

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BENJAMIN N STEIN**  
Claimant

**APPEAL NO. 11A-UI-16579-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARGILL INCORPORATED  
NUTRENA FEEDS**  
Employer

**OC: 11/20/11  
Claimant: Respondent (2-R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed an appeal from the December 22, 2011 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on January 26, 2012. Claimant did not respond to the hearing notice instructions and did not participate. Employer participated through Council Bluffs Plant Manager Brent Brinegar. Employer's Exhibit 1 was admitted to the record. The administrative law judge took judicial notice of the administrative record.

**ISSUE:**

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits and whether he is overpaid benefits as a result.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an elevator operator and was separated from employment on November 10, 2011. His last day of work was October 21. During harvest season, he was expected to work seven days per week. From October 29 through November 10, 2011, claimant did not provide medical excuses as the employer required and his absences exceeded the Family Medical Leave Act (FMLA) leave authority. His absence period from October 24 through 28, 2011, was covered by medical excuse. He had two periods of FMLA leave approved September 27, 2011, which allowed (Employer's Exhibit 1, fax pages 17 - 22) sporadic absences of one to two hours every two weeks and one to two hours one day per week from September 27 through December 27, 2011; and June 28, 2011, covering April 1 through August 1, 2011 (Employer's Exhibit 1, fax pages 23 - 27) allowing four hours per day for five to six days per week from June 24 through July 10, 2011 and after that one day per week. After claimant was tardy on September 13 and 14, Brinegar and Supervisor Kile Smith warned him verbally on September 14, 2011 and told him any further absences after his full medical release on September 8, 2011 (Employer's Exhibit 1, fax page 16) would need to be supported by medical documentation. (Employer's Exhibit 1, fax page 6) On October 19, 2011, Brinegar

issued claimant a written warning about an initial tardiness and then absence on October 13, followed by absences on October 14, 15, and 16, and a no call-no show on October 17, 2011. He was instructed to provide medical documentation for any further absences and notify Smith well in advance of issues that inhibit his ability to get to work as scheduled. (Employer's Exhibit 1, fax page 7) Claimant presented medical excuses from October 29 through November 2, 2011, October 24 through 28, 2011 (Employer's Exhibit 1, fax pages 8 - 11), and October 19, 20, 22, 2011 (Employer's Exhibit 1, fax pages 12 - 14)

The claimant has received unemployment benefits after the separation on a claim with an effective date of November 20, 2011.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.

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). Absences due to **properly** reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

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. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and that the final absence period was not excused, because it fell outside of the FMLA coverage and no medical documentation was provided. The final absence, in combination with the claimant's history of unexcused absenteeism (tardiness and no-call, no-show), is considered excessive. Benefits are withheld.

The administrative law judge further concludes claimant has been overpaid benefits.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

**DECISION:**

The December 22, 2011 (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.

**REMAND:**

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

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