

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MARK T KOVACS
325 S SAMSON ST
ROLAND IA 50236

IOWA DEPARTMENT OF
TRANSPORTATION
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-10052-RT
OC: 08-08-04 R: 02
Claimant: Respondent (3)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.4-3 – Required Findings (Able and Available for work)
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Iowa Department of Transportation, filed a timely appeal from an unemployment insurance decision dated September 7, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Mark T. Kovacs. After due notice was issued, a telephone hearing was held on November 1, 2004, with the claimant participating. Kimberly Nobling, Management Analyst II, participated in the hearing for the employer. The employer was represented by Joyce Habel, of TALX UC eXpress. Claimant's Exhibit A was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. This matter was originally scheduled for a hearing on October 8, 2004 at 9:00 a.m. and rescheduled by the administrative law judge

because the employer's witness had a fire alarm in her building. The claimant had contacted the administrative law judge by telephone call at 8:56 a.m. on September 24, 2004 and asked that the hearing be moved up and held sooner to get the hearing over sooner. The administrative law judge had to deny the claimant's request to reschedule the hearing by moving it sooner because his schedule was already full.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer as a full-time equipment operator from October 27, 2000 until he was discharged on December 1, 2003 as shown at Claimant's Exhibit A. The claimant's last day of work for the employer was March 19, 2003. The claimant was involved in a work related accident on December 23, 2000 when he was rear-ended while operating a snowplow for the employer. The claimant was injured. The claimant was placed on light-duty, which met his restrictions until March 19, 2003. At that time, his physician placed permanent restrictions on the claimant, which the employer could no longer meet. Those restrictions were no lifting of over 25 pounds, no repeated lifting of over 15 pounds, no repetitive bending of his back or twisting or repetitive movements and primarily a job requiring sedentary work. Prior to that time, the claimant had been given various tasks, which would meet his restrictions. The claimant had the opportunity to apply for other positions of the employer that would meet his restrictions but the claimant has not done so because he is now under a narcotic medicine, which prohibits him from driving, and he cannot even get to work. Further, the claimant has chronic back pain, which causes certain episodes rendering him helpless and unable to work. These episodes can last from anywhere from 2 hours to 14 hours. These episodes are random. The claimant is taking powerful narcotic drugs as noted above and is still taking them and will be taking them in the foreseeable future. The claimant has placed no other restrictions on his ability to work although the claimant was unable to specifically state what work he could do. The claimant needs a sedentary job, but cannot get to work and work because of the narcotics and because of the episodes of pain that render him helpless. The claimant has placed no restrictions on his availability to work and is earnestly and actively seeking work although he cannot specify what specific work he would be able to do. The claimant was on long-term disability until July 24, 2004. The claimant filed for unemployment insurance benefits effective August 8, 2004 and received unemployment insurance benefits in the amount of \$375.00 as follows: \$75.00 for benefit week ending August 14, 2004 and \$75.00 for four weeks, from benefit week ending October 9, 2004 to October 30, 2004. The claimant did not file weekly claims during the intervening period because he was under the influence of narcotic medication.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he was and is not able, available, or earnestly and actively seeking work. The claimant is ineligible to receive unemployment insurance benefits for these reasons.
3. Whether the claimant is overpaid unemployment insurance benefits. He is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The administrative law judge concludes that the claimant was effectively discharged effective December 1, 2003. The employer's witness, Kimberly Nobling, Management Analyst II, testified that the claimant was terminated on that date. The claimant testified that he was discharged. The claimant's separation is also discussed at Claimant's Exhibit A. It appears to the administrative law judge that the claimant was effectively and essentially discharged on December 1, 2003.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The claimant was discharged because he was unable to meet the essential functions of his job and because of medical restrictions placed on him by a physician, which the employer could no longer meet. However, these restrictions and the claimant's

inability to perform the essential functions of the job were caused by work related injury when a snowplow that he was operating was rear-ended by a motor vehicle. The administrative law judge notes that the claimant was able to work at light duty from the date of the injury, December 23, 2000 until March 19, 2003 when he was given permanent restriction. Although there was some evidence that the permanent restrictions prohibited him from doing the light duty, the administrative law judge is not convinced. It appears that the employer could have continued to employ the claimant but chose not to do so since he was placed on long-term disability because of an injury. However, the injury was work related. Under the circumstances here, the administrative law judge must conclude that the claimant's inability to do his work and his physical work restrictions were not deliberate acts or omissions by the claimant constituting a material breach of his duties nor do they evince a willful or wanton disregard of the employer's interest nor are they carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)(2) provide:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of

services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he is and was at relevant times, able and available for work. There was evidence establishing permanent physical restrictions on the claimant including no lifting of over 25 pounds, no repetitive lifting of over 15 pounds, no repetitive bending or twisting or repetitive movements, and primarily sedentary work. Although these restrictions may not have totally impeded the claimant's opportunity to obtain employment, the claimant further testified that he is continuing to take a narcotic medication, which prohibits him from driving, and he cannot get to work even if he could find a job that met his restrictions. The claimant was unable to state just exactly what jobs would meet his restriction. Finally, the claimant testified that he is subject to pain episodes that render him helpless and last anywhere from 2 hours to 14 hours. These episodes are random and he is unable to work during these episodes. The claimant even testified that he thought he might be able to do the work of a Right-of-way Agent I for the employer but he has not applied because he is under the narcotic medication and because of the pain episodes. Under the evidence here, the administrative law judge is constrained to conclude that the claimant's health conditions and his restrictions thereto render him unable to work and unavailable for work. The administrative law judge is not without sympathy for the claimant but must conclude that the claimant is neither able to work or available to work at this time and, as a consequence, he is ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he demonstrates that he is able, available, and earnestly and actively seeking work and is otherwise eligible to receive unemployment insurance benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$375.00 since filing for such benefits effective August 8, 2004, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision dated September 7, 2004, reference 01, is modified. The claimant, Mark T. Kovacs, is not entitled to receive unemployment insurance benefits, until or unless he demonstrates that he is able, available, and earnestly and actively seeking work, because the claimant is not now and has not been able and available for work. The claimant is not disqualified to receive unemployment insurance benefits as a result of his separation from the employer because he was discharged but not for disqualifying misconduct but is nevertheless ineligible to receive unemployment insurance benefits because he is not now and has not been able, available, and earnestly and actively seeking work. The claimant has been overpaid unemployment insurance benefits in the amount of \$375.00.

kjf/tjc