

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JOSE O MACK

Claimant

APPEAL NO. 14A-UI-12334-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRIDGESTONE AMERICAS TIRE

Employer

OC: 11/02/14

Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated November 20, 2014, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on December 17, 2014. The parties were properly notified about the hearing. The claimant participated in the hearing. Jim Funcheon participated in the hearing on behalf of the employer with a witness, Tom Barragan. Exhibit One was admitted into evidence at the hearing.

ISSUES:

Was the claimant discharged for work-connected misconduct?

Was the claimant overpaid unemployment insurance benefits?

FINDINGS OF FACT:

The claimant worked full time for the employer as a production worker from April 2, 2012, to November 4, 2014. The claimant was informed and understood that under the employer's work rules, employees were required to notify the employer if they were not able to work as scheduled and were subject to termination after going through the steps in the attendance control program. Under the program, an employee with five incidents of absence in a nine-month period receives a counseling. For each an additional incident within nine months, the claimant receives a written warning; a written reprimand, a final written warning, and termination.

The claimant was counseled on October 7, 2014, for having five attendance incidents - including incidents where he did not properly report his absence. He received a written warning on March 29, after an absence due to illness properly reported. He received a written reprimand on May 10, after an absence due to illness properly reported. He received a final written warning on June 3, 2014, after an absence due to some unknown personal business properly reported.

The claimant was scheduled to work at 6 p.m. on October 24. The claimant became drunk in a bar in the afternoon. After leaving the bar, the claimant jumped the curb in his car. When he got home, he tried sleeping it off, but when he woke up, he felt he was too intoxicated to work. As a result, he called in absent stating it was for personal reasons.

The employer discharged the claimant on November 4, 2014, for violating the employer's attendance control policy.

The claimant filed for and received a total of \$2,715 in unemployment insurance benefits for the weeks between November 2 and December 27, 2014.

The employer's witnesses at the hearing were unaware of what happened at the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The unemployment insurance rules provide: "Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer." 871 IAC 24.32(7).

The final incident of absenteeism in this case was for an unexcused reason. The claimant had gone through all of the steps in the attendance control policy. Some of his previous absences were not properly reported. The claimant's absenteeism, therefore, was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case.

The unemployment insurance law generally requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. But a claimant is not required to repay an overpayment when an initial decision to award benefits on an employment-separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. He, therefore, was overpaid \$2,715 in benefits.

In order to decide whether the claimant is required to repay the overpayment and whether the employer will be charged for overpaid benefits, it is necessary to decide whether the employer participated in the fact-finding interview and whether the claimant received benefits due to fraud or willful misrepresentation, which requires consideration of documents not included as part of the evidence. This issue is remanded to the Agency.

DECISION:

The unemployment insurance decision dated November 20, 2014, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The issue of whether the claimant is required to repay the overpayment and whether the employer will be charged for overpaid benefits is remanded to the Agency.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css