

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARK D KITTO**  
Claimant

**APPEAL NO. 09A-UI-03416-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**JOHNSRUD TRANSPORT INC**  
Employer

**OC: 02/01/09**  
**Claimant: Appellant (1)**

Section 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

The claimant, Mark Kitto, filed an appeal from a decision dated February 23, 2009, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued a hearing was held by telephone conference call on March 30, 2009. The claimant participated on his own behalf and was represented by John Hemminger. The employer, Johnsrud Transport, participated by Human Resources Manager Douglas Dutter and Safety Director John Osborn.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Mark Kitto was employed by Johnsrud Transport from September 10, 2007 until November 26, 2008 as a full-time over-the-road truck driver. On October 21, 2008, the claimant was involved in an accident in Indiana. A curve in the highway was posted at 30 miles per hour and according to the on-board computer, he was traveling at 42 miles per hour. The vehicle crossed into the opposing lane and rolled over off that side of the road. The claimant had to be “cut” out of the tractor and evacuated to a local hospital where he was for four or five days. Both the tractor and the trailer were a total loss.

The employer learned of the accident the same day and Safety Director John Osborne began an investigation. He gathered facts from the adjustors who were on site, the police report, the on-board computer and the claimant’s log book from the preceding eight days. It was determined the claimant had not taken the proper rest periods required by federal regulations. He left no later than 12:30 p.m. on October 20 and the accident occurred 1:30 p.m. on October 21, 2008. The regulations would have prohibited him from driving after 2:00 a.m. on October 21, 2008.

The engine report shows no period of time when the claimant could have taken the required break. When he was interviewed Mr. Kitto admitted he had not taken some of the required rest

breaks because he was delayed in picking up a load. However, he could have contacted dispatch, explained the delay and asked to be rescheduled for his load. He alleged he had "napped" for brief periods of time when the truck was not moving.

After completing the investigation the employer notified Mr. Kitto he was discharged on November 26, 2008. At that time all the logs and reports were gone over with him again.

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

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 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 accident was not, in and of itself, the reason for the discharge. The decision to fire Mr. Kitto was due, in part, to the total loss of the tractor and the trailer. But when the investigation revealed he had not only been speeding on the curve but had violated federal regulations regarding the rest periods, the sum of all these factors caused the discharge.

Mr. Kitto argued he had rested fully in the three days before leaving on the trip, but sleep periods cannot be "banked." A driver is to rest for ten hours after driving for 11, and this he failed to do. By definition he was in a fatigue state and drove incautiously on a curving road, was speeding around a curve and damaged the employer's equipment.

There does not appear to have been any prior incidents of preventable accidents. In order to be disqualified from unemployment benefits for a single incidence of misconduct, the misconduct

must be a deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees. Henry v. IDJS, 391 N.W.2d 731 (Iowa App. 1986). The administrative law judge considers the claimant's conduct in this instance to rise to that level of misconduct and he is disqualified.

**DECISION:**

The representative's decision of February 23, 2009, reference 01, is affirmed. Mark Kitto is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/pjs