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

DAVID K INGLEBRIGHT
VILLAGE CT #44
MEDIAPOLIS IA 52637

NELSON TRUCKING SERVICE INC
510 MEADOW ST
MEDIAPOLIS IA 52637

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ATTORNEY AT LAW
111 E WASHINGTON ST
MT PLEASANT IA 52641

Appeal Number: 04A-UI-10657-DT
OC: 09/05/04 R: 04
Claimant: Respondent (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 written 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 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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Nelson Trucking Service, Inc. (employer) appealed a representative's September 23, 2004 decision (reference 01) that concluded David K. Inglebright (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 28, 2004. The claimant participated in the hearing and was represented by Dick Bell, attorney at law. Clay Johnson appeared on the employer's behalf. During the hearing, Employer's Exhibits One, Two, and Three were entered into evidence. 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.

FINDINGS OF FACT:

The claimant started working for the employer on January 20, 1997. He worked full time as a driver for the employer's over-the-road trucking business. His last day of work was September 1, 2004. The employer effectively suspended him on that date and on October 8, 2004 informed him that he was terminated. The reason asserted for the discharge was a positive drug test.

The claimant's job required him to hold a commercial driver's license (CDL). Holding the CDL placed the claimant subject to federal department of transportation drug testing requirements. Further, the employer had special policies for drug testing as applied to its employees that were covered by the federal law. The policy provided that the claimant was required to submit to drug and alcohol testing under certain circumstances, including when he might be selected randomly for testing, and that he was subject to termination if he tested positive for illegal drugs. Pursuant to the policy, the claimant was required to submit to a random drug test on August 26, 2004. A urine sample was properly taken from the claimant and properly analyzed using an initial drug screen test and subsequent confirmatory test by a certified laboratory. The analysis disclosed at least a trace amount of amphetamine. The claimant was properly notified about the results of the drug test by the medical review officer (MRO) on September 1, 2004. He told the MRO that the night before and the morning of his drug test, he had taken a double dose of Sudaphed ® because he had not felt well. The MRO told the claimant of his right to have a test performed on the split sample. However, the MRO did not tell the claimant of the procedure for requesting the retest or what the cost would be of the retest. The MRO told the claimant he would likely be idled until the retest was done.

The claimant then contacted the employer and reported what the MRO had told him. He repeated his request for a retest. The employer's representative to whom he spoke responded that she "would get back to" him. The claimant did not hear anything further from the employer regarding his status, so on September 8 checked back with the employer. At that time he was told he had been discharged. The claimant denied that he had had any exposure to or consumption of any amphetamine product at any time other than what might have been in the Sudaphed ®.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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.

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).

The reason cited by the employer for discharging the claimant is the positive drug test. The administrative law judge acknowledges that the claimant's position was subject to federal drug testing regulations, rather than the provisions of state law. The administrative law judge further notes that many of the measures included under state law for protection of employees are not required by federal law, such as requirements that the employee be provided with a copy of the test results before discharge. However, the administrative law judge concludes that, consistent with Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003) and Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 554 (Iowa 1999), in order for a violation of an employer's drug or alcohol policy to be disqualifying misconduct, it must be based on a drug test performed in at least substantial compliance with the federal drug testing laws.

49 USC 49 §31306(c) provides in pertinent part:

> In carrying out subsection (b) of this section [relating to the drug testing program for operators of commercial motor vehicles], the Secretary of Transportation shall develop requirements that shall –

> (5) provide that each specimen be subdivided, secured, and labeled in the presence of the tested individual and that a part of the specimen be retained in a secure manner to prevent the possibility of tampering, so that if the individual's confirmation test results are positive the individual has an opportunity to have the retained part tested by a 2d confirmation test done independently at another certified laboratory if the individual requests the 2d confirmation test not later than 3 days after being advised of the results of the first confirmation test.

The regulations developed to implement this statute include 49 CFR §40.153, which requires that the MRO:

> (a) . . . [Y]ou [the MRO] must notify the employee of his or her right to have the split specimen tested. You must also notify the employee of the procedures for requesting a test of the split specimen.
> (b) You must inform the employee that he or she has 72 hours from the time you provide this notification to him or her to request a test of the split specimen.
> (c) You must tell the employee how to contact you to make this request. You must provide telephone numbers or other information that will allow the employee to make this request. As the MRO, you must have the ability to receive the employee's calls at all times during the 72 hour period (e.g., by use of an answering machine with a "time stamp" feature when there is no one in your office to answer the phone).
> (d) You must tell the employee that if he or she makes this request within 72 hours, the employer must ensure that the test takes place, and that the employee is not required to pay for the test from his or her own funds before the test takes place. You must also tell the employee that the employer may seek reimbursement for the cost of the test (see §40.173).

Neither the MRO nor the employer complied with these requirements. The administrative law judge concludes that this failure is a significant breach of the federal requirements. Because the employer has not proven the testing was in substantial compliance with federal law, the claimant is not subject to disqualification. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's September 23, 2004 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/pjs