IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

HOMER BROWN
Claimant

MIDWEST INDUSTRIAL & MECHANICAL INC
Employer

APPEAL NO. 10A-UI-09582-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/01/09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

Homer Brown (claimant) appealed a representative's June 25, 2010 decision (reference 03) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Midwest Industrial & Mechanical, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 24, 2010. The claimant participated in the hearing. The employer received the hearing notice and responded by calling the Appeals Section on August 3, 2010. The employer indicated that Matt Gollobit would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, Mr. Gollobit was not available; therefore, the employer did not participate in the hearing. The record was closed at 2:34 p.m. At 2:37 p.m., the employer called the Appeals Section and requested that the record be reopened. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Should the hearing record be reopened?

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The employer received the hearing notice prior to the August 24, 2010 hearing. The instructions inform the parties that they are to be available at the specified time for the hearing, and that if they cannot be reached at the time of the hearing at the number they provided, the judge may decide the case on the basis of other available evidence. The reason the employer's witness was not available was because he had intended to take the call for the hearing on a cell phone, contrary to the recommendation on the hearing notice, and he was working on a job site in a hole where he had no cellular service at the time for the hearing.

The claimant started working for the employer on or about July 1, 2008. He worked as an industrial maintenance worker at the employer's client business sites in Kansas and Nebraska; the client businesses were primarily ethanol plants and meat processing plants. His last day of work for the employer was on or about December 10, 2009.

As many of the ethanol plants were closing down for the winter, work with the employer became slow in about October 2009, prompting the claimant to file a claim for unemployment insurance benefits effective November 1, 2009. He was recalled by the employer for some work on a few occasions after that date. The next time the employer contacted the claimant for work after about December 10 was on or about December 22. The employer sought to have the claimant report to a meat processing plant client in West Point, Nebraska, about a four-hour drive from the claimant's home in Omaha. The employer was seeking to have the claimant provide his own transportation to the work site. The employer had in the past always provided transportation for the claimant and other crew members. Further, the employer was aware that the claimant did not have a valid driver's license. As a result of these transportation issues, the claimant declined to report to the work site in West Point.

The claimant heard nothing further from the employer, and assumed it was because business remained slow. On or about January 14, 2010, the claimant recontacted the employer to learn what the upcoming work prospects might be; he was then informed that the employer had determined to discharge the claimant because he had been unable or unwilling to report for work at the worksite in West Point on or about December 22.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the employer's request to reopen the hearing should be granted or denied. After a hearing record has been closed the administrative law judge may not take evidence from a non-participating party but can only reopen the record and issue a new notice of hearing if the non-participating party has demonstrated good cause for the party's failure to participate. 871 IAC 26.14(7)b. The record shall not be reopened if the administrative law judge does not find good cause for the party's late contact. Id. Failing to read or follow the instructions on the notice of hearing are not good cause for reopening the record. 871 IAC 26.14(7)c.

The employer was not available at the scheduled time for the hearing, and did not recontact the Appeals Section until after the hearing had been closed. Although the employer intended to participate in the hearing, the employer failed to read or follow the hearing notice instructions and did not make sure that its representative was available at the time for the hearing and did not seek a rescheduling to ensure the representative could be available. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The employer's choice to have its witness attempt to participate in the hearing on a cell phone while working on a project in a hole is a business decision for which the employer, not the claimant, must bear the consequences. The employer did not establish good cause to reopen the hearing. Therefore, the employer's request to reopen the hearing is denied.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right

to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is his declining to report for work at a distant work site without the employer providing the transportation, as was the norm. Under the circumstances of this case, the claimant's declining to report for that work was at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good-faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's June 25, 2010 decision (reference 03) is reversed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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