**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**KEVIN M ISHMAN**
Claimant

**M & W MANUFACTURING CO INC**
Employer

**APPEAL NO: 07A-UI-03482-DW**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 03/04/07 R: 03**
**Claimant: Respondent (2)**

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

**STATEMENT OF THE CASE:**

M & W Manufacturing Company, Inc. (employer) appealed a representative's March 30, 2007 decision (reference 02) that concluded Kevin M. Ishman (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant's employment separation was for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on July 11, 2007, in Cedar Rapids. The claimant appeared with his attorney, Gerald Kucera. Chris Scheldrup, attorney at law, represented the employer. Lisa Lamb and Dan Musil testified on the employer's behalf. Paula Denison, a legal assistant, observed the hearing. The parties stipulated that Claimant Exhibits One through Six and Employer Exhibits A through M could be admitted as evidence. During the hearing, Employer Exhibits N and O were offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Did the claimant voluntarily quit his employment for reasons that qualify him to receive unemployment insurance benefits, or did the employer discharge him for work-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

**FINDINGS OF FACT:**

The claimant started working for the employer on November 27, 2005, as a full-time machinist. On June 22, 2006, the claimant was involved in a work-related injury. The claimant's injury was covered under workers' compensation.

The claimant's treating physician released the claimant to do light-duty work on September 18, 2006. The claimant went to work, but left because the light and noise at the facility bothered him. (Employer Exhibit B.) On January 2, 2007, the employer sent the claimant a letter

advising him to report to work on January 8, 2007, because the employer learned he had been released for light-duty work the week of December 18, 2006. (Employer Exhibit A.) On January 4, Scheldrup sent Kucera a letter explaining that the claimant needed to return to work on January 8 and the employer would accommodate the claimant's work restrictions. (Employer Exhibit B.)

On January 8 Musil gave the claimant work instructions that he was not to do any work that exceeded his physician's work restrictions. The employer only wanted the claimant to work on regular attendance and not job performance. (Employer Exhibit D.) The claimant reported to work on January 8, but left work because he did not believe the work the employer assigned him met his work restrictions. In a January 10 letter, Scheldrup informed Kucera that if the claimant continued his refusal to do light-duty work, his workers' compensation benefits could be suspended. (Employer Exhibit F.)

The employer made a video of the proposed work the employer believed accommodated the claimant's work restrictions and sent it to the claimant's treating physician. The treating physician reviewed video and verified the work the employer assigned the claimant accommodated his light-duty work restrictions. (Employer Exhibit J-11.) The claimant reported to work on January 11 and worked until January 18 at the main building. The claimant did not report any problems performing this work until the morning of January 18, 2007. Prior to January 18, the claimant worked his entire shift. Musil checked on the claimant during the day to make sure the claimant was all right. When the claimant worked at the main building, he did not report any problems, but at times rested. The employer had no problems with the claimant resting at work. The employer did not care how much work the claimant did, the employer just wanted the claimant at work.

On January 18, 2007, the employer did not have any more work for the claimant to do in the Main building where the claimant had been working. The employer transferred the claimant to the East building. The employer again wanted the claimant to count or straighten out bolts. The difference between the work on January 18 from the work he had been doing was that the bolt containers in the East building could not be moved to a table. The containers in the East building were fixed on a pallet. The employer provided the claimant a chair so he could sit while he retrieved bolts from the bin opening. (Employer Exhibits N and O.)

After working about 30 minutes on January 18, Musil checked on the claimant. The claimant told Musil he was in pain and wanted to leave. Musil wanted the claimant to stay even if he did not do any work. When the claimant told Musil that the work the employer had him doing that day and since January 11 was not within his work restrictions, Musil took offense at the claimant's remarks. Musil indicated the claimant's treating physician had approved the work the claimant was doing. The employer tried to tell the claimant the main objective was to stay at work. The employer did not care what work, if any, the claimant completed, the employer just wanted the claimant to remain at work. The claimant expressed frustration with his treating physician because he had not been in contact with the claimant. The claimant did not agree with his doctor's opinion that he should be doing light-duty work. The two men became frustrated with each other when Musil insisted the work did not violate the claimant's work restrictions and the claimant believed he should not be doing the work the employer asked him to do. An impasse occurred between the two men when Musil told the claimant he wanted the claimant to stay but not do anything that hurt him, but the claimant indicated he was in pain and could not do the work any longer and was leaving. After Musil realized that he and the claimant were at an impasse and the claimant planned to leave, Musil asked Lamb to come and witness the rest of the conversation.

When Lamb was called into the meeting, she knew the employer had already told the claimant on January 8 that the employer would do whatever needed to be done to keep the claimant at work. In Lamb's presence, Musil offered to call the doctor or the lawyers, but claimant said nothing. Musil told the claimant that if he left work, the employer would consider him to have voluntarily quit his employment. Again, the claimant said nothing. The claimant left work early.

After leaving work on January 18, the claimant contacted his attorney. As a result of this contact, a January 19 letter was generated to the employer's attorney on January 19, 2007. This letter asserted the employer told the claimant to clock out for the day and the employer had the claimant perform work on January 18 that was outside his work restrictions. (Claimant Exhibit One.)

On February 21, Kucera sent Scheldrup a letter indicating the claimant would be willing to attempt to go back to work for the employer even though he still had symptoms that his treating physician concluded were not work-related. (Claimant Exhibit Five.) In a March 8 letter, Scheldrup informed the claimant and his attorney that the employer no longer considered the claimant an employee as of January 18, 2007, because he left work and was told that if he did leave work early, the employer would consider the claimant to have voluntarily quit his employment. (Employer Exhibit I.)

The claimant established a claim for unemployment insurance benefits during the week of March 4, 2007. The claimant filed claims for the weeks ending March 10 through June 30, 2007. The claimant received his maximum weekly benefit amount of $314.00 for each of these weeks.

**REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if he voluntarily quits without good cause or an employer discharged him for reasons constituting work-connected misconduct. Iowa Code sections 96.5-1, 2-a. When the claimant left work early on January 18, he left because he refused to stay at work, but he did not intend to quit his employment. Since the claimant did not quit, the employer initiated the employment separation and discharged the claimant.

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The credibility of the witnesses becomes a major factor in this decision. If the employer told the claimant to leave work, the claimant did not commit work-connected misconduct. To decide the credibility issue, a review of some history between parties must be examined.

After the claimant's physician released the claimant to do light-duty work on September 18, the claimant went to work, but left the workplace contending light and noise in the workplace bothered him too much. During the week of December 18, 2006, the claimant was again released to do light-duty work. When the claimant went back to work on January 8, 2007, the employer gave him work instructions and told the claimant it was not important how much work

he did, the employer just wanted the claimant to stay the entire shift. The employer reminded the claimant not to do anything that was outside his work restrictions. The claimant left work indicating he could not do the work and did not believe the work the employer assigned was within his work restrictions.

The evidence indicates there were problems between the claimant and employer. This led to both parties' frustration and left communication between the parties up to their attorneys. To make sure the employer did not ask the claimant to do anything outside of his work restrictions, the employer videotaped the assigned work and sent it to the claimant's treating physician. Even though the treating physician verified the assigned work was within the claimant's work restrictions, the claimant did not agree with his treating physician's opinion. The evidence, however, shows that the employer accommodated the claimant's light-duty work restrictions as set forth by the claimant's treating physician. The claimant's assertion that the employer did not provide him work within his work restrictions is without merit.

On January 18, the claimant is apprehensive about hurting himself and disagrees with the work restrictions his treating physician has given him. When the employer changed the location of his work on January 18, the work changed in some ways. The work in the new building was the same, but had to be carried out in a different way. On January 18, bolts were in bins that could not be placed on a work surface. The claimant had to gather the bolts from an opening and then place them on a table. The containers for the bolts were fixed and some of the bin openings were close to the floor. After the claimant had worked about 30 minutes at the new location, Musil checked on him. The claimant told Musil he was in pain. The claimant wanted to go home and accused the employer of having him perform work since January 11 that did not meet his work restrictions. Musil disagreed with this assertion and explained that the claimant's doctor reviewed the work and agreed it met his work restrictions. The clamant then expressed frustration with the treating physician because he would not respond to the claimant's inquires. The claimant knew or should have known the employer did not care if he lay down on the floor and did no work; his insistence to leave because the employer did not make the necessary accommodations is not based on the facts. The two men became exasperated and reached an impasse. Even though the claimant asserted Musil told him to punch out, the facts do not support the claimant's testimony. If Musil had told the claimant to punch out, he would not have asked Lamb to witness the conversation between Musil and the claimant. Lamb testified that when she was present Musil specifically told the claimant the employer would contact his doctor and attorney in attempt to get the current problem resolved. The claimant did not say anything in response to these suggestions. By this time, it appears the claimant made up his mind to leave and may not have even been listening to anything the employer said. The claimant decided he was going to leave work early again. Since Lamb may have been the only person with a "cool" head the morning of January 18, her testimony is given a great deal of weight as to what was said when she was present. As a result of her credibility, the evidence shows that the employer told the claimant that if he left work early on January 18, the employer would consider him to have voluntarily quit his employment. Since the claimant decided to leave work anyway, his actions amount to insubordination. The employer made reasonable accommodations for the claimant and just wanted him to stay his entire shift (even if he did not do any work), but the claimant refused to do this. The claimant's apprehension about re-injuring himself without any medical evidence to support this belief does not give him an excuse to again leave work early. If part of the job assigned to him on January 18 bothered or hurt him, the claimant simply did not have to do this. The claimant's refusal to stay at work, his refusal to work more slowly and his refusal to do the work that did not bother him amounts to insubordination. On January 18, 2007, the claimant committed work-connected misconduct by refusing to stay at work.

Since the employer discharged the claimant as of January 18, 2007, Iowa Code section 96.5-1-d does not apply in this case. As of March 4, 2007, when the claimant established his claim for unemployment insurance benefits, he is not qualified to receive unemployment insurance benefits.

If an individual receives benefits he is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code section 96.3-7. The claimant is not legally entitled to receive benefits for the weeks ending March 10 through June 30, 2007. The claimant has been overpaid $5,338.00 in benefits he received for these weeks.

**DECISION:**

The representative's March 30, 2007 decision (reference 02) is reversed. The claimant did not intend to voluntarily quit his employment, but he was insubordinate on January 18, 2007. The employer discharged the claimant for reasons for work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of March 4, 2007. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The claimant is not legally entitled to receive benefits for the weeks ending March 10 through June 30, 2007. The clamant has been overpaid and must repay a total of $5,338.00 in benefits he received for these weeks.

_____
Debra L. Wise
Administrative Law Judge

_____
Decision Dated and Mailed

dlw/pjs