

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK DILLAVOU

Claimant

APPEAL NO: 10A-UI-00181-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL MEAT SOLUTIONS CORP

Employer

OC: 11-15-09

Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 30, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 12, 2010. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Jessica Shepard, Human Resources Associate, 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 production worker for Cargill from May 7, 2008 to January 20, 2010. On November 13, 2009, he was involved in a work accident and consequently the employer required him to take a drug test in the employer's medical office. He tested positive but the illegal substance he tested positive for is unknown. The employer's witness believes the testing conditions were sanitary and private and the sample was split. She did not know if the sample was kept for 45 days, whether the claimant was given the opportunity to provide a list of prescription or nonprescription drugs that might affect the outcome of the test, or whether the employer informed the claimant of the drugs for which he would be tested. There was no evidence there was a confirmed positive testing by certified laboratory before disciplinary action or that the confirmatory test, if done, used a different chemical process. The claimant was not notified of the results by certified mail, return receipt requested, or of his right to a confirmatory test at a certified lab of his choosing, payable by the claimant, within seven days from the date of mailing of the retesting rights. After Jessica Shepard, Human Resources Associate, was notified the claimant tested positive for an unknown illegal substance, she contacted him to come in and discuss the employer's Step Down program which offers continued employment if the employee submits to follow up drug testing. The claimant agreed to participate in the program and returned to work November 20, 2010, after being suspended November 13, 2010. He was tested again at that time, possibly due to a reasonable suspicion,

and the result was “non-negative” so the claimant was suspended again while the sample was sent out for further testing. The employer sent him a letter November 20, 2010, notifying him that his employment was terminated due to violation of the employer’s drug policy. The employer does not know if the letter was registered.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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). While it appears the claimant tested positive for an illegal substance, the employer failed to follow state law with regard to the testing and notification procedures on both occasions. Although the administrative law judge is pleased to see the employer provide an opportunity for employees who test positive and agree to undergo treatment to keep their jobs if they remain sober, that does not eliminate the employer’s responsibility to follow Iowa law when administering the original and any subsequent tests. Consequently, because the employer did not provide the evidence that it followed the required procedures, benefits must be allowed.

DECISION:

The December 30, 2009, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs