

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAN KALDENBERG
Claimant

APPEAL NO. 09A-UI-07875-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JELD-WEN INC
Employer

**Original Claim: 04/19/09
Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Jeld-Wen, filed an appeal from a decision dated May 18, 2009, reference 01. The decision allowed benefits to the claimant, Dan Kaldenberg. After due notice was issued, a hearing was held by telephone conference call on June 16, 2009. The claimant did not provide a telephone number where he could be contacted and did not participate. The employer participated by Human Resources Manager Chris Juni and Production Manager Eric Pederson and was represented by TALX in the person of Bill Stasek.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Dan Kaldenberg was employed by Jeld-Wen from June 25, 2007 until March 3, 2009 as a full-time laborer. At the time of separation, he was working third shift on the door production line. His job duties were to load carts with end rails or other material needed by the line for the particular door it was producing. The items to be loaded on the cart are put on a "batch ticket," which designates what part is to be loaded and how many.

Mr. Kaldenberg received written warnings on July 16 and 31, and August 20, 2008, for loading the incorrect items on the carts for the first half of each shift. Failure to follow the information on the batch ticket meant the production line was slowed down, the workers on the line were not meeting the necessary quota, and some work had to be redone.

After each warning, he would improve slightly for a short period of time but then begin to make the same mistakes. A new manager had been hired in that area shortly after the final warning in August 2008, and he spent a number of months working with the claimant to try and resolve any problems he was having. Mr. Kaldenberg always said he knew what was to be done but could not give any reason for failing to load the correct parts on the cart even though he had the batch ticket in front of him.

On March 3, 2009, he loaded the incorrect parts on the cart four times during the first half of the shift. Manager Eli Van Zante notified Production Manager Erick Pedersen of this when he came in for the morning shift. The claimant was discharged for failing to do his work as directed.

Dan Kaldenberg has received unemployment benefits since filing a claim with an effective date of April 19, 2009.

The record was closed at 2:14 p.m. At 2:46 p.m., the claimant called and requested to participate. The claimant received the hearing notice prior to the June 16, 2009 hearing. The instructions inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The first time he directly contacted the Appeals Section was on June 16, 2009, after the scheduled start time for the hearing. The claimant had not read all the information on the hearing notice and had assumed that the Appeals Section would initiate the telephone contact even without a response to the hearing notice.

REASONING AND CONCLUSIONS OF LAW:

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.

The claimant had been advised his job was in jeopardy as a result of his failure to perform his work duties. Mr. Kaldenberg demonstrated he was capable of doing the job; because after each warning or coaching, his performance would improve to a satisfactory level for a brief period.

The employer attempted to counsel and retrain him, and work with him in an attempt to find out what the problem was and resolve it, all without success. He continued to maintain he knew what to do and how to do it, but simply did not do so. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer. The claimant is disqualified.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

The next issue is whether the record should be reopened. The judge concludes it should not.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The first time the claimant called the Appeals Section for the June 16, 2009 hearing was after the hearing had been closed. Although the claimant may have intended to participate in the hearing, he failed to read or follow the hearing notice instructions and did not contact the Appeals Section as directed prior to the hearing. 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 claimant did not establish good cause to reopen the hearing. Therefore, the his request to reopen the hearing is denied.

DECISION:

The representative's decision of May 18, 2009, reference 01, is reversed. Dan Kaldenberg is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw