IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

DECISION OF THE ADMINISTRATIVE LAW JUDGE

TIM L. HOWARD
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ALL ACQUISITIONS LLC
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Appeal Number: 17IWDUI078
OC: 07/17/16
Claimant: Appellant (1)

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 Notice of Appeal, directly to the ***Employment Appeal Board, 4TH 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 the department. 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.

(Administrative Law Judge)

October 18, 2016
(Decision Dated & Mailed)

STATEMENT OF THE CASE

All Acquisitions, LLC (employer) filed an appeal from a decision issued by Iowa Workforce Development (Department) dated August 2, 2016 (reference 01). In that decision, the Department determined that Tim Howard was eligible to receive unemployment insurance benefits because the employer did not furnish sufficient evidence to show misconduct.

The case was transmitted from Workforce Development to the Department of Inspections and Appeals to schedule a contested case hearing. A telephone hearing was held October 6, 2016. Mr. Howard was present and represented by attorney, Marlon Mormann. The employer was represented by attorney, Benjamin R. Merrill. Mr. Howard submitted exhibits A through D, which were admitted into the record as evidence. The employer submitted exhibits 1 and 2, which were admitted into the record as evidence. The

administrative file also contained a packet of information dated September 12, 2016, which was admitted into the record.

ISSUE

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause.

FINDINGS OF FACT

Tim Howard was employed by All Acquisitions, LLC as a technician assistant; he was hired by the employer on February 17, 2012. As part of his job duties, Mr. Howard handled tools and equipment. On June 28, 2016, Mr. Howard was injured while on the job. (Howard testimony)

The employer has a written policy regarding drugs and alcohol, which includes protocol related to drug and alcohol testing. Mr. Howard signed an acknowledgment that he received the employee manual on his date of hire. The drug or alcohol testing policy also applies to active employees with the stipulation that in the case of accident there will be follow-up testing. The policy indicates that failure to comply with any portion of the policy may disqualify the associate from unemployment benefits. Mr. Howard does not dispute that the company has a policy against drug use, out of concern for the safety of the employees and company assets. He also agrees that it would be dangerous to be on any drugs while working. (Employee handbook, Howard testimony)

Following Mr. Howard's accident on June 28, 2016, he underwent a post-accident drug test. According to Mr. Howard, when he underwent testing, he did not see the test sample being placed the shipping container, so he was unable to verify the chain of command. He further noted that the person administering the test scratched out the original address and put a new address on the sample. Mr. Howard had taken other drug tests for this company, and did not feel this was normal procedure. (Howard testimony)

On July 8, the employer received the results of Mr. Howard's drug test, which indicated a positive result for marijuana. Mr. Howard was terminated from employment on that day. (Disciplinary action form)

At hearing, Mr. Howard testified that the employer did not tell him the result of his drug test; the employer instructed him to call Dr. Brown in Nebraska, and Dr. Brown informed him of the results. He never received a certified letter in the mail telling him about his rights. (Howard testimony)

Following his termination, Mr. Howard applied for unemployment insurance benefits. The notice of unemployment insurance fact-finding interview indicated that a fact finding interview would be held at 1:50, but no date was given. It appears the Department attempted a "first attempt" call to the employer at 1:52 PM on July 29, 2016 and left a message. The decision justification statement reads, "no cert letter, no opp. for split sample." (Ex. A). The fact finding worksheet for misconduct discharge form included an

explanation from Mr. Howard as to why he was terminated. The employer did not complete an explanation for termination, but later sent documentation substantiating the termination. (Ex. B, September 12, 2016 information)

On August 2, 2016, the Department issued a notice of decision finding that Mr. Howard was dismissed from work on July 8, 2016 for alleged misconduct. Because the employer did not furnish sufficient evidence to show misconduct, the Department determined he was eligible to receive unemployment insurance benefits. The employer appealed. (Notice of decision)

REASONING AND CONCLUSIONS OF LAW

An individual is disqualified from receiving unemployment insurance benefits if he or she has been discharged for misconduct in connection with employment.[1] The employer has the burden of proving that the claimant is disqualified from receiving benefits because he was discharged for misconduct.[2]

Misconduct is a deliberate act or omission which constitutes a material breach of the employee's duties and obligations. It is limited to conduct which demonstrates willful or wanton disregard of an employer's interest, such as deliberate violation or disregard of standards that the employer has the right to expect, or recurrent careless or negligence that shows an intentional and substantial disregard of the employer's interests or the employee's obligations. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, isolated incidents of ordinary negligence, and good faith errors in judgment are not misconduct.[3]

Employers may conduct drug or alcohol testing in investigating accidents in the workplace in which the accident resulted in an injury to a person.[4] Drug or alcohol testing by an employer shall be carried out within the terms of a written policy which has been provided to every employee subject to testing, and is available for review by employees and prospective employees.[5]

In this case, the employer bases its assertion of misconduct on Mr. Howard's positive drug test result. Mr. Howard does not contest that the employer had a written policy for drug testing following an accident, nor that he signed that policy. He argues that after he took the drug test, he received no certified record of the results, which made the drug test invalid.

With regard to the written notification, the law requires that the urine sample collected must be split into two components at the time of initial testing. The second portion of the sample must be of sufficient quantity to permit a second, independent confirmatory test and must be forwarded to the laboratory who is conducting the initial confirmatory testing.

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[1] Iowa Code (ICA) § 96.5(2) (2015).
[2] ICA § 96.6(2).
[3] 871 Iowa Administrative Code (IAC) 24.32(1).
[4] ICA § 730.5 (8)(f).
[5] ICA § 730.5 (9)(a)(1)

The laboratory must store the second portion of any sample until receipt of a confirmed negative test result or for a period of at least forty-five calendar days following the completion of the initial confirmatory testing if the initial confirmatory testing yields a positive result.[6] If the employer receives a confirmed positive test result, the employer is required to notify the employee in writing by certified mail of the results of the test and the employee's right to request and obtain a confirmatory test of the second sample at an approved laboratory of the employee's choice. If the employee requests a second confirmatory test within seven days from the date of mailing the notification, the second test shall be conducted at the laboratory chosen by the employee.[7]

In the case of *Harrison*, the employer terminated Harrison's employment based on a positive drug test for marijuana.[8] Harrison was then denied unemployment benefits on the ground of misconduct based on the positive drug test. Harrison appealed, arguing that he was informed that he tested positive for marijuana by a telephone call from the testing company and was never given an opportunity to request a second confirmatory test. Harrison was further not told that he could choose the laboratory to conduct the test or that he had seven days to think about it, and he was given a significantly inflated price for the test.[9] The employer argued that substantial compliance with the statute was sufficient, as the employee was informed over the telephone of his right to a second confirmatory test done at his expense. The court found that an employer's noncompliance with the notice requirements of the statute was sufficient to bar its reliance on Harrison's drug test results to prove misconduct. It further found that even if an employer need only substantially comply with the provisions of section 730.5, the employer did not show that level of compliance.[10] The court reasoned that it was important to consider how these requirements serve to protect the employee, and a written document, particularly one sent by certified mail, conveyed a message that the contents of the document were important. The seven-day period allowed the employee adequate time to make a thoughtful choice.[11]

The *Harrison* case dealt with a random drug test, while the current case is based on a work injury and post-injury accident testing. However, both tests were conducted pursuant to an employer policy and the reasons for testing are not in dispute.

In *Sims v. NCI Holding Corp.*, the Iowa Supreme Court determined that substantial compliance – rather than strict compliance – is what was required of employers under section 730.5.[12] Substantial compliance is achieved when the employer "accomplish[es] the important objective of providing notice to the employee of the positive test result and a meaningful opportunity to consider whether to undertake a confirmatory test."[13]

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[6] ICA § 730.5(7)(b).
[7] ICA § 730.5(7)(i)(1).
[8] *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581 (Iowa 2003).
[9] *Id*. at 578-588.
[10] *Id.* at 587.
[11] *Id*.
[12] *Sims v. NCI Holding Corp.*, 759 N.W.2d 333 (Iowa 2009).
[13] *Id.* at 338.

In the situation at hand, there is no dispute Mr. Howard received a written copy of the result from the June 28, 2016 test. This result was from the company WPCI and signed by a medical review officer. However, the record is unclear whether this test result was sent via certified mail with return receipt requested and the date Mr. Howard received these results. Even if Mr. Howard was notified of the results of his drug test in writing by certified mail, there is no documentation to indicate that he was given the opportunity to request and obtain a confirmatory test of the second sample collected; done at an approved laboratory of his choice.

The employer substantially complied with section 730.5 and its own written policy in requesting that Mr. Howard submit to drug testing, and then providing results in writing. However, the employer did not substantially comply with section 730.5 in that it failed to provide Mr. Howard a meaningful opportunity to consider whether to undertake a confirmatory test. The employer did now show substantial compliance and the Department's decision will remain affirmed.

Based on this decision, the undersigned need not address Mr. Howard's other arguments.

DECISION

Iowa Workforce Development's decision August 2, 2016 (reference 01) is AFFIRMED. The Department shall take any action necessary to implement this decision.