

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**STEVE KEMPKER  
1806 AVE A #6  
FORT MADISON IA 52627**

**SAWMILL MANAGEMENT INC  
2841 KENTUCKY AVE  
MOUNT PLEASANT IA 52641**

**Appeal Number: 04A-UI-08208-ET  
OC: 06-27-04 R: 04  
Claimant: Appellant (3)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 26, 2004, reference 03, decision that allowed benefits but relieved the employer's account of charges. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 19, 2004. The claimant participated in the hearing. Melody Yaley, Personnel Manager, participated in the hearing on behalf of the employer.

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 lumber stacker for Sawmill Management from August 5, 2003 to September 5, 2003. New employees are placed on a 90-day probationary period and are allowed one written warning for absenteeism during their probation. On August 11, 2003, the claimant went home early stating he was ill, and on August 12, 2003, he called in sick. He worked August 13 and then called in sick August 14 and 15, 2003. On August 18, 2003, he called in sick and on August 19, 2003, he was a no-call/no-show. On August 20, 2003, the claimant called in sick and on August 21, 2003, he reported for work and provided a doctor's note covering his August 19, 2003, absence. Some of his absences were due to the illness of his child. On August 29, 2003, the claimant was released to return to light-duty work by the company's doctor but failed to report for work. On September 2, 2003, the claimant received a written warning for attendance and the warning stated any further unexcused absences could result in termination. On September 4, 2003, the claimant left for a meeting with his attorney and did not return to work and did not report for work or call the employer September 5, 2003. The employer terminated his employment for excessive absenteeism. The claimant stated that the plant manager told him before he left September 4, 2003, he had to return to work following the appointment or he would lose his job. The employer has no record or documentation of that conversation.

The claimant has claimed and received benefits since his separation.

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 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, (7) provide:

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).

(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 was absent at least eight times due to his own illness and the illness of his child during his one-month of employment but only provided one doctor's excuse. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment. Despite that warning, however, the claimant scheduled an appointment during work hours and did not return to work that day and did not call or show up for work the following day. While absences due to illness are not volitional, the claimant was absent more than one-third of his scheduled workdays and knew, or should have known, it was not reasonable to schedule an appointment during work hours under those circumstances when he had already received a written warning and was still on probation. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The July 26, 2004, reference 03, decision is modified in favor of the respondent/employer. The claimant was discharged from employment due to job-related misconduct. 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 \$348.00.

je/kjf