IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHAEL P COOPER
Claimant

BRIDGESTONE AMERICAS TIRE OPERATIONS LLC
Employer

APPEAL NO. 11A-EUCU-00850-HT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/06/11
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer, Bridgestone, filed an appeal from a decision dated March 31, 2011, reference 01. The decision allowed benefits to the claimant, Michael Cooper. After due notice was issued a hearing was held by telephone conference call on January 4, 2012. The claimant participated on his own behalf. The employer participated by Human Resources Manager Jim Funcheon, Labor Relations Manager Jeff Higgins, and Unemployment State Consultant Kendra McDonald. Exhibit D-1 was admitted into the record.

ISSUE:

The issue is whether the appeal is timely.

FINDINGS OF FACT:

A disqualification decision was mailed to the employer's last-known address of record on March 31 2011. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by April 10, 2011. The appeal was not filed until December 2, 2011, which is after the date noticed on the decision. The decision was mailed to the employer's corporate office but no one can account for what happened to it. The address of record should have been the TALX address which had been the employer's representative since 2005. The employer's representative did not know about the decision until it received a third quarter 2011 statement of charges, although the employer did not account for the first and second quarter 2011 statements of charges which it would have been sent by Iowa Workforce Development.

Michael Cooper was employed by Bridgestone from February 17, 1995 until March 7, 2011 as a full-time production worker. He had received counseling regarding his attendance from Human Resources Manager Jim Funcheon in April 2010. At that time the claimant had already accumulated enough attendance occurrences to have been discharged four times but his supervisor "looked the other way" because of the personal problems Mr. Cooper was having. Mr. Funcheon told him that this could not continue and that there would be no "looking the other

way" in the future. If the claimant's personal problems continued he should contact the human resources department to apply for a leave of absence.

After that the claimant started with the regular disciplinary procedure, receiving counseling for incidents of personal business, lack of transportation and one no-call/no-show. The first written warning was given at six occurrences, the second written warning at seven occurrences, both for personal business.

Mr. Cooper was absent on February 12 and 13, 2011, for illness. He properly reported the first absence but was no-call/no-show to work for the second absence. Under the collective bargaining agreement the employer has seven working days to meet with the claimant and a union representative to discuss the attendance problems. That occurred on February 28, 2011, where Mr. Cooper and his representative were given all the paperwork and then put on a two day "cooling down" period during which the employer would review the documentation. This was extended by another five days after notice to the union representative.

Michael Cooper has received unemployment benefits since filing a claim with an effective date of March 6, 2011.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.6-2 provides in pertinent part:

> The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

The decision was not mailed to the employer's designated representative, although it was mailed to the corporate office. There is no testimony about what happened to the decision when it arrived at the corporate office but it is evident nothing was done until the third quarter 2011 statement of charges was mailed to TALX. As there is no substantial proof as to the actual date of receipt of the earlier mailings, the appeal shall be accepted as timely.

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.

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(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant had been advised his job was in jeopardy as a result of his absenteeism. He was notified of options available to him if his personal problems continued but that further unexcused absences would be counted against him. His absences continued for matters of personal business and lack of transportation, neither of which are considered excused. *Harlan v. IDJS*, 350 N.W.2d 192 (Iowa 1984).

The final incident was a no-call/no-show to work. Mr. Cooper maintained he had called in but did not provide his "call in code" to the employer which he would have been given by the security guards if he had called. The record establishes the claimant was discharged for excessive, unexcused absenteeism. Under the provisions of the above Administrative Code section, this is misconduct for which the claimant is disqualified.

Iowa Code § 96.3-7, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
>
> a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall

be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The decision of the representative dated March 31, 2011, reference 01, is reversed. The appeal shall be accepted as timely. Michael Cooper is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible.

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Bonny G. Hendricksmeyer
Administrative Law Judge

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Decision Dated and Mailed

bgh/pjs