

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GERALD ZWEEP
Claimant

APPEAL NO: 11A-UI-02906-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

B T INC
Employer

OC: 01-30-11
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 4, 2011, reference 02, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 31, 2011. The claimant participated in the hearing. Brenda McNealey, Director of Human Resources; Keith Lamfers, Director of Safety and Compliance; and Jennifer Smith, Employer Attorney, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

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 over-the-road truck driver for B-T, Inc., from December 23, 2009 to January 28, 2011. He was discharged for having too many preventable accidents and incidents. On August 15, 2010, the claimant received a speeding ticket after he was stopped going 66 in a 55 mile per hour zone (Employer's Exhibit Four). He received a written warning and the employer reduced the speed in his truck from 65 to 62 for 90 days (Employer's Exhibit Four). On September 23, 2010, he cut a right hand turn too closely and his right rear tire hit the curb causing \$463.56 in damage to the tire and rim which the claimant paid (Employer's Exhibit Three). The employer sent the claimant a letter notifying him that he was receiving a written warning for the incident and "further preventable accidents or incidents may result in additional disciplinary action up to and including termination" (Employer's Exhibit Three). On January 21, 2011, the claimant was driving southbound near Marston, Missouri (Employer's Exhibit Two). He was driving in winter weather conditions and had been forced to stop the night before because of extreme weather. There was a sign warning of black ice ahead and the claimant reduced his speed from 65 to 55 but when he hit blacktop he lost control and ended up in the median facing north. He testified he should have slowed down more than he did upon seeing the warning sign. The damage to the truck was \$5,306.98 and the damage to the cargo was

\$3,201.67. The employer made the decision to terminate the claimant's employment January 28, 2011, because he showed a "pattern of non-compliance" after being warned.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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 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 of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant had a speeding ticket and two preventable accidents within just over a five-month period of time. The employer researched the accidents and considers the conditions before making a determination that the accidents were preventable. The first accident was the result of the claimant cutting a corner too closely and the second occurred when he failed to adequately slow down and prepare for black ice after being warned by the sign. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer.

The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits must be denied.

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 Section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code Section 96.3-7-b is remanded to the Agency.

DECISION:

The March 4, 2011, reference 02, decision is reversed. 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 has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code Section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs