

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JASON L KIGER
Claimant

APPEAL NO: 19A-UI-01563-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 01/27/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant, Jason L. Kiger, filed an appeal from the February 19, 2019, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 7, 2019. The claimant participated personally and was represented by Stuart Higgins, attorney at law. The employer participated through Brad Sartin, hearing representative with Corporate Cost Control. Employer witnesses included Natalie McGee and Chad Masters. Brent McKenzie attended as an observer. Employer Exhibits 1-8 and Claimant Exhibit A were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a truck driver and was separated from employment on January 31, 2019, when he was discharged (Employer Exhibit 8). The reason for discharge was listed as “negligence resulting in serious accident while on duty, recklessness, or any other intentional misconduct” (Employer Exhibit 8).

When the claimant was hired, he was trained on the employer's rules and policies (Employer Exhibit 7), which includes operating in “safe, legal and professional manner at all times” (Claimant Exhibit A, page 2). The employer also has a written policy which provides. “Based upon the severity of the accident and preventability, Hy-Vee reserves the right to disqualify an employee from driving and/or terminate employment on the first occurrence of any accident” (Claimant Exhibit A, page 3).

The claimant was required to possess a Class A Commercial Driver's License, and comply with Department of Transportation regulations. The claimant was assigned a truck, weighing 80,000

pounds, with a fifty-three foot trailer. He would select his driving routes prior to each shift. On December 23, 2018, the claimant's planned route was from Chariton to Ames to Eldora to Makato and back to Chariton. The claimant estimated the 600 mile route would take approximately eleven hours to complete. His departure time was supposed to be 1:30 a.m. but the claimant did not begin his trip until 3:54 a.m. due to a sick child at home. The claimant also had a birthday party for his other son that evening when he returned.

At approximately 7:19 a.m., the claimant was on County Road D-41 after the Eldora stop, when he made a hard left turn, before swerving right. His vehicle went airborne and ended up in a ditch. The claimant was knocked unconscious from the accident. He was airlifted for medical care. The employer's onboard computer system clocked the claimant going 65 miles per hour at the time of the accident (Masters testimony). The speed limit was 55 miles per hour. The claimant was issued citations for failure to maintain control and for failing to wear a seatbelt.

There was no indication that the claimant's vehicle had faulty parts which contributed to the accident occurring. No evidence was presented that a medical episode contributed to the accident. The employer stated that property damage for the accident included the totaled trailer (\$58,000), tractor (\$53,650), lost product in the truck that could not be delivered (\$28,945) and wrecker fee including towing the vehicle out of the ditch, clean up and disposal of product (\$15,515).

The employer conducted an investigation which included an interview with the claimant and an accident review, which included reviewing the onboard software, photos and interview. The claimant, during his interview with Mr. Masters, acknowledged that he was "pushing it" that day driving because he was trying to get home for the birthday party. He also stated that he had previously worn the shoulder belt to the seatbelt but not the lap belt across his waist because it was uncomfortable due to his size.

The claimant acknowledged memory loss attributed to the accident. At the hearing, the claimant stated he did not recall what caused him to swerve, and doesn't recall if he was wearing a seatbelt, but that he was a proponent of them. The employer determined the accident was a "major preventable accident" by its definition (Claimant Exhibit A) and due to the magnitude of the accident, moved to immediate discharge rather than suspension or a lesser penalty.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying misconduct.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

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 establishing disqualifying job related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995). In this case, the administrative law judge carefully evaluated the employer's evidence, which included a first-hand conversation with the claimant about the accident, coupled with hearsay evidence such as the on board computer system against the claimant's evidence and memory, which he acknowledged was incomplete. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The undisputed evidence is the claimant was discharged for a single accident in which the claimant's 80,000 pound, fifty-three foot semi-truck swerved, went airborne and ended in a ditch. The result of the accident was not only the claimant incurring injury, but also over \$156,000 in property damage. At issue is not whether the accident occurred, but whether the claimant's conduct leading to the accident would meet the definition of misconduct for purposes of unemployment insurance eligibility.

Disqualification for a single misconduct incident must be a deliberate violation or disregard of standards of behavior which employer has a right to expect. *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The undisputed evidence is the claimant started his shift late and had a deadline to return for his son's birthday party. The claimant acknowledged he was pushing to make it home in time after a late start. This was confirmed by the employer's onboard computer system, which clocked the claimant going 65 miles per hour in a 55 miles per hour zone. The claimant thought he had the seatbelt on but reasonably, if he had, he would not have been cited by law enforcement for failure to wear one. The administrative law judge is persuaded the claimant's conduct of operating an 80,000 pound vehicle, ten miles over the speed limit, and not wearing a safety seatbelt were purposeful choices, and contrary to the standards the employer has a right to expect of its employees. Without further assessing the claimant's choices in operating the vehicle, those two choices alone violated state law. Based on the evidence presented, the administrative law judge concludes the claimant's operating of the employer's vehicle was in violation of at least two state laws. The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for misconduct, even without prior warning. Benefits are denied.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The February 19, 2019, (reference 01) decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn