**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**ERICK J TURNER**
Claimant

**OLYMPIC STEEL IOWA INC**
Employer

**APPEAL NO. 15A-UI-01364-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 01/04/15**
**Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the January 23, 2015, reference 01, decision that allowed benefits to the claimant, provided he was otherwise eligible, and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on February 26, 2015. Claimant Erick Turner participated. Lori Bassow represented the employer and presented additional testimony through Shelli Osborne. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Four into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation during the fact-finding interview.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Erick Turner was employed by Olympic Steel Iowa, Inc. as a laser machine operator from 2012 until December 29, 2014 when the employer discharged him for causing a workplace accident. The incident resulted in damage to the employer's property. The incident could have resulted in serious injury. Mr. Turner operated a forklift as part of his regular duties. Mr. Turner had been properly trained in safe operation of the forklift and knew how to safely operate the forklift. Mr. Turner would use the forklift to move bundled metal strips. Because the work routinely

involved dealing with heavily weighted objects, the weight of those objects and the weight capacity of the equipment to be used were clearly displayed. On December 29, 2014, Mr. Turner elected to use a forklift that he knew had a maximum lifting capacity of 4,750 pounds. The claimant lifted two bundles of metal strips, weighing 12,760 pounds in total, onto a table that he knew had a 5,000-pound load capacity. The lifting capacity of the forklift was clearly displayed on the forklift. The weight of the metal strips was clearly displayed in tags that Mr. Turner elected not to read. The load capacity of the table was clearly displayed on the table. When Mr. Turner released the bundles of metal strips on the table, the casters on one side of the table collapsed under the load. The metal strips slid off the table and scattered onto the floor. Mr. Turner had been training another employee at the time of the incident. Neither Mr. Turner nor the coworker was injured. The forklift was not damaged. The employer experienced a $133.84 material loss due to damage to some of the metal strips. The damage to the table was limited to the collapsed casters. The employer incurred additional labor expense due to the need to clean up the scattered metal strips. The employer deemed the incident sufficiently egregious to warrant termination of the employment.

The employer raises other concerns with the employment but these were not the basis for the discharge. The employer's metrics measurements indicated that Mr. Turner operated his laser cutting machine at a lower average efficiency rate than the employer deemed acceptable. However, the metrics measurements did not factor that Mr. Turner was assigned to train other employees and that appropriately training other employees would necessitate stopping at various stages of production to discuss the process with the trainee. The employer's metrics measurements also did not factor that Mr. Turner was sometimes assigned to operate more than one machine at a time and that this would negatively impact the metrics measurement. The employer had not issued any warnings for lack of efficiency. The employer also raises the issue of Mr. Turner's attendance points, but Mr. Turner did not exceed the allowable attendance points.

Mr. Turner established a claim for benefits that was effective January 4, 2015. Mr. Turner has received $4320 in benefits for the ten-week period of January 4, 2015 through March 14, 2015.

On January 22, 2015, a Workforce Development Claims Deputy conducted a fact-finding interview to address Mr. Turner's separation from the employment. The employer's representative of record, Equifax, received proper notice of the fact-finding interview and indicated that Lori Bassow from Olympic Steel Iowa would participate on behalf of the employer. At the time of the fact-finding interview, Ms. Bassow was not available at the number provided for the fact-finding interview. At the time of the fact-finding interview, the Claims Deputy had the employer's protest documentation. That documentation provided the dates of employment, as well as a detailed narrative of the incident that triggered the discharge.

**REASONING AND CONCLUSIONS OF LAW:**

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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.
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> This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

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 establishes misconduct in connection with the employment, based on the final incident that triggered the discharge. Mr. Turner's conduct did not involve ordinary negligence. The conduct was more egregious. Mr. Turner elected to disregard the lifting capacity of the forklift and the forklift to move materials weighing more than two and a half times the load capacity of the lift. Mr. Turner disregard for safe operation of the lift could easily have caused the lift to tip under the load. Mr. Turner elected not to check the weight of the

bundles of metal strips. Mr. Turner elected to disregard the load capacity for the metal table. Mr. Turner caused property damage. Mr. Turner's conduct could easily have resulted in serious injury to himself or others. The conduct, taken together, indicated a willful and wanton disregard of the employer's interests.

The employer presented insufficient evidence to establish misconduct based on the efficiency rating or attendance points. The employer did not provide evidence concerning efficiency beyond the average efficiency rating that was an incomplete and inadequate measure of Mr. Turner's actual work efficiency. The employer did not provide evidence concerning attendance beyond referencing the attendance points, which indicated that Mr. Turner was not at the point of being discharged from the employment based on attendance.

Because the evidence established misconduct in connection with the employment based on the final incident, Mr. Turner is disqualified for benefits 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 unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have 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.

Iowa Administrative Code rule 817 IAC24.10(1) defines employer participation in fact-finding interviews as follows:

> Employer and employer representative participation in fact-finding interviews;
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> 24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid $4320 in benefits for the ten-week period of January 4, 2015 through March 14, 2015. The detailed narrative in the protest materials provided all essential facts concerning the final incident that triggered the discharge. That information was sufficient, in the absence of rebuttal evidence, to establish misconduct in connection with the employment. The administrative law judge concludes that the written information provided by the employer was sufficient to constitute participation in the fact-finding interview. Mr. Turner is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including those benefits already paid to the claimant.

**DECISION:**

The January 23, 2015, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The claimant is overpaid $4320 in benefits for the ten-week period of January 4, 2015 through March 14, 2015. The employer's account will be relieved of liability for benefits. The employer's relief from liability includes relief for those benefits already paid to the claimant.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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