

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RONALD P VERNON**  
Claimant

**APPEAL NO. 12A-UI-00193-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MASIL REFRIGERATED TRANS**  
Employer

**OC: 12/04/11**  
**Claimant: Respondent (2R)**

Section 96.5-2-A – Discharge for Misconduct  
Section 96.3-7 – Overpayment of Benefits

**STATEMENT OF THE CASE:**

The employer filed an appeal from a decision of a representative dated December 28, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 2, 2012. Claimant participated. The employer participated by Mario Silva , the owner, and Yinet Leal, the office manager. The record consists of the testimony of Mario Silva; the testimony of Yinet Leal; and Employer’s Exhibits 1-7.

**ISSUE:**

Whether the claimant was discharged for misconduct; and  
Whether the claimant has been overpaid unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a trucking company. The claimant was hired on May 3, 2011, as a full-time truck driver. He was terminated on November 24, 2011.

The incident that led to the claimant’s termination occurred on November 22, 2011. The claimant had dropped a part of his load at the HyVee location in Chariton, Iowa. He then left for the truck stop. The claimant tried to go under a bridge that was too low to clear his trailer. The trailer was damaged in the amount of \$11,857.53. (Exhibit 7)

The claimant had been placed on probation by the employer’s insurance carrier on October 18, 2012. The employer was informed that any further difficulties encountered by the driver during the underwriting probation period could change the status of the driver to “rejected” and possibly affect the insured’s policy with Great West. (Exhibit 5 and Exhibit 6)

The reason the claimant was on probation was that he had been involved in an accident in New Jersey on October 18, 2011. The police report indicates that the claimant pushed the other car into the curb or the trailer hit the car. (Exhibit 2) The employer's insurance company paid out \$15,518.68 in damages. (Exhibit 1) Later on October 18, 2011, the claimant was stopped by law enforcement for driving on a street closed to truck traffic. He was arrested for two outstanding tickets and the truck was impounded.

All drivers must be insured in order to legally drive under DOT regulations.

### **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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the

worker's duty to the employer. Wanton carelessness that shows a disregard of the employer's interests is misconduct. The employer has the burden of proof to show misconduct.

The evidence in this case established that as of November 22, 2011, the claimant was on probation after he was involved in a motor vehicle accident in New Jersey on October 18, 2011. The claimant testified that this accident was not his fault but a review of the police report and the photographs indicate otherwise. The employer's insurance company paid the damages associated with the accident, within one month of the accident. A reasonable inference from this evidence is that the insurance company believed that the claimant was at fault in the accident. The claimant knew that if he had another accident he might be considered uninsurable, which means he could not drive.

The second accident occurred because the claimant tried to go under a bridge that was too low for his trailer. The claimant, as an experienced truck driver, should have known his height and whether he could safely go under the span. He did significant damage to his trailer. Although he was not ticketed by law enforcement, the accident was clearly his fault. Two accidents within a period of approximately one month show a pattern of wanton carelessness. This is misconduct. Benefits are denied.

The next issue is overpayment of benefits.

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 overpayment issue is remanded to the Claims Section for determination.

**DECISION:**

The decision of the representative dated December 28, 2011, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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