

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICK L BECK
Claimant

APPEAL NO. 10A-UI-13782-N

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

OC: 09/05/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated September 30, 2010, reference 01, which denied unemployment insurance benefits based upon his separation from Menard, Inc. After due notice, a hearing was held in Council Bluffs, Iowa, on November 16, 2010. The claimant participated personally. Participating on behalf of the claimant was Aaron Rodenburg, attorney at law. Appearing as a witness was Ms. Tammy Lundy, claimant's significant other, and Mr. Noah Meyer, a subpoenaed witness. The employer participated by Mr. Scott Walls, attorney for Menard, Inc., and Mr. Dan Gerovac, manager. Claimant's Exhibits 1 through 5 and Employer's Exhibit A and B were received into evidence.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Rick Beck was employed by Menard, Inc. from November 13, 2007, until September 3, 2010, when he was discharged for absenteeism that exceeded the amount allowed under the company's attendance policy. Mr. Beck was employed as a full-time general laborer and primarily worked as a forklift operator. His last immediate supervisor was Dan Gerovac, department manager.

Mr. Beck was discharged on September 3, 2010, after he had exceeded the number of unexcused absences allowed under the company's attendance policy that was in effect at that time. Under the policy, employees were subject to discharge if they accrued five instances of unexcused absence or leaving early within a 90-day rolling period. During the most recent 90-day period, Mr. Beck had been absent or left early on four occasions due to pain or medical issues resulting from a serious non-work-related automobile accident that he had been injured in on August 1, 2009. The additional infraction during the final 90-day period took place when Mr. Beck was unable to report to work due to a transportation issue. On each occasion, the claimant provided the required advance notice to the employer or received permission to leave

work and properly reported his absences or leaving early due to pain caused by his numerous injuries.

Upon returning to work after partial recovery and time away from work under the Family Medical Leave Act, Mr. Beck presented a generalized doctor's excuse to the employer dated March 16, 2010, stating that the claimant was authorized to be off work or to leave work early because of pain (See Exhibit 1).

At the time that Mr. Beck initially returned to work following his injuries, he was under the supervision of Mr. Noah Meyer. Mr. Meyer had also been a party to the same automobile accident in which Mr. Beck had been injured, and Mr. Meyer as well as Menard, Inc. were aware of the claimant's injuries and the necessity that he leave work or be absent at times due to severe pain. The employer thus allowed Mr. Beck to continue in employment and deemed any absences or leaving early to be excused.

At a later date, apparently in the summer of 2010, Mr. Beck requested to transfer to a different department within Menard, Inc. The claimant believed that operating a forklift in the new department under the supervision of Mr. Gerovac would not cause as much jarring or bumping and therefore would be less painful for him to work. The employer did not disagree and allowed the transfer. Prior to leaving his old department under the supervision of Mr. Meyer, the claimant was requested to provide an updated general statement from his physician about the claimant's ongoing need to be absent or leave early.

After coming under the supervision of Mr. Gerovac, Mr. Beck was again requested to provide an updated generalized medical statement so that the company could determine whether the claimant's need to be absent or leave early was still authorized by his physician. For financial and logistical reasons, Mr. Beck did not immediately attempt to secure an appointment with the orthopedic physician who had been the primary doctor involved in his injuries, and the physician was unwilling to provide an updated statement without a scheduled appointment and examination.

Mr. Beck continued, at times, to be required to be absent or to leave early because of his previously sustained serious injuries, and the employer began to issue disciplinary warnings for the claimant's absences because he had not provided an updated generalized doctor's excuse or doctor's excuses for each absence during his final 90-day rolling attendance period. When confronted by the disciplinary warnings that the company began to serve upon him, Mr. Beck attempted to secure an appointment with his doctor. The claimant secured an appointment and was scheduled to be examined. Before Mr. Beck could be seen by his physician and provide an updated absence authorization or authorizations for his absences in the new department, he was again absent because of his injuries and discharged, although he had again properly reported the absence as required by company policy.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

Iowa Code section 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(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.

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 Supreme Court of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that unexcused absenteeism is a form of job misconduct. The Court held that the absenteeism must both be excessive and unexcused. The Court further held that absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer.

In the case at hand, the evidence establishes that Mr. Beck had been seriously injured in a non-work-related automobile accident and that Menard, Inc. was aware of the accident and the nature of the claimant's injuries. The claimant had been allowed to be absent from work or to leave early because the claimant's physician had provided a blanket authorization for Mr. Beck to be absent or to leave early due to the serious nature of his injuries and the ongoing pain. Prior to the claimant's leaving his previous work department, he had been told by his supervisor in that department that a new doctor's excuse was needed so that the claimant's absences could continue to be excused. Mr. Beck was also reminded and instructed to provide an updated doctor's statement by his new supervisor when he went to a new work department in the summer of 2010. Mr. Beck did not immediately comply because of the expense involved

and the difficulty of obtaining an appointment with his orthopedic doctor, the doctor that Mr. Beck reasonably believed that the employer desired a statement from.

When the employer began to subject Mr. Beck to disciplinary warnings because of his ongoing need to leave early or be absent from time to time because of his injuries, Mr. Beck obtained a doctor's appointment with his orthopedic physician as soon as a doctor's appointment was available. Unfortunately, Mr. Beck was required to be absent prior to his doctor's appointment and thus exceeded the number of infractions allowed by Menard, Inc. that the company considered to be unexcused, and he was discharged from employment.

The record in this matter leaves no doubt that Mr. Beck's absences were due to illness or injury and were properly reported. Based upon the decision of the Supreme Court of Iowa in Higgins, Mr. Beck's absences under these circumstances are deemed "excused" and do not constitute misconduct in connection with the work.

An employer may discharge an employee for any number reasons or no reason at all. While the decision to terminate Mr. Beck may have been a sound decision from a management viewpoint, if the employer fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to the separation. Benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated September 30, 2010, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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