

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HERBERT L CLARK
Claimant

APPEAL NO. 16A-UI-05426-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACH FOOD CO INC
Employer

OC: 04/10/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Herbert Clark filed a timely appeal from the May 3, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Mr. Clark had been discharged on March 21, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on May 27, 2016. Mr. Clark participated. Stacey Cale represented the employer and presented additional testimony through Jeff Dewey Exhibits Two through Eight, A, B, C, E through H were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: ACH Food Company, Inc., blends and packages spices. Herbert Clark was employed by ACH on a full-time basis from 1996 until March 29, 2016, when the employer discharged based on purported falsification of company records in connection with a worker's compensation injury claim. During the last two years of the employment, Mr. Clark was as a Dry Sauce Line Foreperson. His duties involved placing 40 to 60-pound rolls of laminated packaging material onto a machine, threading the packaging material into the machine and running the machine to fill the small packets with spices. The work also involved folding boxes for the machine to fill with spice packets, shaking each box to make sure there was no loose product, and lifting and feeding the boxes through the taping machine. Mr. Clark would make and handle 300 to 1,000 boxes per day. The boxes were not heavy, but the work was repetitive. Mr. Clark's work hours were 3:15 p.m. to 1:45 a.m., Monday through Thursday. Mr. Clark would get a 30-minute unpaid lunch break from 8:30 to 9:00 p.m. He would also get a 20-minute paid break during each half of his shift. Ms. Clark's immediate supervisor during the last several months of the employment was Production Supervisor Scott Stegman.

From July 15, 2015 through January 1, 2016, Mr. Clark was approved for intermittent medical leave under the Family and Medical Leave Act. Tonya Erickson, Doctor of Nurse Practice, was and is Mr. Clark's primary care provider. On July 28, 2015, Dr. Erickson completed a Certification of Health Care Provider for Employee's Serious Health Condition" in support of Mr. Clark's need for intermittent FMLA leave. Dr. Erickson indicated that Mr. Clark was "having severe pain in feet + hands – arthritis, fx [fracture] per xray, seeing hand + foot specialist." Dr. Erickson estimated that Mr. Clark might be incapacitated and need to be off work two to three shifts per week.

Mr. Clark has submitted a medical record concerning his evaluation and treatment he received on August 21, 2015 from Dr. ZeHui Han, M.D., at Iowa Ortho. The document includes the following assessment note: "We reviewed the nerve conduction test and EMG [electromyography]. Patient has a very mild carpal tunnel syndrome on both hands. After discussion, we decided to observe this condition. Patient will follow-up in two months for further evaluation. In the meantime, he will use a splint for protection of both wrists." The patient history section of the same medical record states:

1. Follow Up of BUE EMG

The symptoms began 2 to 3 months ago. The symptoms are reported as being mild. The symptoms occur constantly. The location is bilateral hands. Aggravating factors include numbness, pain. Relieving factors include pain medication. He states the symptoms are acute and are unchanged.

Follow-up for bilateral carpal tunnel syndrome. Patient is still complaining of numbness and tingling.

On Friday, March 18, 2016, Mr. Clark dropped a partial roll of laminated packaging material on his right foot while he was replacing the laminate roll on the packaging machine. Mr. Clark was wearing steel-toed boots at the time. Mr. Clark reported the incident to Mr. Stegman the same day and completed a written incident report regarding his foot and knee. In the report, Mr. Clark noted that the laminate roll had dropped from a distance of three feet onto the top of his right foot. Mr. Clark noted that the top part of his foot ached, but that he was more concerned about pain radiating to his knee. Mr. Clark rated his foot and knee pain, on a pain scale of one (no pain) to five (intolerable pain), as a one. During the same conversation, Mr. Clark told Mr. Stegman that he needed to start a worker's compensation claim regarding his hands being sore. Mr. Clark had experienced pain in his wrists and hands when he had picked the roll of packaging material up off the floor. This was on top of the chronic carpal tunnel issues in both hands. Mr. Stegman told Mr. Clark that Mr. Clark would need to speak with human resources about the worker's compensation claim. Mr. Stegman commented that, "this is something you have had for a long time."

From March 18, 2016 onward, the employer's judgment and interactions with Mr. Clark were influenced by the employer's goal of defending against the worker's compensation claim arising from Mr. Clark's bilateral carpal tunnel issues. From March 18, 2016 onward, Mr. Clark's actions and judgment were influenced by a diagnosed anxiety disorder.

On Monday, March 21, 2016, Mr. Clark went to the human resources department to submit a worker's compensation claim. A human resources representative told Mr. Clark that he would have to speak with Gary Klukow, Safety Manager, and that Mr. Klukow was not in that day. Later that day, another employer representative, Bob State, told Mr. Clark that he would need to complete a second incident report concerning the March 18 workplace incident and regarding his hands and wrists. In this second report, Mr. Clark wrote that when he picked the partial roll

of laminate up off the floor after it fell on his foot, both of his wrists and hands hurt. Mr. Clark rated his wrist pain at three on a scale of one (no pain) to five (intolerable pain). Mr. Clark checked boxes to indicate that he was experiencing aching, burning, sharp pain, and tingling. As Mr. Clark was completing the incident report, Jeff Dewey, Production Manager, came to the office and asked Mr. Clark what was wrong with his arms and hands. Mr. Dewey asked Mr. Clark whether Mr. Clark felt like he could work that night. Mr. Clark told Mr. Dewey that he could work, but that he was agitated by the need to fill out a second incident report.

When Mr. Clark arrived for work on March 22, he was directed to go see Gary Klukow, Safety Manager. Mr. Clark complied. Mr. Klukow asked Mr. Clark why Mr. Clark thought ACH Food Company was responsible for his carpal tunnel issues. Mr. Clark asserted that the issues were caused by the repetitive nature of his work and not being able to rotate duties with anyone. In November 2015, Mr. Clark had filed a grievance in which he requested to rotate duties like other line workers and asserted that not being allowed to rotate duties subjected him to increased risk of injury. On March 22, Mr. Klukow asked why Mr. Clark could not get his own doctor to take care of his carpal tunnel issues. Mr. Clark told Mr. Klukow that the reason why he could not have his own doctor take care of the issues was because they were work related. Mr. Clark also mentioned that his doctor might not be interested in seeing him anymore after the employer sent the doctor short-term disability paperwork to complete on March 14, instead of appropriate FMLA materials, and now the doctor had to spend more time completing a second set of paperwork. The paperwork in question related to a request for FMLA medical leave during the period of March 3-14, 2016, while Mr. Clark underwent medication adjustment for his anxiety disorder.

Mr. Klukow sent Mr. Clark to be interviewed and evaluated by Jason Horras, Doctor of Physical Therapy. The employer has Dr. Horras come to the workplace three days a week to evaluate and treat employees. Dr. Horras prepared a report for Mr. Klukow in which he wrote the following:

Employee indicated he dropped a laminate on his right foot on Friday March 18, 2016 and had no foot pain but had some immediate right knee pain. He indicates that he currently has no right foot pain and no pain in his right knee. He did state that he has right knee pain that comes and goes. He indicates that his main c/o [concern] is bilateral hand and wrist pain. Employee reports left is worse than right and has been going on for about six months. He is right hand dominant but tries to be ambidextrous. He reported that he has more of an "arthritic ache" in his bilateral wrists and hands and in his knuckles. He states that his hands get more swollen when he works with them. I asked him if he had seen his primary Dr about wrist and hand pain and he said "that he had something happen with his Dr and couldn't be seen anymore." He didn't give me more details. I asked him about FMLA and if his hands and wrists were part of the reason for this and he said "it wasn't, it was other stuff." I did not further question him on this topic.

Dr. Horras examined Mr. Clark and made the following findings:

I performed a Phalen's Test and he had no increase in symptoms. I tested his grip strength at Notch 2 on JAMAR Hand Grip Dynamometer and he had the following measurements: 3 trial average: Right=155 lbs and Left=108 lbs. He had bilateral wrist AROM WFL [active range of motion within functional limit] and all of his joints in bilateral hand were WFL. No gross swelling or deformities noted.

Dr. Horras noted that he had discussed with Mr. Klukow both the subjective interview and objective evaluation of Mr. Clark's hands and wrists.

In an email that Production Supervisor Stegman sent to Gary Klukow, Safety Manager, on March 22, 2016, Mr. Stegman asserted that he had asked Mr. Clark on March 18 whether the soreness in his hands was work related. Mr. Stegman asserted in the March 22 email that on March 18 Mr. Clark told Mr. Stegman that the soreness in his hands was *not* work related. Mr. Clark denies making that statement. The weight of the evidence indicates that the bilateral carpal syndrome was indeed related to, either caused or aggravated by, the repetitive nature of the work duties.

Mr. Klukow next had Mr. Clark provide a urine specimen for "quick cup" drug testing. Though Mr. Clark had provided no reason to suspect that he would tamper with that process, the person collecting the specimen remained in the restroom and observed Mr. Clark provide the urine specimen. The specimen tested negative. Mr. Clark's anxiety level increased in connection with the surprise drug test and the conditions under which it was performed. After the drug test, Mr. Klukow notified Mr. Clark that he had arranged for Mr. Clark to be evaluated by Physician's Assistant Von Miller the next day and that Mr. Klukow would also attend the appointment.

On March 23, before Mr. Clark met with the employer's worker's compensation health care provider, Mr. Klukow provided P.A. Miller with the two incident reports drafted by Mr. Clark, the memo from the physical therapist, and a written statement from Production Supervisor Stegman regarding his conversation with Mr. Clark on March 18. Mr. Clark's meeting with P.A. Miller did not go well. Though Mr. Clark told Mr. Klukow that he did not want Mr. Klukow in the examination room, Mr. Klukow asserted that the employer had a right to be present and came along anyway. Before the physician's assistant entered, a nurse took Mr. Clark's vital sign measurements. Mr. Clark's blood pressure measured high at 180/110. Immediately before the physician's assistant entered, and as the physician's assistant entered, Mr. Klukow quizzed Mr. Clark regarding why he thought ACH was involved in his hand and wrist issues and why he did not see his own doctor for the issue. Mr. Clark responded that the issues were caused by the repetitive nature of his work duties and not being rotated to other duties. When P.A. Miller entered, he asked Mr. Clark what the problem was. Mr. Miller responded that it was carpal tunnel syndrome from doing the same job. Mr. Clark thought P.A. Miller rolled his eyes in response. Toward the start of P.A. Miller's contact with Mr. Clark, P.A. Miller asked Mr. Clark about a diabetes diagnosis. When Mr. Clark confirmed he had been diagnosed with diabetes five years earlier, P.A. Miller told Mr. Clark that one of the side effects of diabetes can be arthritic pain in the wrists and hands. Mr. Clark became immediately distrustful of P.A. Miller. Mr. Clark became agitated and responded that he believed the assertion to be "bullshit." Mr. Clark said, "Fuck you" and "This is fucking bullshit." P.A. Miller terminated the contact with Mr. Clark, directed him to leave the clinic, and indicated the police would be summoned. Before Mr. Clark left the clinic, he attempted to apologize for his behavior.

After the medical appointment, Mr. Klukow and Mr. Clark returned to the workplace. Mr. Klukow told Mr. Clark that he would need to meet with human resources before he could return to work. The employer then suspended Mr. Clark with pay.

On March 28, 2016, Mr. Clark submitted an application for Family and Medical Leave to cover the period of March 3-14, 2016, during which he had undergone medication adjustment for his diagnosed anxiety. This was the second set of paperwork that Mr. Clark had made reference to earlier. In connection with this application for FMLA leave, Dr. Erickson provided a Certification of Health Care Provider for Employee's Serious Health Condition in support of the requested leave period.

On March 29, 2016, Stacey Cale, Human Resources Manager, and Jeff Dewey, Production Manager, and Jeff King, Chief Union Steward, met with Mr. Clark. Mr. Clark was distrustful of Mr. King and delayed his participation in the meeting by requesting a different union representative. Ms. Cale focused her questions for Mr. Clark on whether he had stated to Mr. Klukow and/or Mr. Stegman that his doctor would no longer see him and whether he had stated that he, therefore, had no choice but to file a worker's compensation claim. Ms. Cale then referenced the outburst at the doctor's office. Mr. Clark acknowledged that his conduct at the appointment had been inappropriate and that he had apologized. Ms. Cale then turned to issue of why Mr. Clark had completed two separate injury reports. Mr. Clark expressed a concern that a worker's compensation claim would lead to retaliation. Ms. Cale told Mr. Clark that she was going to issue a reprimand to him for swearing at the worker's compensation doctor, for being late to the meeting, and for falsifying a company record in connection with the worker's compensation claim. Ms. Cale and Mr. Dewey subsequently took a break. Mr. Clark stepped outside to smoke a cigarette. When Mr. Clark attempted to reenter the workplace, Mr. King prevented him from doing so and said that he would receive "a resolution." Mr. Clark remained on suspension. The employer subsequently sent Mr. Clark written notice that he was discharged for falsifying company records.

In May 2016, Mr. Clark obtained a written statement from Dr. Erickson, DNP. Dr. Erickson wrote as follows:

Mr. Clark has been an established patient of mine since June 2011. In July of 2015, he complained of pain in both hands related to repetitive motion at his work. He also complained of weakness and his grip strength in his left hand was decreased.

He has mentioned numerous times that he was the only one that "did his job" and he did not rotate like others in the factory. He had an EMG (nerve conductive study) which revealed carpal tunnel blockage of the left median nerve. It was recommended that he have surgery. Mr. Clark declined to have surgery.

Mr. Clark did not want to lose his job because he had missed a lot of work and did not want to go through another surgical procedure. I then suggested that he wear his splints. In March of 2016, I had seen Mr. Clark regarding his hand pain; I did recommend that he talk to his surgeon at that time. I had assumed he had filed a worker's compensation claim because carpal tunnel syndrome is caused by repetitive motion.

Mr. Clark suffers from adult attention deficit disorder and frequently has trouble articulating what is "concerning" him. He has been treated for this in the past and currently is not on any medication for this disorder.

Mr. Clark filed a grievance through Teamsters Local Union 238 to change his discharge from the employment. In connection with that grievance, the employer proposed that Mr. Clark enter into a Settlement Agreement and General Release "as a full, final and complete settlement and release of all claims and legal causes of action, including, but not limited to Grievance No. 16-03 concerning the discharge of the Grievant, his employment by ACH, and the termination of said employment." The employer proposed a settlement amount equal to four weeks' wages and further proposed that the employer would "not protest any appeal for unemployment benefits." Mr. Clark declined to enter into the proposed agreement.

Mr. Clark has submitted a medical record concerning evaluation and treatment he received on May 9, 2016 from Dr. Benjamin Paulson, M.D., at Iowa Ortho. The document includes the following assessment note: "Patient appears to have Bilateral carpal tunnel syndrome. Nerve conduction study shows Left carpal tunnel syndrome. Did injection for Right. Has braces. Follow up in 2-4 weeks to assess response."

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The administrative law judge notes that the employer elected not to present testimony through Mr. Klukow or Mr. Stegman. Thus, Mr. Clark was the only person to testify from personal knowledge regarding those contacts.

The evidence in the record fails to establish misconduct in connection with the employment that disqualifies Mr. Clark for unemployment insurance benefits. The weight of the evidence establishes that Mr. Clark was indeed suffering from bilateral carpal tunnel syndrome during the last several months of the employment and that the condition was related to the repetitive nature of his work. Regardless of whether the work caused the condition, a reasonable person would conclude that the repetitive nature of the work duties would aggravate the condition. The weight of the evidence fails to establish that Mr. Clark falsified any company documents with regard to reporting the issues with his hands and wrists in connection with the March 18, 2016 workplace incident. The weight of the evidence indicates that Mr. Clark mentioned the hand and wrist pain when speaking to Mr. Stegman on March 18. Mr. Stegman directed Mr. Clark to defer report of the hand and wrist concerns and direct that report to the human resources department. The weight of the evidence indicates that from that moment onward, the employer engaged in a pattern of conduct designed to thwart and undermine Mr. Clark's worker's compensation claim. The employer repeatedly quizzed Mr. Clark on the matter, including why Mr. Clark could not just continue to handle the matter through his own doctor. The employer enlisted the physical therapist in helping to defend against the worker's compensation claim. The employer unduly influenced the physician's assistant prior to the March 23 examination. Mr. Clark's outburst during that medical appointment arose from Mr. Clark's reasonable conclusion that the employer was unduly influencing the medical evaluation process. The outburst, given the full context, did not constitute misconduct in connection with the employment that would disqualify Mr. Clark for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Clark was discharged for no disqualifying reason. Accordingly, Mr. Clark is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Clark.

DECISION:

The May 3, 2016, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs