reaching eight attendance points. Under the new contract, the changes revolved around the type of discipline issued for an employee that

reached six and seven points. After May 23, 2016, instead of a final written warning for reaching six attendance points the employee receives a three-day in-house suspension and instead of a five-day suspension for reaching seven attendance points the employee receives a five-day suspension but serves three of those days in-house. The new contract also changed the time allowed for an employee to be considered tardy and receive .50 points from one hour to two hours.

On June 1, 2016, each employee received a personal absence allowance which could be used with 24 hours' notice. Under the new contract, employees also received an emergency day that can be used on an emergency basis if the employee does not have 7.00 or 7.50 points and notifies the employer at least 30 minutes prior to the start time of his shift.

Employees were notified of the new contract changes through television screens located throughout the facility. The employer sent out a "highlighter" that showed the changes in discipline for the seventh and eighth occurrences and the change in points for tardiness (Employer's Exhibit One). The highlighter did not address the emergency day off (Employer's Exhibit One).

The claimant was .72 hours tardy August 17, 2015, and received .50 point; he was 1.70 hours tardy September 17, 2015, and did not call the employer at least 30 minutes prior to the start of his shift and received 1.50 points; on November 11, 2015, he called in and reported he was ill but did not call at least 30 minutes prior to the start of his shift and received 1.50 points; he was absent November 12, 13 and 16, 2015, but did not receive any points because he was absent consecutive days after receiving 1.50 points for his absence November 11, 2015; he was absent for personal reasons December 11, 2015, and received 1.00 point; he was absent January 25 and 26, 2016, and received 1.00 point for that absence; and the claimant called and reported he was ill March 17, 2016, and received 1.00 point for that absence for a total of 6.50 points. On June 6, 2016, the claimant's alarm clock was not plugged in and when he woke up he had to charge his phone in his car. He called the employer after the start time of his shift. When he called he stated he wanted to use his emergency day off but because he did not call in at least 30 minutes prior to the start of his shift, as required for an emergency day, he was assessed .50 points which placed him at 7.00 points. When an employee has 7.00 or 7.50 points he is not allowed to use his emergency day off.

The claimant previously received a verbal written warning, a written warning, and a final written warning prior to November 17, 2015, at which time he received a three-day suspension because he was at 6.50 points for the rolling calendar year. On December 14, 2015, the claimant received a five-day suspension because he had accumulated 7.50 points for the rolling calendar year. Points dropped off February 19 and May 11, 2016.

The claimant has claimed and received $2,586.00 in unemployment insurance benefits for the six weeks ending July 23, 2016.

The employer personally participated in the fact-finding interview through the testimony of Human Resources Representative Joyce Stimpson.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

Iowa Admin. Code r. 871-24.32(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).

The claimant exceeded the allowed number of attendance points with his June 6, 2016, absence. Additionally, not only was he absent on that date for personal reasons, he failed to call and report his absence at least 30 minutes prior to the start time of his shift. While it is unfortunate the claimant's alarm was not plugged in and he had to wait to call until his phone charged in his car, those are both issues of personal responsibility and consequently that absence cannot be considered excused.

There is an issue regarding whether the claimant should have been allowed to use his emergency day June 6, 2016. Neither the employer nor the union did a good job of explaining the emergency day provided for in the new contract to employees. The employer believed information was provided in the highlighter and the claimant testified that is where he read about the emergency day off but the information was not contained in the document provided by the employer at the conclusion of the hearing. That would indicate the claimant garnered his knowledge about the emergency day off from another source.

While both the employer and the union should have done a better job of explaining the details of the new contract's provision for an emergency day, given the claimant's number of points and the fact he had received several warnings and suspensions due to his attendance, he had a greater responsibility to learn the details of the emergency day off because his job was on the line as he was very close to termination at least throughout his last year of employment. Because the claimant did not report his June 6, 2016, absence at least 30 minutes prior to the start time of his shift and had seven attendance points at that time, he was not eligible to use his emergency day off.

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 absenteeism, is considered excessive. Therefore, benefits must be denied.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
>
> (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.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

Consequently, the claimant is overpaid benefits in the amount of $2,586.00 for the six weeks ending July 23, 2016.

**DECISION:**

The June 28, 2016, reference 01, decision is reversed. The 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 is overpaid benefits in the amount of $3,017.00 for the seven weeks ending July 23, 2016.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/pjs