At 11:21 a.m. on October 27, 2005, the claimant called the Appeals Section and spoke with the administrative law judge. The claimant explained that he had just received the notice the day before, but did not open it then. He had seen it sitting on the table but he did not open it yesterday. The claimant woke up at 10:30 a.m. and opened the envelope and noticed the hearing. He did not open it earlier or call earlier because he was asleep. The claimant had no real explanation as to why he did not call at 10:30 a.m. or even at 11:00 a.m. or even 11:15 a.m. The claimant said he tried to call the number on the notice but got another number. The numbers on the notice are clear and connect the party immediately with the Appeals Section. The administrative law judge explained to Mr. Jones that he could not take evidence from him since the hearing had been completed when the record was closed at 11:16 a.m. The administrative law judge informed the claimant that he would treat his telephone call as a request to reopen the record and reschedule the hearing made after the record had been closed and the hearing held.

871 IAC 26.14(7) provides:

> (7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.
>
> a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
>
> b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
>
> c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

At issue is a request to reopen the record made after the hearing had concluded. The request to reopen the record is denied because the party making the request failed to participate by reading and following the instructions on the hearing notice.

The administrative law judge concludes that the claimant has not demonstrated good cause to reopen the record and reschedule the hearing. Even the claimant conceded that he received a notice on October 26, 2005, but did not bother to open it. He said that he saw the notice sitting on the table but did not open it that night. The next day, the claimant did not wake until 10:30 a.m. and then opened the notice. Even at 10:30 a.m. the claimant had a half an hour to call the appeals section. In fact, had the claimant called the appeals section by 11:16 a.m. he would have been allowed to participate in the hearing. The parties to an appeal hearing must take some responsibility to see that they promptly open their mail and comply with the instructions therein. The claimant did not. The administrative law judge concludes that the claimant has not demonstrated good cause to reopen the record and reschedule the hearing and, as a consequence, the claimant's request therefore is hereby denied.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer off and on since January 2, 2004. The employer is a temporary employment agency. On June 2, 2005, the claimant was assigned to Anderson Services, which was a long-term assignment. The claimant did not satisfactory complete that assignment because he was discharged for poor attendance and not calling in according to the employer's policy. The employer, Remedy Intelligent Staffing, Inc., has a policy that requires that employees call the employer and notify the employer of an absence or a tardy prior to the start of the employees shift at the assignee. The claimant signed an acknowledgement of this policy. As a result of the claimant's absences and tardies and failure to properly report them, the claimant was discharged on August 17, 2005.

On August 17, 2005, the claimant was absent. He did properly report this absence but provided no reason to the employer for his absence. The claimant was then discharged. On August 11, 2005, the claimant was absent and did not report his absence al all. Eventually on that day, the employer called the claimant and the claimant informed the employer that he had things going on and he needed to get more sleep. On August 3, 2005, the claimant was absent because of problems at home and called the employer late, after the claimant's shift was to start. On July 28, 2005, the claimant was tardy. He did not timely call the employer, calling the employer after his shift started. The claimant gave no reason for the tardy. On July 15, 2005, the claimant was absent for personal illness but again his call was late being after the start of his shift. At that time the claimant said he had just woke up. On June 16, 2005, the claimant was absent for transportation. The claimant first notified the employer that he was going to be tardy, but this notification was late. Later the claimant notified the employer that he was not going to be at work at all. On each occasion that the claimant was absent or tardy, he was given an oral warning from the employer about his attendance and the call-in procedures.

Pursuant to his claim for unemployment insurance benefits filed effective December 19, 2004 and reopened effective August 21, 2005, the claimant has received unemployment insurance benefits in the amount of $597.88 as follows: $146.00 per week for four weeks, from benefit week ending August 26, 2005 to benefit week ending September 17, 2005 and $13.88 for benefit week ending September 24, 2005. These benefits, coupled with benefits that the claimant received prior to his assignment with Anderson Services, exhausted the claimant's unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.

2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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.

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.

The employer's witness, Alan Roberts, Manager, credibly testified, and the administrative law judge concludes, that the claimant was discharged on August 17, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Mr. Roberts credibly testified that the claimant was absent or tardy six times in two months as set out in the findings-of–fact. Only one was for reasonable cause or personal illness, July 15, 2005. The others were for transportation or having things going on and needing more sleep or problems at home or not providing a reason. Further, none were properly reported, being reported to the employer late except for the absence on August 27, 2005. Each time the claimant was absent or tardy he received an oral warning. On the record here, the administrative law judge is constrained to conclude that five of the claimant's absences and tardies were not for reasonable cause or personal illness and five were also not properly

reported to the employer. Therefore, the administrative law judge concludes that the claimant's absences and tardies were excessive unexcused absenteeism and disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $597.88 since separating from the employer herein on or about August 17, 2005 and reopening his claim for benefits effective August 21, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision of September 28, 2005, reference 03, is reversed. The claimant, Jonathan M. Jones, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of $597.88.

dj/kjw