

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL E PANICK
Claimant

APPEAL NO. 14A-UI-02026-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARTLAND EXPRESS INC OF IOWA
Employer

OC: 01/26/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Michael Panick filed a timely appeal from the February 14, 2014, reference 01, decision that disqualified him for unemployment insurance benefits. After due notice was issued, a hearing was held on March 14, 2014. Mr. Panick participated. Don McLaughlin represented the employer. Exhibits A through J were received into evidence.

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: Michael Panick was employed by Heartland Express Inc. of Iowa as a full-time over-the-road truck driver from 2010 until November 19, 2013, when Don McGlaughlin, Director of Safety, discharged him from the employment for having too many accidents in the employer's truck.

The final incident that triggered the discharge occurred on November 19, 2013, in Dauberville, Pennsylvania. The employer's dispatch personnel had given Mr. Panick route instructions that directed him down a narrow road. The employer's dispatch and driver protocol required Mr. Panick to use the route instructions issued to him by the dispatch personnel. There were no signs posted in the vicinity to warn Mr. Panick not to drive a tractor-trailer on the road. There were no shoulders on the side of the road. The road included a curve with unique characteristics. On the inside of the curve sat a house, the corner of which was not more than a few feet from the road. Because the house sat so close to the road, a stone and/or concrete wall had been erected to protect the house from traffic passing on the curve. The protective wall was a few feet high. The corner of the wall was no more than about a foot off the road.

To make the narrow curve in the tractor-trailer without colliding with the wall, it was necessary for Mr. Panick to move temporarily into the opposite lane. Mr. Panick slowed as he approached the curve in order to travel safely through the curve. As Mr. Panick moved into the curve, a car came from the opposite direction at excessive speed. It was necessary for Mr. Panick to quickly

move back into the inside lane to avoid a collision. As Mr. Panick did that, a portion of the tractor-trailer made contact with the protective wall. A couple of wheels on the tractor-trailer dropped into a depression between the road's edge and the wall and the truck became stuck. Mr. Panick promptly notified the employer of the incident. The home owner came out and notified Mr. Panick that several similar accidents had occurred on that corner. The home owner summoned law enforcement.

Once a tow truck lifted the truck's wheels out of the depression and lifted the truck back onto the road, Mr. Panick continued to his delivery point. Mr. Panick followed travel instructions issued by the law enforcement officer to get to the delivery point without further incident. The employer then directed Mr. Panick to return the employer's truck to the employer's yard in Iowa. The employer then suspended Mr. Panick, after leading him to believe that the employer would further investigate the matter. Without conducting any investigation, the employer concluded that the accident was preventable. Mr. Panick investigated the road characteristics and discovered that the road width and the lack of road signage to warn trucks not to use the road did not comply with Pennsylvania requirements.

Mr. Panick repeatedly checked in with the employer concerning his job status. When Mr. Panick contacted the employer on November 29, 2013, Mr. McGlaughlin told him that the employer would not be returning him to the employment.

The employer considered prior incidents when making the decision to discharge Mr. Panick from the employment. The most recent prior incident occurred in September 2013.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record fails to establish carelessness, negligence or intentional misconduct in connection with the final incident that triggered the discharge. The employer gave Mr. Panick bad route instructions. The employer's dispatch and driver policies required that Mr. Panick use those bad route instructions. The bad route instructions set Mr. Panick up for an accident on a narrow curve where several similar accidents had occurred. Mr. Panick responded in a reasonable manner to avoid a collision with a speeding vehicle and a portion of the employer's tractor-trailer made contact with a barrier wall, causing a couple wheels to drop off the edge of the narrow road. The accident was indeed preventable, but not by Mr. Panick. The accident could have been prevented if the employer's dispatch department had provided safe route instructions. The accident could have been prevented if the other motorist had not been speeding.

Because the administrative law judge finds no carelessness, negligence or intentional misconduct on the part of Mr. Panick in connection with the final incident, the evidence fails to establish a current act of misconduct. Because there was no current act of misconduct, the administrative law judge need not consider the prior incidents. Because there was no current act of misconduct, there can be no disqualification for benefits. See 871 IAC 24.32(8).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Panick was discharged for no disqualifying reason. Accordingly, Mr. Panick is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's February 14, 2014, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs