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

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

**SHAWNA CHANEY**
Claimant

**SUKUP MANUFACTURING CO**
Employer

**APPEAL NO. 21A-UI-12925-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 03/22/20**
**Claimant: Respondent (1)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the May 13, 2021, reference 02, decision that held the claimant was eligible for benefits provided she met all other eligibility requirements and that employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on December 4, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on July 26, 2021. Claimant, Shawna Chaney, participated. Cassandra Hecker represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1, 2 and 3 into evidence. The administrative law judge took official notice of the available 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 in connection with the fact-finding interview.

**ISSUE:**

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

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant, Shawna Chaney, was employed by Sukup Manufacturing Company as a full-time general manufacturing laborer at the employer's main location in Sheffield, Iowa from January 2020 until December 7, 2020, when the employer discharged her in response to a positive drug test. The claimant last performed work for the employer on December 2, 2020. The claimant's work involved use of power equipment. The claimant's usual work hours were 6:30 a.m. to 4:30 p.m., Monday through Friday.

The employer has a written Drug & Alcohol Policy that the employer provided to the claimant and reviewed with the claimant at the start of the employment. The employer's written Drug & Alcohol Policy calls for drug and/or alcohol testing in instances wherein an employee causes an

accident that results in injury for which a report would be required under Iowa Code Chapter 88 or wherein damage to equipment exceeded $1,000.00. The policy calls for collection of a body specimen for testing and includes saliva as one such body specimen. The policy lists the controlled substances to be screened and includes amphetamine in that list. The policy states the employee subject to testing will be given the opportunity to provide information to the medical review officer for consideration. The policy states a certified letter will be issued to the subject employee pursuant to the requirements of the Iowa Code and that the letter may include information regarding the claimant's right to additional testing of the split specimen. The Drug & Alcohol Policy prohibits use of drugs unless prescribed to the employee. The policy prohibits use of alcohol. The policy indicates the employer retains sole discretion to decide whether to terminate the subject employee with or without receipt of the drug test result. The policy calls for annual training of supervisors.

On December 2, 2020, the claimant suffered a minor injury in the course of the employment. The claimant had been using a riveting gun and set the riveting gun on a shelf before descending to a lower level to assist a coworker. A coworker tripped over the power cord and caused the riveting gun to fall on the claimant's head. The claimant initially did not think she needed to be evaluated. However, the claimant then felt her head and then observed blood on her hand. The claimant promptly reported the incident to her supervisor, Production Supervisor Yolanda Velica. The supervisor told the claimant she should go see the nurse. The supervisor said nothing about requesting the claimant submit to drug testing. An emergency medical technician (EMT) transported the claimant to the onsite clinic. The onsite clinic nurse asked the claimant the purpose of her visit. The claimant explained what had occurred. The nurse did not examine the claimant's injury. The nurse told the claimant that she had to submit to a drug test. The nurse collected urine and saliva from the claimant. The claimant produced an insufficient quantity of urine for testing. The nurse then collected a saliva specimen from each side of the claimant's mouth. The employer witness does not know whether claimant's supervisor and/or the nurse who collected the bodily specimen participated in training pertaining to drug and alcohol testing and/or in discerning whether an individual is under the influence of drugs or alcohol. The employer generally has supervisors participate in a three-hour training pertaining to Department of Transportation drug testing. The employer witness believes a first report of injury was filed, but that the injury did not proceed to a worker's compensation claim.

After meeting with the nurse, the claimant was transported to an off-site clinic to be evaluated by a doctor. The physician evaluated the claimant, said she would be fine, and released her to return to work.

The claimant then reported to the employer's human resources personnel. The employer asserted that the saliva had produced a preliminary positive test result. The employer suspended the claimant pending receipt of the drug test result. A human resources representative told the claimant that her saliva had tested positive for drugs, directed the claimant to leave the workplace, and directed the claimant to leave her vehicle at the workplace and secure a ride home.

While the claimant was waiting to hear further from the employment, someone from the drug testing laboratory called the claimant and solicited information from the claimant. The claimant does not recall the name or title of the person who contacted her. The person asked if the claimant had been under the influence of a substance or whether the claimant was taking a prescription medication that could alter the result of the drug test. The claimant reported that she was taking three different prescription drugs, that she was around someone who might have been using drugs, and that she uses someone's nicotine vaping device.: hydrocodone (an

opioid), Adderall (an amphetamine), and Xanax (a benzodiazepine). The lab person did not ask for a prescription. The claimant had a prescription for each prescription medication.

The employer received a drug test result on December 7, 2020 that was deemed positive for amphetamines. The drug test report indicates the result was reviewed and verified by a certified medical review officer.

On December 7, 2020, Human Resources Representative Jasmine Wright notified the claimant by telephone call that the employer had received a positive drug test result and that the claimant was discharged from the employment.

On December 7, 2020, the employer mailed a termination letter to the claimant by regular mail. The employer attached a copy of the drug test report. In the termination letter, the employer told the claimant the employer had received a report of a drug test positive for amphetamines. The letter told the claimant that she could discuss the result with the MRO and provided a toll-free number for the MRO. The letter told the claimant of her right to request a second drug screen of the specimen by a lab of the claimant's choosing by submitting a written request within seven days of receipt of the employer's letter. The letter told the claimant the estimated cost would be $50.00 and that the cost represented a portion of what the employer typically paid. The letter referenced the employer's Drug & Alcohol Policy. The letter told the claimant she was being discharged *effective October 28, 2020,* based on the positive drug test result. The claimant did not request a second test of the saliva specimen.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5(2)(a) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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)l(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 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).

The evidence in the record establishes a discharge for no disqualifying reason. There were significant gaps and omissions in the evidence presented by the employer. Most or all of the gaps and omissions were attributable to the employer witness lacking personal knowledge of the matters in question. The claimant's testimony supplemented the employer's testimony and helped to fill a number of the gaps. The employer presented insufficient evidence to prove that the supervisor and/or nurse involved in the drug test request had the training required by Iowa Code section 730.5(9)(h).

The employer presented insufficient evidence to prove the written policy provided uniform standards for actions that will be taken in case of a confirmed positive test, as required by Iowa Code 730.5(9)(b). Instead, the employer retained discretion under the policy to decide whether to terminate the subject employee with or without receipt of the drug test result.

The employer presented insufficient evidence to prove the claimant *caused* an accident resulting in an OSHA reportable injury or property damage exceeding $1,000.00. See Iowa Code section 730.5(1)(i)(5). The claimant testified the riveting gun fell when a coworker tripped over a cord. The employer presented insufficient evidence to rebut that testimony. The weight of the evidence indicates the coworker caused the accident, not the claimant. The claimant was merely the injured party.

The employer presented insufficient evidence to rebut the claimant's testimony that the claimant was taking an amphetamine, Adderall, pursuant to a prescription, and that the claimant shared that information with a lab representative. In the absence of such rebuttal evidence, the evidence fails to establish a violation of the employer's Drug & Alcohol policy.

The evidence fails to establish that the employer complied with the notice requirements set forth in the employer's written policy and at Iowa Code section 730.5(7)(j)(1). The evidence establishes that notice regarding the test result and the right to additional testing was mailed by regular mail, rather than by the required certified mail, return receipt requested. See *Eaton v Employment Appeal Board*, 602 N.W.2d 553 (Iowa 1999) and *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003).

The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The May 13, 2021, reference 02, decision, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

October 29, 2021
Decision Dated and Mailed

jet/scn