

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JUSTIN D PRUSHA**  
Claimant

**APPEAL NO. 13A-UI-04555-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**(01-N) CODE 001- DES MOINES**  
Employer

**OC: 03/17/13**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Justin D. Prusha filed a timely appeal from a representative's decision dated April 8, 2013, reference 02, which denied unemployment insurance benefits finding that he was discharged from work on March 21, 2013 for conduct not in the best interests of the employer. After due notice was provided, a telephone hearing was held on July 15, 2013. Claimant participated. Participating on behalf of the claimant was Ms. Jean Pendleton, Attorney at Law. The employer participated by Mr. Joseph Quinn, Attorney at Law, and witnesses: Mr. James Rottinghaus, Mr. Dan Webster and Ms. Mary Krampe. Employer's Exhibits A, B, C, D, E, F and G were received into evidence. Claimant's Exhibits 3, 4, 5, 6, 7, 8, 9 and 10 were received into evidence.

**ISSUE:**

The issue in this matter is whether claimant was discharged for misconduct in connection with his work.

**FINDINGS OF FACT:**

Justin Prusha was employed by the captioned employer d/b/a John Deere Des Moines Works from February 9, 2004 until March 21, 2013 when he was discharged from employment. Mr. Prusha was employed as a full-time production worker and was paid by the hour.

Mr. Prusha was discharged because the employer believed that Mr. Prusha had misrepresented his physical condition following a reported job injury that had occurred on August 6, 2012. The claimant had initially been referred to a physician's assistant in the company's medical department and scheduled for an MRI. The claimant was later referred to a neurosurgeon after he visited his personal physician about the injury. On August 15, 2012, the claimant began to receive disability pay through the company because of his injury and restrictions by his doctors. Mr. Prusha continued to attend his appointments with his physician, Dr. McGuire, and was referred to Dr. Boarini, a neurological spinal surgeon. Mr. Prusha continued to report neck pain, difficulty in neck movement and headaches. By the end of August his physician determined that Mr. Prusha's neck issues were not work related and the claimant was informed that he must be

released to full duty before he could return to work. The claimant was scheduled for an independent evaluation with Dr. Boarini to be held on November 14, 2012. In late September and into October 2012, Mr. Prusha was given work limitations by Dr. McGuire restricting hours that he could work and providing a lifting restriction of 30-40 pounds. John Deere rules require that employees be able to lift 45 pounds.

Mr. Prusha continued to report to the company as well as to his physicians that there had been little improvement in his neck pain and that he continued to have difficulty in turning his head from side to side through December 3, 2012. In January 2013, the claimant began to report improvement, but that he was still experiencing difficulty moving his head from side to side. Mr. Prusha was scheduled for an appointment with Dr. McGuire on January 11, 2013 and on that date, Dr. McGuire released the claimant to return to full duty effective January 14, 2013. By that time Dr. McGuire had received a report from the neurosurgeon, Dr. Boarini, confirming Dr. McGuire's belief that there had been no significant medical reason preventing the claimant from working.

Because the employer had been suspicious of the disability claim, a private investigative company was hired to do surveillance on the claimant. The claimant was observed and filmed from November 30, 2012 through December 08, 2012. The surveillance reports and video tapes showed Mr. Prusha engaging in strenuous activities which included pushing trucks by hand, moving, twisting and lifting heavy objects on November 30, 2012, and doing a variety of physical activities without any apparent difficulty. After the claimant's return to work medical information became available to the employer and the employer began a review. The records showed that on November 14, 2012, claimant was examined by Dr. Boarini, a neurological and spinal surgeon, and Dr. Boarini had concluded that claimant had suffered only a very minor injury and that he had suffered no significant or permanent injury and that the claimant could have resumed normal work activities. (See Exhibit 7). They also found that by October 26, 2012, the claimant's own physician, Dr. McGuire, had also concluded that it would be safe for Mr. Prusha to return to work, except for the fact the claimant had stated concerns about long drive times, and the working time each day. A review of the medical documentation also showed that on December 3, 2012, Dr. McGuire concluded that the claimant could be performing many duties for the company and noted that the claimant had been able to travel to Colorado and back without difficulty, but still complained of neck pain. Dr. McGuire made reference to the claimant's returning to his regular job for John Deere at that time, but based upon the claimant's statement of his number of hours driving to and from work and the requirement that he perform up to 10 hours of heavy work each day, Dr. McGuire delayed his full release of the claimant until Dr. Boarini's report was received.

The company considered the surveillance reports and tapes showing Mr. Prusha's strenuous activities which included pushing trucks by hand, lifting heavy objects, bending, twisting and also sustained physical activity for extended periods of time. They also considered Mr. Prusha's ongoing statements of lack of little significant physical improvement, ongoing neck pain and his statements about difficulty in turning his head and Dr. Boarini's assessment of November 14, 2012, in which the doctor concluded that the claimant had suffered only a very minor injury and there was no evidence of any significant or permanent injury as of that date. The employer concluded the claimant had exaggerated his claim of injury and was untruthful in his statements about his condition for the purpose of collecting disability payments.

The claimant asserts that he continued to have the neck pain as he described to the company and examining physicians and that an earlier return to work was prohibited by the company's determination that his injury was not work related and the requirement that he obtain a release to return to full duties, and that he did return promptly upon being fully released effective January 14, 2013.

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

The first question for the administrative law judge is whether the evidence in the record establishes work-related misconduct on the part of the claimant. It does. The second question before the administrative law judge is whether the evidence in the record establishes that the claimant was discharged from employment on March 21, 2013 due to a current act of misconduct. It does not.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing job disqualifying misconduct. Cosper v. Iowa Department of Job Service, 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 Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants the denial unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988).

Employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if fails to meet its burden of proof to establish a current act of job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation.

The evidence in the record establishes that Mr. Prusha had not followed the employer's reasonable requirement that he provide accurate and timely information to the company and to his physicians about his medical condition while off work and drawing disability payments from the company. Claimant had indicated that an accident at work in August 2012 had continued to cause him substantial neck pain, headaches and trouble moving his head from side to side. These assertions by the claimant continued to be made on December 3, 2012. Dr. Boarini's and Dr. McGuire's statements about the claimant's condition in the middle of November 2012 concluded no significant injury had occurred and video surveillance reports and tapes showed the claimant engaging in strenuous physical activities without apparent impairment on November 30, 2012. The employer was thus reasonable in its conclusion that the claimant's failure to provide accurate information to his physicians and to the company had delayed the claimant's return to work date and caused the claimant to receive disability payments that he otherwise would not have been eligible to receive. Mr. Prusha had knowingly misrepresented his physical condition in violation of the company's policies and reasonable expectations.

In this matter, however, when Mr. Prusha was allowed to return to work and his full duties on January 14, 2013, the company was aware of the results of the security surveillance that had taken place between November 30 and December 8, 2012 and additional medical information about doctor's visits, results of examinations, diagnosis, and doctor's conclusions became available to the employer. Although it is understandable that due to the complex and at times conflicting nature of the doctor's reports and medical documentation that a reasonable amount of time would be necessary to investigate the matter, however, he was not terminated until over two months later on March 21, 2013 after the claimant presented his side in a disciplinary hearing. No evidence in the record shows that the delay was occasioned by the claimant or his union representatives. The claimant was allowed to resume work and perform duties between January 14, 2013 and his discharge on March 21, 2013 without any intervening act of misconduct. There is nothing in the record to establish good cause for the delay in discharging the claimant. The administrative law judge concludes that the claimant was discharged for misconduct, his discharge over two months after returning to work, was not for a current act of misconduct within the meaning of 871 IAC 24.32(8) which provides the discharge must be based upon a current act of misconduct.

**DECISION:**

The representative's decision dated April 8, 2013, reference 02, denying unemployment insurance benefits is reversed. Claimant's discharge on March 21, 2013 was not for a current act of misconduct. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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