

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOEY G BURTON

Claimant

APPEAL NO: 12A-UI-08796-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WASTE CONNECTIONS INC

Employer

OC: 06/17/12

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge

Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Waste Connections, Inc. (employer) appealed a representative's July 11, 2012 decision (reference 01) that concluded Joey G. Burton (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 15, 2012. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Mark Bennett appeared on the employer's behalf and presented testimony from one other witness, Mike Anderson. During the hearing, Employer's Exhibits One, Two, and Three were entered 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on April 11, 2008. He worked full-time as a roll-off driver out of the employer's Des Moines, Iowa location. He normally worked from 6:00 a.m. until done, Monday through Friday. His last day of work was June 21, 2012. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism and failure to follow instructions regarding attendance.

The employer's procedures, of which the claimant was on notice, require that drivers call in an absence at least an hour prior to a shift, and if a driver is absent on one day, the driver is to call in by about 3:00 p.m. on the afternoon of that date to report whether the driver anticipates being able to work the next day. The claimant had been given a final warning on March 20, 2012 for failing to call in by 3:00 p.m. to indicate availability for work, and had been given a final warning and five-day suspension on April 27, 2012 for being a no-call, no-show for a scheduled shift.

On June 18 the claimant was a no-call, no-show for his 6:00 a.m. shift. He did call at 2:08 p.m. that day to report that he was sick and that he had a doctor's excuse for that day. He did subsequently provide a doctor's note, but it was dated June 20 and indicated it was for June 19. On June 19 the claimant was absent and did call in to report he would be absent, although he technically called in a half-hour late, calling at 5:30 a.m. He did not subsequently call that afternoon to report if he anticipated being able to work the next day, and on June 20 he was a no-call, no-show for work. He did not call that afternoon to report on his likely availability for June 21.

When the claimant came in for work on June 21, he was discharged for his no-call, no-show absences and his failure to follow the instructions for calling in on the afternoons of his missed days for work the following day.

The claimant established a claim for unemployment insurance benefits effective June 17, 2012. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Excessive absences are not considered misconduct unless unexcused. 871 IAC 24.32(7). Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional. *Cosper*, supra. However, the illness-related absence in this matter was not properly reported, nor was an acceptable reason provided to excuse the failure to properly report the absence. The claimant had previously been warned that future absences of that nature could result in termination. *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). Further, the claimant's failure after being warned to follow the employer's instructions regarding calling on the afternoon of an absence for the following day 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. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's July 11, 2012 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of June 21, 2012. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw