

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MATTHEW OSBORN**  
Claimant

**APPEAL NO. 11A-UI-11768-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TRINITY STRUCTURAL TOWERS INC**  
Employer

**OC: 08-07-11**  
**Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge/Misconduct  
Section 96.3-7 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 2, 2011, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 30, 2011. The claimant provided a phone number prior to the hearing but was not available at that number when called for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Chris Hopwood, human resources manager, participated in the hearing on behalf of the employer.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time blaster for Trinity Structural Towers from November 9, 2009 to August 10, 2011. During the morning of August 10, 2011, the claimant's lead person found the claimant and another employee under the underground, cave-like, blast booth smoking a cigarette and hiding from the lead person. The employer uses a buddy system; and when employees are in the blast booth, another employee must be stationed outside for their protection and the claimant did not utilize the buddy system. The lead person called down into the pit for the claimant and the other missing employee and the other employee came out but the claimant remained in the blast booth without indicating he was there. The lead person got a flashlight and went down into the pit and found the claimant hiding there and smoking a cigarette, which is strictly prohibited due to the flammable nature of the magnesium dust the employer works with. Smoking is prohibited by state and federal law as well as by the employer's regulations and is a serious safety concern. The claimant had been trained in confined space work but had no reason to be under the blast booth at that time. The employer investigated the incident and terminated the claimant's employment for his reckless and deliberate action, which could have resulted in serious damage to himself and/or co-workers and serious damage to company property or loss of productivity, a serious violation of company

policy, and a violation of city, state or federal law while on duty, which were all major violations of company policies and procedures. The termination also included three minor violations, which were loafing, showing inattention to work, and neglecting his job responsibilities, as well as a serious safety violation in failing to observe company rules and procedures in smoking on the job site.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant hid from the lead person in the blast booth and was smoking a cigarette when he was discovered after failing to come out when called. The magnesium dust present is highly flammable and his actions in smoking, in violation of the employer's policy and local, state, and federal law, placed himself as well as all others in jeopardy. Additionally, the claimant did not utilize the employer's buddy system as required when an employee enters the blast booth. The claimant's actions were dangerous, reckless,

unprofessional, and inappropriate, and were a knowing violation of the employer's rules, procedures and, most importantly, the safety policies put in place to protect the claimant as well as all other employees. Although this was an isolated incident of misconduct, the severity of the claimant's actions and intentional disregard of the employer's policy was such that termination was warranted. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

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 section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

**DECISION:**

The September 2, 2011, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/kjw