

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CLAIMANT**

**B T I SPECIAL COMMODITIES**  
Employer

**APPEAL NO. 13A-UI-04212-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/03/13**  
**Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the March 28, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 15, 2013. The claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Gary Handley, Safety Director, represented the employer.

The administrative law judge stipulates, by his signature below, that the drug test information submitted in this case will only be made available to the parties to the proceeding in the compliance with 49 USC § 31306(c)(7), which requires that test results and medical information of employees tested under the Omnibus Transportation Employee Testing Act of 1991 remain confidential.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by B.T.I. Special Commodities as a full-time over-the-road truck driver from 2004 until March 1, 2013, when Gary Handley, Safety Director, discharged him from the employment in connection with a positive drug test. Mr. Handley was the claimant's immediate supervisor. As a commercial truck driver, the claimant was subject to federal drug testing regulations. The employer had a drug testing policy that incorporated the regulation requirements. The employer had provided the claimant with a copy of the drug testing policy. Mr. Handley had undergone training related to drug testing and had completed an hour of such training within the year prior to the claimant's discharge.

On Wednesday, February 27, 2013, the claimant was involved in a rollover accident while operating the employer's tractor-trailer. The claimant misjudged the location of the shoulder on the side of a road and the tractor-trailer tipped over as a result. Weather was a factor in the accident. The rollover accident resulted in \$16,000.00 damage to the tractor, \$8,000.00 in damage to the trailer, and an unknown freight damage or loss.

On February 27, Mr. Handley requested that the claimant submit to post-accident drug screening. Before Mr. Handley had a chance to make that request, the claimant had admitted to a D.O.T. officer that he had used methamphetamine the previous weekend. Mr. Handley had an insurance claims investigator transport the claimant to an Iowa Methodist Hospital facility in Ankeny, where the claimant provided a urine specimen for testing. The specimen was collected as a split sample. One portion of the sample was forwarded to a licensed testing facility, Industrial Health Services. The testing facility subsequently notified the employer of the test result, positive for methamphetamine. Mr. Handley contacted the claimant to advise him that the employer had received the test result. Mr. Handley does not know whether a medical review officer spoke to the claimant and, if so, what the claimant or the MRO said during said conversation. The employer does not know whether the MRO spoke to the claimant about his right to have a second portion of the split specimen tested. Mr. Handley notified the claimant that he was discharged from the employment. The employer's written drug testing policy required discharge from the employment in connection with possession of a controlled substance or being under the influence of a controlled substance while operating or while being otherwise responsible for one of the employer's vehicles.

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

The first issue in this case is the effect of the confidentiality requirements of the federal law. The Omnibus Transportation Employee Testing Act of 1991 authorized the United States Department of Transportation (DOT) to prescribe regulations for testing of commercial motor vehicle operators. 49 USC § 31306. Congress required that the regulations provide for "the confidentiality of test results and medical information" of employees tested under the law. 49 USC § 31306(c)(7). Pursuant to this grant of rulemaking authority, the DOT established confidentiality provisions in 49 CFR 40.321 that prohibit the release of individual test results or medical information about an employee to third parties without the employee's written consent. There is an exception, however, to that rule for administrative proceedings (e.g. unemployment compensation hearing) involving an employee who has tested positive under a DOT drug or alcohol test. 49 CFR 40.323(a)(1). The exception allows an employer to release the information to the decisionmaker in such a proceeding, provided the decisionmaker issues a binding stipulation that the information released will only be made available to the parties to the proceeding. 49 CFR 40.323(b). In the statement of the case, a stipulation in compliance with the regulation has been entered.

This federal confidentiality provision must be followed despite conflicting provisions of the Iowa Open Records Act (Iowa Code chapter 22), the Iowa Administrative Procedure Act (APA) (Iowa Code chapter 17A), and Iowa Employment Security Law (Iowa Code chapter 96). The federal confidentiality laws regarding drug testing must be followed because, under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution" are invalid. Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604 (1991).

In this case, the Iowa Open Records law, APA, and Employment Security law actually conflict with the federal statute 49 USC § 31306(c)(7) and the implementing regulations 49 CFR 40.321 to the extent that they would require the release of individual test results or medical information about an employee to third parties beyond the claimant, employer, and the decisionmaker in this case. It would defeat the purpose of the federal law of providing confidentiality to permit the information regarding the test results to be disclosed to the general public. Since the decision to discharge the claimant was based on his testing positive on a DOT drug test, it would be impossible to issue a public decision identifying the claimant without disclosing the drug test results. Therefore, the public decision in this case will be issued without identifying information. A decision with identifying information will be issued to the parties; but that decision, the exhibits, and the audio record (all of which contain confidential and identifying information) shall be sealed and not publicly disclosed.

The next issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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 Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on a drug test performed in violation of Iowa's drug testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). As the court in Eaton stated, "It would be contrary to the spirit of chapter

730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." Eaton, 602 N.W.2d at 558. Iowa's drug testing laws, however, do not apply to employees who are required to be tested under federal law and regulations. Iowa Code § 730.5-2. Although the court has not addressed this issue, it is logical that the courts would likewise require compliance with federal law before disqualifying a claimant who was discharged for failing a drug test required by federal law and regulations.

The evidence in this case establishes that the drug testing in this case complied with the applicable requirements of 49 CFR Part 382 that deal with the circumstances under which a truck driver can be tested. However, the evidence fails to establish that the drug test protocol substantially complied with 49 CFR Part 40, which sets forth the testing procedures. Under the federal law, the MRO must contact the employee, or attempt to contact the employee, to discuss the positive drug test. Under the federal law, the MRO must discuss with the employee his right to have the second portion of the split specimen tested. See 49 CFR 40.137. The evidence in the record fails to establish that the MRO had any contact, or attempted contact, with the claimant. The evidence in the record fails to establish that the MRO discussed with the claimant his right to have the second portion of the split sample tested. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

**DECISION:**

The Agency representative's March 28, 2013, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs