

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DEAN R WHALEY
Claimant

APPEAL 17A-UI-01843-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BROCK INDUSTRIAL SERVICES LLC
Employer

**OC: 06/05/16
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 730.5 – Private Sector Drug-free Workplaces
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:

Brock Industrial Services, LLC (employer) filed an appeal from the February 10, 2017, reference 02, unemployment insurance decision that allowed benefits based upon the determination it failed to furnish sufficient evidence to show Dean R. Whaley (claimant) was discharged for disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on March 10, 2017. The claimant participated and was represented by Union Field Representative Harold Davis. The employer participated through Site Safety Manager Daniel Neal, Project Manager Dave Contorno, and Human Resources Coordinator DaShara Holt. Employer's Exhibits 1 and 2 were received.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits?
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: The claimant was employed full-time as a Laborer beginning on October 10, 2016, and was separated from employment on January 25, 2017, when he was discharged. The employer has a substance abuse and testing policy as part of its Employee Handbook. The claimant agreed to read and abide by the policies in the Employee Handbook when he was hired. In December 2016, the employer issued a new substance abuse and testing policy. According to the both policies, its employees are subject to random drug testing. A failure to submit to a drug test is a violation of either policy which would result in termination of employment.

On January 25, 2017, the claimant received notice he was selected for a random drug test. He reported to the onsite independent drug testing facility. The claimant had just come back from

break and notified the nurse who was testing him that he did not need to urinate. The claimant was given 40 ounces of water and three additional hours to produce a urine sample. The nurse told him that he could obtain medical documentation explaining why he was unable to produce a sample and provide the results of a urine test obtained within 24 hours. Site Safety Manager Daniel Neal was called to the testing facility as the claimant's three hours were coming to an end and it was looking like he would not produce a sample. Neal asked the claimant what was happening and the claimant explained he did not urinate very often. Neal explained that if the claimant did not produce a sample in the three-hour window, it would be considered a refusal of the drug test.

After the three hours expired without the claimant providing a sample, Neal walked him to the front gate. Neal told the claimant that he was being discharged for violating the substance abuse and testing policy but said if he obtained medical documentation regarding his inability to urinate and a negative test the employer would consider the information. The claimant did not obtain the additional testing and did not return to the employer's facility as he had been discharged.

The administrative record reflects that the claimant has received unemployment benefits in the amount of \$2,155.00, since filing a claim with an additional date of January 22, 2017, for the six weeks ending March 4, 2017. The administrative record also establishes that the employer participated 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 based upon wages credited from this employer's account are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa regulations define misconduct, stating:

"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.

Iowa Admin. Code r. 871-24.32(1)a. 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 establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). 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). (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).

It is the duty of the administrative law judge as 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 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. *Id.* 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible.

The employer has a random drug testing policy that it enacted pursuant to Iowa Code § 730.5. The claimant received a copy of the policy and knew he was subject to random drug testing. He was selected for testing by a third-party administrator. The claimant reported for the drug test, but did not need to urinate. The employer gave him a reasonable amount of time and additional liquids to aide him in producing a sample. The claimant did not produce a sample and knew or should have known that failure to provide a sample would result in his discharge. The claimant has not provided any information stating he was medically unable to provide a urine sample when he was sent for testing. The employer has an interest in maintaining a drug-free workplace. The claimant's refusal to provide a urine sample was a deliberate disregard of the employer's interest. The conduct is disqualifying even without prior warning. Benefits based on wages credited from this employer's account are denied.

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. Iowa Code § 96.7. 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. Iowa Admin. Code r. 871-24.10(1). 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 10, 2017, reference 02, unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits based on wages credited from this employer's account 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 been overpaid unemployment insurance benefits in the amount of \$2,155.00 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.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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