IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CLYDE M HOEKSTRA Claimant **ROSENBOOM MACHINE & TOOL INC** Employer	**APPEAL 17A-UI-01541-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/01/17** **Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the February 3, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 3, 2017. Claimant participated. Employer participated through Director of Human Resources Jack Schreurs, Shipping and Warehouse Manager Chris Lindahl, and Dispatch Shawn Runcie. Employer Exhibit 1 was offered into evidence. Claimant objected to Employer Exhibit 1 because it was not relevant. Claimant's objection was overruled and Employer Exhibit 1 was admitted into evidence. Employer Exhibit 2 was offered into evidence. Claimant objected to Employer Exhibit 2 because it was not relevant. Claimant's objection was overruled and Employer Exhibit 2 was admitted into evidence.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an over-the-road truck driver from December 15, 2003, and was separated from employment on January 3, 2017, when he was discharged.

As an over-the-road truck driver, claimant was governed by the Federal DOT rules and regulations, including hours of service. The employer requires over-the-road truck drivers to follow the Federal DOT rules. The Federal DOT rules restrict the number of hours an over-the-road truck driver may work and how much of a rest period an over-the-road truck driver must take. The rules allow over-the-road truck drivers to work fourteen hours in a twenty-four hour day, but they can only drive eleven of the fourteen hours. Over-the-road truck drivers are required to have off duty (e.g., lunch or break) or sleeping birth time; ten hours or a two hour

plus eight hour split. The rules and regulations used to require over-the-road truck drivers to keep a paper log of their hours. Since March 2015, the employer has used electronic logs and also used a tracking device on its vehicles. The employer gave claimant training on the electronic log system and instructions on the electronic log system.

On December 22, 2016, claimant was driving a scheduled route, when the employer determined he committed an hours of service violation. According to claimant's electronic log, he recorded he went off duty at 6:49 p.m. in Clayton, Wisconsin and then he exited the system. Employer Exhibit 1. With the electronic log, the over-the-road truck driver manually enters when they go off duty; however, the electronic log uses GPS to record the address. Claimant recorded that he was off duty from 6:49 p.m. to 8:50 p.m. for his two hour split break after he had been driving. Employer Exhibit 1. According to claimant's electronic log, he then logged back into electronic system as on duty at 8:50 p.m.; however, he was located in Menasha, Wisconsin. Employer Exhibit 1. Claimant's truck had traveled approximately twenty miles during the time he recorded as off duty. Employer Exhibit 1. The employer's tracking system showed the route claimant's truck went while claimant recorded he was off duty. Employer Exhibit 1. Mr. Lindahl testified that because claimant logged out of the electronic log system when he went off duty at 6:49 p.m., his electronic log would not show any drive time. Employer Exhibit 1. The electronic log's 'hours of service' is specific to the driver, where the tracking device is specific to the truck. Claimant was the only driver with the truck on December 22, 2016 during this time period. The employer does not allow riders and claimant was the only driver. The employer became aware of the hours of service violation on December 23, 2016.

On December 23, 2016, claimant sent a text message to Mr. Lindahl that he made repairs during his two hour off duty time period (6:49 p.m. – 8:50 p.m.) on December 22, 2016. Claimant does not get paid when he is off duty. Claimant was requesting to be paid during this time because he performing repairs. Mr. Lindahl testified over-the-road truck drivers are not allowed to perform repairs while off duty. If claimant was making repairs, he should have recorded in the electronic log that he was on duty (not driving), because it counts against his fourteen hours. After claimant requested two hours of pay for the repairs, the employer reviewed claimant's electronic log and the device recorder for the truck. On December 23, 2016, the employer decided to discharge claimant; however, because the employer was starting a one week shutdown for the holiday season, the employer did not inform claimant he was discharged until he came back to work on January 3, 2017.

Claimant had two prior warnings for hours of service violations. Employer Exhibit 2. On July 22, 2016, claimant signed for a written warning for an 'hours of service' violation. Employer Exhibit 2. The incident occurred on July 14, 2016. Employer Exhibit 2. Claimant was warned that his job was in jeopardy and his pay was reduced for one pay period. Employer Exhibit 2. On July 19, 2016, claimant signed for a written warning for an hours of service violation. Employer Exhibit 2. The incident occurred on July 7, 2016. Employer Exhibit 2.

The administrative record reflects that claimant has received unemployment benefits in the amount of $894.00, since filing a claim with an effective date of January 1, 2017, for the two weeks ending January 14, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of

fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits submitted. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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.

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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v.*

Iowa Dep't of Job Serv., 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's requirement that its over-the-road truck drivers follow the Federal DOT rules and regulations, including hours of service, is reasonable. Professional drivers, particularly those that drive large and/or heavy vehicles, reasonably have a higher standard of care required in the performance of their job duties to ensure public safety. That duty is evident by special licensing requirements. The employer is charged under both federal and state law with protecting the safety of its employees and the general public by ensuring employees follow safety laws while operating a company vehicle. Claimant's argument that the electronic log system was not working correctly and he did not have the proper training is not persuasive. Employer Exhibit 1 clearly shows that claimant recorded in his electronic log that he was off duty while in Clayton, Wisconsin. Approximately two hours later, claimant changed his status in the electronic log to on duty, yet he was located in Menasha, Wisconsin. The tracking device also showed the route claimant's truck went during this time period, which was clearly more than a couple of blocks to a truck stop. Even if there was an error with the electronic log system, claimant admitted that he was not taking his two hour break while he recorded he was off duty. Claimant testified he was performing work (making repairs) during this two hour off duty time. Mr. Lindahl credibly testified that over-the-road truck drivers are not allowed to perform repairs while off duty.

The employer has presented substantial and credible evidence that claimant was acting against the best interests of the employer and the safety of the general public when he had an hours of service violation on December 22, 2016. Furthermore, claimant had two prior warnings for hours of operation violations. This is disqualifying misconduct.

Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
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> a. 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.
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> b. (1) (a) 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 employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.
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> (b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(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.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or

knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. 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 if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The February 3, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of $894.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs