

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

MICHAEL J DOWNEY
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KNOXVILLE IA 50138

BARR-NUNN TRANSPORTATION INC
ATTN KATHY
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PO BOX 518
GRANGER IA 50109-0518

Appeal Number: 06A-UI-04045-RT
OC: 04/03/05 R: 02
Claimant: Respondent (5-R)

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 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Barr-Nunn Transportation, Inc., filed a timely appeal from an unemployment insurance decision dated April 5, 2006, reference 04, allowing unemployment insurance benefits to the claimant, Michael J. Downey, because he was discharged from work but not for disqualifying misconduct. After due notice was issued, a telephone hearing was held on May 1, 2006, with the claimant participating. Aimee Hanson, Safety, Training, and Prevention Coordinator, participated in the hearing for the employer. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full-time over-the-road company driver driving a semi-tractor trailer from July 28, 2005, until he separated from his employment on February 28, 2006. When the claimant was employed he had diabetes but he was not dependent on insulin. However, the claimant became insulin dependent for his diabetes on or about February 28, 2006. In order to drive a semi-tractor trailer as the claimant was driving, he must have a commercial drivers license (CDL) according to both state and federal regulations. Further, according to federal regulations, when a person with diabetes finds it necessary to control the condition with insulin, the person is not qualified to operate a commercial motor vehicle in interstate commerce. See Employer's Exhibit Two. The claimant became insulin dependent and was unable to drive a commercial motor vehicle or to maintain a CDL.

The claimant maintains that he was discharged when he was asked to return his equipment and told he could no longer drive for the employer because of his insulin dependence caused by his diabetes and therefore his inability to drive a commercial motor vehicle and maintain his CDL. The employer maintains that the claimant voluntarily quit by resigning because of the same reason and offers as evidence Employer's Exhibit One which is a computer generated document. Whether there were other positions available to the claimant at the time of his separation is uncertain. The claimant initially filed an application with the employer for employment but this was only for an over-the-road company driver of a semi-tractor trailer. The employer requires another application for other positions and the claimant has not submitted such an application. The claimant has been a semi-tractor trailer driver for 30 years and is not sure what other employment he can perform. Pursuant to his claim for unemployment insurance benefits filed effective in a prior benefit year, from April 3, 2005 to April 2, 2006, and reopened effective February 26, 2006, the claimant has received unemployment insurance benefits in the amount of \$1,670.00 as follows: \$334.00 per week for five weeks from the benefit week ending March 4, 2006 to the benefit week ending April 1, 2006. The claimant then opened a new claim for a new benefit year effective April 2, 2006 and has received unemployment insurance benefits in the amount of \$1,296.00 as follows: \$324.00 per week for four weeks, from the benefit week ending April 8, 2006 to the benefit week ending April 29, 2006. Total benefits received by the claimant since his separation from the employer on February 28, 2006 total \$2,966.00. This amount has all been offset against an overpayment from 2005 leaving the claimant still overpaid unemployment insurance benefits in the amount of \$113.00.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not overpaid any unemployment insurance benefits as a result of his separation from the employer herein.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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 first issue to be resolved is the character of the separation. The claimant maintains that he was discharged when he was told to turn in his equipment and informed that he could no longer work for the employer. The employer maintains that he voluntarily quit when he could no longer work for the employer and resigned or effectively resigned. Both parties agree that the claimant has a diabetic condition which he had when he began work for the employer and which, on or about February 28, 2006, caused the claimant to become insulin dependent. Both parties agree that such an insulin dependency prohibits the claimant from driving a commercial motor vehicle and maintaining a commercial drivers license (CDL) which is required to drive such a commercial vehicle which the claimant was operating, per federal rules at Employer's Exhibit Two. The claimant's position at all material times hereto with the employer was an over-the-road company driver operating a semi-tractor trailer which is a commercial motor vehicle requiring a CDL. On the record here, the administrative law judge is constrained to conclude that the claimant's separation was neither a discharge nor a quit but was rather another separation for a failure to meet the physical standards required of the position. See 871 IAC 24.1(113). This is consistent with the majority decision of the Employment Appeal Board in 06B-UI-01685. In that decision, the administrative law judge ruled in a similar situation that the claimant had voluntarily quit because of physical restrictions unrelated to his

employment. The administrative law judge concludes here that the claimant's physical restrictions are unrelated to his employment with the employer herein. The claimant testified that his employment caused his insulin dependency but the administrative law judge finds this testimony not credible. The claimant testified that he had irregular driving times and irregular eating patterns but that this was not common with other trucking companies. The administrative law judge disagrees and believes any over-the-road driver is going to have irregular driving times and irregular eating patterns. The claimant himself conceded that he had a diabetic condition before going to work for the employer. Diabetic conditions worsen on their own. The claimant has not provided competent medical evidence that his insulin dependency is related to his employment with the employer herein. Accordingly, the administrative law judge concludes that claimant's physical condition prohibiting him from continuing his employment with the employer was not caused or exacerbated or even aggravated by his employment. Accordingly, the administrative law judge would conclude here that the claimant effectively voluntarily left his employment (See White v. Employment Appeal Board, 487 N.W.2d 342 (Iowa 1992).) but, because of the Employment Appeal Board decision noted above, the administrative law judge reluctantly concludes that the claimant's separation was another separation neither a discharge nor a quit and therefore the separation is not disqualifying.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant's separation was neither a discharge nor a quit but another separation which is not disqualifying. Therefore, the administrative law judge concludes that the claimant is not disqualified to receive unemployment insurance benefits.

The administrative law judge would note that if the claimant's separation was considered a discharge that there is not a preponderance of the evidence that the claimant was discharged for any disqualifying misconduct on his part and he would still not be disqualified to receive unemployment insurance benefits. The administrative law judge would note that had the claimant voluntarily left his employment, there is no evidence that the claimant left because of any reasons attributable to the employer for his quit. The administrative law judge notes the dilemma faced by the employer. It cannot keep the claimant employed because the claimant does not meet the requirements of the job and he does not meet the requirements of the job through any reasons attributable to the employer. If the claimant has been deemed to have quit, the employer cannot discharge the claimant because the claimant gets benefits. In any event, the administrative law judge concludes, as noted above, that the claimant was not discharged nor did he quit. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

In order to determine whether the claimant is otherwise eligible to receive unemployment insurance benefits, this matter must be remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not able, available, and earnestly and actively seeking work. This issue was not set out on the notice of appeal and the administrative law judge has no jurisdiction to reach that issue. However, facts raised at the hearing indicate that there is a serious issue as to whether the claimant is able and available for work. The claimant is insulin dependent for a diabetes condition and he had been a truck driver for 30 years and does not know what other jobs he could do and he has not applied for another position with the employer which might entail something other than driving a commercial motor vehicle requiring a CDL. Accordingly, this matter is remanded to claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not able, available, and earnestly and actively seeking work under Iowa Code section 96.4(3).

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,966.00 since separating from the employer herein on or about February 28, 2006. The administrative law judge further concludes, that insofar as his separation from the employer is concerned, the claimant is entitled to receive such benefits and is not overpaid such benefits.

DECISION:

The representative's decision of April 5, 2006, reference 04, is modified. The claimant, Michael J. Downey, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was neither discharged from his employment nor did he voluntarily quit his employment but he was subject to a different separation because he failed to meet the physical standards of the job and this is not disqualifying. In order to determine whether the claimant is otherwise eligible to receive unemployment insurance benefits, this matter must be remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not able, available, and earnestly and actively seeking work under Iowa Code section 96.4(3). As a result of his separation from the employer herein, the claimant is not overpaid any unemployment insurance benefits.

REMAND:

This matter is remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not able, available, and earnestly and actively seeking work under Iowa Code section 96.4(3). If Claims determines that the claimant is ineligible to receive unemployment insurance benefits for some period of time, then Claims must also investigate and determine whether the claimant is overpaid any unemployment insurance benefits as a result.

cs/tjc