

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MELVIN MILLER**  
Claimant

**APPEAL NO: 06A-UI-08992-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BAZOOKA FARMSTAR INC**  
Employer

**OC: 08/13/06 R: 03  
Claimant: Respondent (2)**

871 IAC 26.14(7) - Late Call  
Section 17A.12-3 - Non-Appearance of Party  
Section 96.5-2-a - Discharge for Misconduct  
Section 96.3-7 - Overpayment

**STATEMENT OF THE CASE:**

Bazooka Farmstar, Inc. (employer) appealed an unemployment insurance decision dated August 31, 2006, reference 01, which held that Melvin Miller (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 September 25, 2006. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which he could be contacted, and therefore, did not participate. The employer participated through Jim Knowles, General Manager and Roger Milks, Plant Superintendent. 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 record should be reopened and 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 saw operator from April 25, 2005 through August 11, 2006 when he was discharged for poor work performance. He successfully performed his job duties from the date of hire until his first written warning on October 26, 2005. The claimant was warned about attendance due to his habitual tardiness. Another warning was issued on December 5, 2005 for his neglect of equipment and failure to follow instructions. The claimant had a new saw but was not keeping it clean and in good working order. He was again warned for attendance on December 14, 2005 after two days of no-call/no-shows.

On January 31, 2006, the claimant received a warning for unsatisfactory work quality and failure to follow instructions. He cut the parts incorrectly on January 26, 2006 causing a loss of time

and a loss of material since the parts were too short. He was advised his job was in jeopardy if it happened again since the employer's business was dependent upon production of a quality product. The claimant called the employer on June 30, 2006 stating that he would be late because he had a flat tire. He never reported to work that day and did not call to offer an explanation. A written warning was issued advising him he would be suspended without pay if it happened again. The final incident was the claimant's continued failure to clean his saw, which was affecting the quality of his work. The employer spoke with the claimant about it and he said he would clean it that afternoon but chose not to do so. He was discharged on the following day.

The record closed at 12:24 a.m. The claimant contacted the Appeals Section for the first time on September 25, 2006, at 12:44 a.m. He received the hearing notice prior to the September 25, 2006 hearing. The instructions inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The claimant misread the hearing notice instructions and requested that the record be reopened.

The claimant filed a claim for unemployment insurance benefits effective August 13, 2006 and has received benefits after the separation from employment.

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

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied. If a party responds to a hearing notice after the record has been closed, the administrative law judge can only ask why the party responded late to the hearing notice. If the party establishes good cause for responding late, the hearing shall be reopened. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. 871 IAC 26.14(7)(b) and (c). The claimant has not established good cause and the record will not be reopened.

The next issue to be determined 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 section 96.5-2-a.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 poor work performance and failure to follow the employer's directives. When an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. Iowa Department of Job Service, 386 N.W.2d 552 (Iowa App. 1986). The claimant successfully performed his required job duties for the first six months of his employment but stopped following the employer's directives after that, even after being warned. Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The claimant's actions demonstrate a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The unemployment insurance decision dated August 31, 2006, 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 claimant is overpaid benefits in the amount of \$1,700.00.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

sda/pjs