

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID J FARRELL
Claimant

APPEAL NO. 07A-UI-05778-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE AMERICAN BOTTLING CO
Employer

**OC: 05-20-07 R: 02
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 4, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 26, 2007. The claimant did not participate. The employer did participate through Rick Troncin, Branch Manager.

ISSUES:

Was the claimant discharged for work related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a bulk driver full time beginning August 14, 2006 through February 5, 2007 when he was discharged for failing to provide a sample for a drug test.

The claimant has a commercial driver's license and pursuant to Federal DOT regulations the employer subjects employees to random drug testing. On February 2, 2007 the claimant was notified that he had to report for a random drug test pursuant to the employer's notification from their testing agency. The claimant reported for the drug test at the facility and provided a sample. The temperature of the sample was not within norms and was rejected by the tester because of the temperature. The claimant was asked to provide another sample. The claimant had ample opportunity to wait and provide another sample but he chose not to wait and left the testing facility without providing a sample that was within norms. The claimant was given a copy of the employer's drug testing policy that put him on notice that failure to provide a compliant or valid sample for a random drug test would result in his discharge.

The claimant was discharged on February 5, 2007 when the employer learned that he had not stayed to provide another sample that was within temperature limits on February 2, 2007.

The claimant was not available to participate in the hearing when the administrative law judge called him to begin the hearing. The claimant called after the hearing record had been closed and had not followed the hearing notice instructions pursuant to 871 IAC 26.14(7)a-c. The claimant was not available when the administrative law judge called him to begin the hearing.

The claimant received the hearing notice prior to the June 26, 2007 hearing. The claimant was on another phone call when the administrative law judge called him to begin the hearing. The administrative law judge left a message for the claimant to call in to participate in the hearing. When the claimant was put through to the administrative law judge, he indicated that he had been on hold for twenty minutes waiting to be put through to the administrative law judge. The entire hearing only took a little over thirteen minutes and the claimant called in at 1:18 p.m. so it is impossible for him to have been on hold for twenty minutes. The claimant knew the hearing would be taking place and could have requested a continuance of the hearing if he had to participate in an important phone call.

Claimant has received unemployment benefits since filing a claim with an effective date of May 20, 2007.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied.

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 administrative law judge is not persuaded that the claimant was holding on the phone while the hearing was being held. The claimant was not available for the hearing when called to participate and did not request a continuance of the hearing. The claimant called after the hearing had been completed. Being on another phone call when called for the hearing is not good cause for reopening the record. The administrative 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 claimant's request to reopen the hearing is denied.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 Federal Motor Carrier Safety Act (FMCSA) generally provides that employees may be subjected to random drug tests. When the samples are collected the temperature must be within means or limits to insure that the person being tested did not bring in a sample from someone else and place it in the container. Temperature controls to determine validity of samples are done on all samples provided.

The employer has met the requirements of the FMCSA. The claimant received a copy of the drug testing policy that put him on notice that he must provide a valid sample when requested to do so for a random drug test. The claimant could have remained at the testing facility to provide another sample, but chose not to do so. The claimant's failure to provide a valid sample for a random drug test is misconduct sufficient to disqualify him from receiving unemployment insurance benefits. Benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because claimant's separation was disqualifying, benefits were paid to which claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The June 4, 2007, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. Claimant is overpaid benefits in the amount of \$1,735.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs