

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BOBBY D THOMPSON
Claimant

W W TRANSPORT INC
Employer

APPEAL 21A-UI-18961-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/25/21
Claimant: Respondent (4-R)

Iowa Code § 96.5(2)a – Discharge from Employment
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

On August 25, 2021, employer W.W. Transport, Inc., filed an appeal from the August 19, 2021 (reference 01) unemployment insurance decision that allowed benefits based on a determination that claimant was discharged due to absenteeism and claimant's absences were due to non-disqualifying, properly-reported illness. The parties were properly notified of the hearing. During the hearing, claimant agreed to waive notice on the issue of whether he was able to work and available for work. A telephonic hearing was held at 3:00 p.m. on Tuesday, October 19, 2021. The claimant, Bobby D. Thompson, participated. The employer, W.W. Transport, Inc., participated through Randi Gerling, Human Resources/Administrative. Employer's Exhibits 1, 2, and 3 were received and admitted into the record without objection. The administrative law judge took official notice of the administrative record.

ISSUES:

Was the claimant discharged from employment for disqualifying, job-related misconduct?
Is the claimant able to work and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer W.W. Transport, Inc., on July 17, 2017. Claimant worked for the employer as a full-time over-the-road truck driver. Claimant's employment ended on April 22, 2021, when he was discharged from employment.

On November 17, 2020, claimant went on FMLA-protected medical leave due to a heart condition. He was initially out of work for twelve weeks and scheduled to return on February 9, 2021. Subsequently, the employer granted him eight additional weeks of leave, which expired on or about April 6, 2021. Claimant was still not able to return to work at that point, as he had not been medically cleared by his doctor. On April 22, 2021, the employer discharged claimant for being unable to return to work. Gerling stated there was no misconduct underpinning the discharge; claimant's leave simply expired.

Claimant was released to return to working with restrictions on May 3, 2021. Specifically, claimant's doctor told him that he could not work more than twelve hours per day, and he stated that claimant could not lift more than 40-50 pounds without a mechanical device to assist him. Because of these restrictions, claimant is no longer able to work as an over-the-road truck driver. Claimant is currently looking for work as an auto mechanic, diesel mechanic, gas station attendant, or service truck operator. He has extensive experience in the automotive field and is well-qualified for any of these positions.

While claimant was out of work, he received short-term disability payments, followed by long-term disability payments. Claimant received his last long-term disability payment on May 5, 2021. Claimant did not report receiving any income when filing his weekly claim for the one-week period ending May 1, 2021; or the one-week period ending May 5, 2021.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was separated from employment for no disqualifying reason, and benefits are allowed. Claimant was not able to work for the one-week period ending May 1, 2021. Claimant was able to work and available for work effective May 2, 2021.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Excessive absences are not considered misconduct unless unexcused. 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 up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, 321 N.W.2d at 6; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, 734 N.W.2d at 554. 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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law."

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because claimant's last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, any history of prior incidents will not be examined. Accordingly, benefits are allowed.

As claimant was separated for no disqualifying reason, the issues of overpayment, repayment, and chargeability are moot at this time.

Iowa Code § 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a

market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Admin. Code r. 871-24.22(1) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

Iowa Admin. Code r. 871-24.23(35) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

In this case, the claimant began filing for unemployment insurance benefits effective April 25, 2021, one week before he was released to return to work. At that point, claimant was still under the care of his doctor and had not yet been released to return to work. Therefore, the administrative law judge finds claimant was not eligible for benefits for the one-week period ending May 2, 2021.

Claimant was released to return to work on May 3, 2021. Therefore, the administrative law judge finds that he was able to work and available for work effective May 2, 2021. He began an active and earnest search for work that week and has made appropriate and sufficient job contacts each week.

Claimant received an unknown amount of long-term disability funds during the week of May 3 through May 9, 2021. This matter will be remanded to determine whether claimant was monetarily eligible for benefits that week.

DECISION:

The August 19, 2021 (reference 01) unemployment insurance decision is modified in favor of the employer/appellant. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot at this time.

Claimant was not able to work for the one-week period ending May 2, 2021. Benefits for that week are withheld.

Claimant was able to work and available for work effective May 3, 2021. Benefits are allowed from that date forward, provided he is otherwise eligible

REMAND:

The issue of whether claimant properly reported his long-term disability payment received on May 5, 2021, and whether he is monetarily eligible for benefits that week is remanded to the Benefits Bureau of Iowa Workforce Development for determination.



Elizabeth A. Johnson
Administrative Law Judge
Unemployment Insurance Appeals Bureau

October 27, 2021
Decision Dated and Mailed

lj/scn