

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HEATH HOBBS

Claimant

APPEAL NO: 09O-UI-08298-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PORT NEAL WELDING CO INC

Employer

OC: 03/15/09

Claimant: Appellant (5/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

Iowa Code § 96.3-7 - Overpayment

871 IAC 26.14(7) - Late Call

Iowa Code § 17A.12-3 - Non-Appearance of Party

STATEMENT OF THE CASE:

Heath Hobbs (claimant) appealed an unemployment insurance decision dated April 9, 2009, reference 01, which held that he was not eligible for unemployment insurance benefits because he voluntarily quit his employment with Port Neal Welding, Inc. (employer) without good cause attributable to the employer. Administrative Law Judge Marlon Mormann conducted an initial hearing on this matter in appeal 09A-UI-06057-MT in which benefits were allowed. The employer appealed the decision indicating it did not participate due to lack of notice. The Employment Appeal Board remanded for a new hearing in an order dated June 9, 2009. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 25, 2009. The claimant provided a telephone number but was not available when that number was called for the hearing, and therefore, did not participate. The employer participated through Owner Dan Lee. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was not available when called for the 2:00 p.m. hearing on June 25, 2009. The record closed at 2:18 p.m. and the claimant called the Appeals Section at 2:19 p.m. The administrative law judge questioned the claimant as to why he was not available and he stated that he had stepped outside. The claimant requested that the record be reopened.

The claimant was employed as a full-time millwright from April 10, 2007 through March 16, 2009. Part of the claimant's job duties was driving and he had recently lost his driver's license

due to a conviction of driving while intoxicated. During the process, the claimant missed a lot of work due to court dates. Since driving was an integral part of his job, he could have been discharged. However, the employer instead lowered his pay and placed him on a final warning or a type of last chance agreement. The claimant signed the warning on January 7, 2009 which stated that any further issues that included drugs, alcohol, tardiness, disruptive attitudes, and/or lack of good work practices will result in further wage reductions, suspension and/or termination.

The claimant worked on March 9, 2009 but asked for the next day off and did not work. He called in on March 11, 2009 stating that he was going to the chiropractor but failed to show for the entire day. The claimant was a no-call/no-show on March 12, 2009 and the employer's work rules provide that employees can be discharged after one no-call/no-show. He called the employer on the evening of March 12, 2009 and reported he missed work that day because he was in jail. The claimant was incarcerated due to drinking and driving, drug possession and a hit and run. The employer told him to take off Friday and he would let the claimant know something by Monday. The employer made the decision to discharge the claimant on March 16, 2009 due to the claimant's violation of the last-chance agreement.

The claimant filed a claim for unemployment insurance benefits effective March 15, 2009 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The Iowa Administrative Procedures Act § 17A.12-3 provides in pertinent part:

If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and make a decision in the absence of the party. If a decision is rendered against a party who failed to appear for the hearing and the presiding officer is timely requested by that party to vacate the decision for good cause, the time for initiating a further appeal is stayed pending a determination by the presiding officer to grant or deny the request. If adequate reasons are provided showing good cause for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If adequate reasons are not provided showing good cause for the party's failure to appear, the presiding officer shall deny the motion to vacate.

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 record was considered closed. The request to reopen the record is denied because the party making the request failed to participate by not being available at the telephone number provided.

The substantive issue to be determined is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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(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.

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 Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for violation of his last-chance agreement. Due to a conviction of driving while intoxicated, the claimant could no longer carry out the essential functions of his position. The employer gave him another chance but warned him he could be terminated if there any further problems with drugs, alcohol,

tardiness or even a bad attitude. The claimant subsequently missed work due to being incarcerated for another charge of driving while intoxicated, plus a drug possession charge and a hit and run charge.

Violation of a specific work rule, even off-duty, can constitute misconduct. In Kleidosty v. EAB, 482 N.W.2d 416, 418 (Iowa 1992), the employer had a specific rule prohibiting immoral and illegal conduct. The worker was convicted of selling cocaine off the employer's premises. The Court found misconduct. In its analysis, the Court stressed the importance of a specific policy, even one which was stated only in terms of illegal or immoral conduct. The claimant's conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated April 9, 2009, reference 01, is modified with no effect. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until 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 matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css