

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK FISHLER
Claimant

APPEAL NO: 090-UI-06070-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MWR TRUCKING INC
Employer

OC: 01/25/09
Claimant: Appellant (2)

Section 96.5-2-a - Discharge for Misconduct

STATEMENT OF THE CASE:

Mark Fishler (claimant) appealed an unemployment insurance decision dated February 13, 2009, reference 01, that concluded he was discharged for work-related misconduct. A telephone hearing was held on May 14, 2009. The claimant participated in the hearing. Mike Mickels participated in the hearing on behalf of the employer.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full-time as over-the-road truck driver for the employer from November 3, 2008, to January 5, 2009. The claimant understood that repeated late deliveries were grounds for termination. The claimant had been verbally warned by the owner about late deliveries on November 17, November 28, and December 4, 2008.

The claimant was scheduled to pick up a load at 5:00 a.m. on January 5, 2009, in California. The claimant has a severe allergy to insect bites. On January 4, he was bit on the neck by a spider. He had a severe allergic reaction to the bite and ended up being a semiconscious condition. He did not come to until after noon on January 5. He called the owner, Mike Rickels, and told him about the spider bite and his reaction to it. Rickels then discharged the claimant because he was late in picking up the load that day.

The employer's account is not presently chargeable for benefits paid to the claimant since it is not a base period employer on the claim.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

Additionally, 871 IAC 24.32(8) provides that past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

While the employer may have been justified in discharging the claimant, no current act of work-connected misconduct as defined by the unemployment insurance law has been established. The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. I believe the late pick up on January 5 was because the claimant had a severe reaction to a spider bite and was unable to perform his job duties or contact the employer until after noon that day. I do not believe this was a matter of the claimant simply oversleeping.

The employer's account is not presently chargeable for benefits paid to the claimant since it is not a base period employer on the claim. If the employer becomes a base period employer in a future benefit year, its account may be chargeable for benefits paid to the claimant based on this separation from employment.

DECISION:

The unemployment insurance decision dated February 13, 2009, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css