IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

ED J RUSSO
Claimant

BRIDGESTONE AMERICAS TIRE
Employer

APPEAL NO. 18A-UI-04442-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/05/17
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 2, 2018, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on March 18, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on May 3, 2018. Claimant Ed Russo participated. Jeffery Higgins represented the employer and presented additional testimony through Jared Lofland. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6 into evidence. The administrative law judge took official notice of the fact-finding materials.

ISSUES:

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

Whether the claimant was overpaid unemployment insurance benefits.

Whether the claimant is required to repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ed Russo was employed by Bridgestone Americas Tire as a full-time forklift operator from 2010 until March 19, 2018, when Jesus Escobedo, Labor Division Manager, discharged him from the employment for unsafe conduct and for failure to follow the employer's accident reporting protocol. Mr. Russo was assigned to the C shift. The work hours on the C shift were 2:00 p.m. to 10:00 p.m., Monday through Friday. Lowell Lund, C Shift Curing Supervisor, was Mr. Russo's immediate supervisor. Mr. Lund reports to Don Zieser, Curing Foreman.

Mr. Zieser reports to Jared Lofland, Area Business Manager and Curing and Final Inspection Manager.

Mr. Russo's job involved operating a 10,000-pound forklift to transport tires to the curing department in large steel tubs/racks and to transport the empty tubs from the curing department. The steel tubs could measure 8' X 8' and weigh 2,000 pounds. Most of the tubs could be stacked two or three tubs high during transport. Smaller tubs could be stacked four tubs high. Mr. Russo completed appropriate training at the start of his employment to become certified to safely and efficiently operate the forklift. Thereafter, the employer periodically recertified Mr. Russo as a forklift operator by observing Mr. Russo's operation of the forklift.

The employer's decision to discharge Mr. Russo from the employment followed five workplace incidents involving Mr. Russo's operation of the 10,000-pound company forklift. On September 20, 2017, Mr. Russo hit an overhead sprinkler head while trying to move tubs that someone had been stacked four tubs high. The tubs in question were not to be stacked higher than three tubs. Mr. Lund addressed the incident with Mr. Russo. Mr. Lund told Mr. Russo that if the tubs were stacked four tubs high, Mr. Russo should not attempt to move them, but should instead notify Mr. Lund so that he could address the issue. Mr. Lund reported the September 20 incident to the management staff pursuant to the employer's safety/accident reporting protocol.

On October 25, 2017, Mr. Russo hit the top of a doorway with a tub while transporting empty tubs that were stacked four tubs high. Mr. Russo knew that door opening was only high enough to allow tubs stacked three high to pass through. When Mr. Russo hit the top of the doorway with the highest tub, that tub fell. Mr. Russo concedes that a falling steel could be very dangerous. After the incident, Mr. Russo continued to perform his regular duties for another 20 to 25 minutes before reporting the incident to a supervisor.

On October 30, 2017, Mr. Russo was again operating the forklift through the same doorway with the tubs again stacked four tubs high when he hit the top of the doorway with the uppermost tub and one or two steel tubs fell. Mr. Russo continued to go about his duties and did not report the incident to the employer in violation of the employer's safety protocol.

The October 30 incident came to the employer's attention on November 2, 2017. On that day, Jared Lofland, Area Business Manager and Curing and Final Inspection Manager, spoke to Mr. Russo about the incident. Mr. Russo asserted that an incident had taken place a week and a half earlier and asserted that he had reported that incident to a supervisor. Mr. Lofland further investigated the matter and determined that Mr. Russo had not reported the October 30 incident to a supervisor and that Mr. Russo had intentionally misled Mr. Lofland when Mr. Lofland questioned him about the October 30 incident. Mr. Lofland suspended Mr. Russo without pay for 30 days. The employer executed a Condition of Employment document with Mr. Russo regarding Mr. Russo's unsafe operation of the forklift.

On January 17, 2018, Mr. Russo was operating the forklift with tubs stacked four high when the uppermost tub hit some ductwork. After the incident, Mr. Russo continued to perform his regular duties for another 30 minutes before he reported to Mr. Lund. The delayed report violated the employer's safety/accident reporting protocol. When Mr. Russo reported the incident, he reported the incident as having occurred in an area of the plant other than the area where it had actually occurred. Other employees had reported the incident in the meantime. The employer could not locate the previous Condition of Employment document. The employer suspended Mr. Russo and had him sign a second Condition of Employment document. Mr. Russo returned to the employment on February 2, 2018.

The final incident that triggered the discharge occurred on March 13, 2018. On that day, Mr. Russo was transporting two stacked tubs when the top tub slid off the bottom tub and onto the top of the forklift cage. Each steel tub measured 8' X 8' and weighed 2,000 pounds. Mr. Russo enlisted a forklift operator from a different area to help him move the tub that had slid onto the forklift cage. While Mr. Russo remained on the forklift, the other employee attempted to move the tub. In the process of moving the tub, part of the tub slid down beside the forklift in which Mr. Russo was still sitting. When the tub slid down, it broke a mirror off the side of the forklift and bent a "dummy" lever. All of this occurred while Mr. Russo was positioned just inches away in the open-sided forklift. Mr. Russo had not reported the mishap to the employer prior to attempting to resolve the situation on his own. After the steel tub had slid down and damaged the forklift, another supervisor came upon the scene. Mr. Lofland subsequently investigated what had taken place in the aftermath of the tub sliding. The employer concluded that Mr. Russo had not only failed to promptly report the incident, but had placed himself in danger of serious injury by remaining in the forklift while the other forklift operator attempted to move the steel tub from atop the forklift cage.

Mr. Russo established an original claim for benefits that was effective November 5, 2017 and an additional claim that was effective March 18, 2018. Bridgestone Americas Tire is the sole base period employer. Iowa Workforce Development calculated Mr. Russo's weekly benefit amount to be $455.00. In connection with the additional claim for benefits, Mr. Russo was approved for $3,185.00 in benefits for the seven-week period of March 18, 2018 through May 5, 2018. All but one week's benefits were paid to Mr. Russo. Iowa Workforce Development approved, but held back $455.00 in benefits for the week of April 1-7, 2018 to recover a previous overpayment of benefits.

On March 30, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Russo's separation from the employment. The employer's representative of record, Equifax/Talx UCM Services, received appropriate notice of the fact-finding interview. On March 29, 2018, Equifax submitted a cursory letter to the Benefits Bureau that stated, "The claimant was discharged." The letter did not provide any additional information concerning Mr. Russo's separation from Bridgestone. The letter stated that Rhonda Caloia, Equifax Unemployment Insurance Consultant, would represent the employer at the fact-finding interview and provided a telephone where Ms. Caloia could be reached at the time of the fact-finding interview. At the time of the fact-finding interview, Ms. Caloia told the deputy, "I have no information other than it was a discharge." No one from Bridgestone participated in the fact-finding interview. Neither the employer nor Equifax submitted documentary evidence for the fact-finding interview. Mr. Russo participated in the fact-finding interview and provided an oral statement regarding the particulars of his separation from the employment. Mr. Russo's statement did not include any deliberately misleading or fraudulent comments.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.
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> 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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

The evidence in the record establishes a discharge for misconduct in connection with the employment based on Mr. Russo's pattern of careless, negligent and unsafe conduct and based on Mr. Russo's repeated violation of the employer's safety/accident reporting protocol. The weight of the evidence establishes that the employer had made clear to Mr. Russo at the time of

the September 20, 2017 incident the employer's expectation that Mr. Russo would promptly report unsafe circumstances so that a supervisor could assess the situation and determine safe and appropriate steps to resolve the unsafe situation. The September 20 incident arose from Mr. Russo's decision to operate the employer's forklift in an unsafe manner. The October 25 and October 30 nearly identical incidents also arose from Mr. Russo's decision to operate the employer's forklift in an unsafe manner. Mr. Russ waited 20 to 25 minutes to report the October 25 incident and did not report the October 30 incident. To make matters worse, Mr. Russo intentional misled the employer on November 2 at the time Mr. Lofland attempted to investigate the October 30 incident. The January 17 incident arose from Mr. Russo's decision to operate the employer's forklift in a careless manner and again involved a failure to report the incident in a timely manner. When Mr. Russo did finally report the incident, he placed in the wrong area of the plant. The final incident involved both gross negligence on the part of Mr. Russo and a failure to properly report the incident. The employer accurately concluded that Mr. Russo placed himself at risk of serious injury by remaining inside the open-sided forklift as the other forklift driver attempted to maneuver the steel tub above the forklift cage. If Mr. Russo had promptly reported the incident, the evidence indicates that the employer would have directed Mr. Russo to leave the forklift before anyone attempted to maneuver the steel tub overhead. The pattern of conduct indicated an intentional and substantial disregard of the employer's interests in maintaining a safe work environment.

Because the evidence establishes a discharge for misconduct in connection with the employment, Mr. Russo is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Russo must meet all other eligibility requirements.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews as follows:

> Employer and employer representative participation in fact-finding interviews.
> 24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in

> the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

The evidence establishes that the employer did not participate in the fact-finding interview within the meaning of the law. The employer's involvement in the fact-finding interview was limited to an Equifax representative getting on the phone to tell the Benefits Bureau deputy that she had no information other than Mr. Russo was discharged from the employment.

Mr. Russo received unemployment insurance benefits, but has been disqualified for those benefits as a result of this decision. Accordingly, Mr. Russo was overpaid $3,185.00 in benefits for the seven-week period of March 18, 2018 through May 5, 2018. Because Mr. Russo did not receive benefits due to fraud or willful misrepresentation and because the employer failed to participate in the fact-finding interview within the meaning of the law, Mr. Russo is not required to repay the overpaid benefits. The employer's account may be charged for the benefits already paid to Mr. Russo in connection with the additional claim for benefits. The employer's account shall not be charged for benefits for the period subsequent to the mailing date of this decision.

DECISION:

The April 2, 2018, reference 01, decision is reversed. The claimant was discharged for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant was overpaid $3,185.00 in benefits for the seven-week period of March 18, 2018 through May 5, 2018. The claimant is not required to repay the overpaid benefits. The employer's account may be charged for the benefits already paid to the in connection with the additional claim for benefits. The employer's account shall not be charged for benefits for the period subsequent to the mailing date of this decision.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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