

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEREK KELLY
Claimant

APPEAL NO: 09A-UI-15799-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALL STATE GUTTER INC
Employer

OC: 12/28/08
Claimant: Respondent (2/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

All State Gutter, Inc. (employer) appealed an unemployment insurance decision dated October 20, 2009, reference 01, which held that Derek Kelly (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 23, 2009. The claimant participated in the hearing. The employer participated through owner Rick Ross and Mike Fuller. Employees Deb Nixon, Kevin Irving and Pat Becker were present on behalf of the employer but provided no evidence. Employer's Exhibit One was admitted 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.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time gutter installer from August 21, 2006 through September 16, 2009 when he was discharged for theft. The employer allows its employees to keep scrap materials from jobs and the employees can then turn in the useless materials to the scrap yard for money. Employees are not allowed to take materials that can be used for additional projects.

On September 16, 2009 employee Mike Fuller arrived at the salvage yard as the claimant and co-employee Bart Berry were leaving. Mr. Fuller noticed there was a large piece of aluminum coil that had come from the employer and had been recently placed in the scrap container. The size of the coil was substantial and it could have been used by the employer for additional jobs. Mr. Fuller contacted owner Rick Ross and reported it. The owner told Mr. Fuller to retrieve the aluminum and bring it back to the work site. The owner called the claimant and Mr. Berry into the office. He asked them if they had recently placed a large piece of green aluminum in the

scrap yard and they both stated no. They were given the benefit of the doubt and directed to return to work.

When Mr. Fuller returned with the aluminum, the owner saw that it was a terra stone bronze color instead of green. The owner called the claimant and Mr. Berry back to the office and asked them if they had turned a large piece of terra stone bronze aluminum into the scrap yard and they had admitted they had. The coil weighed over 50 pounds and was over 134 inches in length. The supply company from whom the employer orders supplies documented that this amount of aluminum was sufficient to form enough five inch seamless gutters to cover the eave lines of two houses with gable roofs up to 33 inches in length. The cost of the material was worth approximately \$84.00 but the claimant and Mr. Berry received less than \$20.00 from the scrap yard. The owner discharged both employees at that time.

The claimant filed a claim for unemployment insurance benefits effective December 28, 2008 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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 § 96.5-2-a.

Iowa Code § 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for theft. He contends his co-employee must have placed the coil in the back of the truck but even if that were the case, the claimant knew or should have known that the large piece of aluminum, that he was selling for pennies, could be used by the employer for additional jobs. The claimant's conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated October 20, 2009, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for

insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs