

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

DAVID J SNYDER
Claimant

APPEAL NO. 15A-UI-00126-N-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**K & L LANDSCAPE & CONSTRUCTION
INC**
Employer

OC: 11/30/14
Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

K & L Landscape & Construction, Inc. filed a timely appeal from a representative's decision dated December 31, 2014, reference 01, which held claimant eligible to receive unemployment insurance benefits finding that the claimant said that he had not voluntarily quit work but was discharged by the employer finding that there was not sufficient evidence of willful or deliberate misconduct to disqualifying the claimant from unemployment insurance benefits. After due notice was provided, an initial telephone hearing was held on January 28, 2015. The hearing was reconvened on March 30, 2015 and completed on May 5, 2015. The claimant participated on each occasion. Appearing as a witness for the claimant on each occasion was Mr. Forrest Ueding, the claimant's uncle. Potential witnesses for the claimant, Jim Hayes and Darrell Pittman were not available at the telephone numbers provided on each occasion. The employer participated on each occasion by Ms. Jenna Wilson, Vice President; Mr. Kevin Alexander, Company President; and Mr. Dennis Stranathan, Driver Superintendent/Safety Director. Amanda Welch also participated as a witness for the employer. Employer's Exhibits A, C and D were admitted into evidence. Employer's Exhibit B was not admitted into evidence, but will remain with the administrative file.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: David Snyder was employed by K & L Landscape & Construction, Inc. from May 28, 2014 until December 1, 2014 when he was discharged by the employer. Mr. Snyder was most recently assigned to work as a full-time side dump tractor trailer driver and was paid by the hour. His immediate supervisor was Jim Hayes, Project Driver Foreman.

Mr. Snyder's separation from employment from K & L Landscape & Construction, Inc. took place because the claimant was involved in a rollover accident on the morning of December 1, 2014 at a jobsite near Council Bluffs, Iowa, that caused significant damage to the company's side dump tractor trailer unit that Mr. Snyder was operating. The employer concluded that the rollover was preventable and due to driver error because Mr. Snyder had failed to clean out the dump tub portion of the tractor trailer unit that he was assigned to the preceding evening as required. The employer concluded the claimant's failure to clean out dirt and debris resulted in the materials left in the dump body to become frozen and acting as a "counterweight," causing the unit to roll over.

Mr. Snyder informed the company, located in Sergeant Bluff, Iowa, of the rollover accident via cell phone. Jim Hayes, the working driver's foreman at the construction site, was also immediately informed of the rollover. Established company policy requires a driver to immediately report accidents to their supervisor, and also requires drivers to remain at the accident site to be available for a post-accident drug screen. Mr. Snyder was aware of the company policy by being issued a company handbook, and acknowledged its receipt.

Prior to beginning the construction project near Council Bluffs, Iowa, the company president met with company drivers and advised the drivers that Mr. Jim Hayes would be placed in charge of driver operations at the jobsite. Mr. Stranathan was to continue as the driver superintendent above Mr. Hayes and he would continue to work from the company offices located in Sergeant Bluff. Drivers were urged to perform their duties well and advised that any work issues on the high paying federal project in Council Bluffs would result in a transfer to a less paying assignment or termination.

After the rollover on the morning of December 1, 2014, Mr. Snyder initially remained with the truck and assisted in righting the truck back on its wheels, however, the truck was not operable. Mr. Snyder had reported the rollover to the company headquarters as well as to Mr. Hayes at the jobsite. After reporting the rollover and riding in another driver's truck for approximately one hour, to avoid being outside in the cold, Mr. Snyder stated that he would like to go to his uncle's house, located nearby where he had been staying. Mr. Hayes gave the claimant permission to do so.

During this time Mr. Stranathan, the safety director and drivers' superintendent, was enroute from Sergeant Bluff to Council Bluffs, an approximate 80-mile trip. Mr. Stranathan's intention was to review the incident and take the claimant for a drug screen per company policy. Although company president, the vice president and Mr. Stranathan repeatedly attempted to contact Mr. Snyder via his cell phone, they were unable to reach him and Mr. Snyder could not be located at the jobsite when Mr. Stranathan arrived. The repeated calls by management to the claimant, were, for the most part, unanswered because the claimant was having cell phone issues. Some intermittent contact via phone was made, however, and Mr. Stranathan spoke directly the claimant on December 2, 2014 about the matter.

After allowing Mr. Snyder to go to his uncle's house after the rollover incident on the morning of December 1, Mr. Hayes spoke to the company management, and then was in personal contact with the claimant and his uncle and stated to the claimant in the presence of Mr. Ueding, "you are done." When asked for a clarification, Mr. Hayes stated "you're fired." That declaration was made in reference to the rollover of the truck and the claimant's failure to clean out the dump box as required the previous evening. Mr. Hayes reflected the company management's belief that the rollover had been caused by the claimant's omission. Mr. Snyder also believed that he had been discharged base on the statements that Mr. Stranathan had made to him during a telephone call on December 2, 2014.

It appears that the company's upper management were unaware the claimant had been told that he had been discharged by Mr. Hayes and concluded the claimant had quit when he had not reported back to work after three or more consecutive workdays following December 1, 2014. The employer also believed that the claimant had failed to report to avoid taking the mandatory post-accident drug screen.

Later, when positive test results for a drug screen that Mr. Snyder had taken with the Veteran's Administration, were addressed to the company and inadvertently opened by a company employee, the employer was further convinced that the positive drug screen had been the claimant's motivation for failing to wait at the jobsite, as two of the positive results were for substances prohibited under the company's written drug testing policy. The claimant had not informed the company, or received authorization to work while using the substances.

Because Mr. Snyder was reasonable in his belief that Jim Hayes had management authority over drivers at the Council Bluffs jobsite, he had concluded that Mr. Hayes had authorized him to go to his uncle's house that morning and thought that Mr. Hayes would pass that information along to other management, if necessary. The claimant was also reasonable in concluding that he had been discharged from employment based upon Mr. Hayes' statements in the presence of his uncle and Mr. Hayes' further clarification confirming the discharge from employment. Based upon those statements and Mr. Hayes' apparent authority, Mr. Snyder concluded that he had been discharged and had no obligation to report back to work on the following day.

REASONING AND CONCLUSIONS OF LAW:

The first question before the administrative law judge is whether the evidence in the record establishes that the claimant quit employment or was discharged by the employer. The administrative law judge concludes the claimant was discharged. Mr. Snyder reasonably concluded that Jim Hayes had been given management authority over drivers at the construction site and that based upon the statements of Mr. Hayes, the claimant was reasonable in concluding that he had been discharged from employment.

The next question before the administrative law judge is whether the evidence in the record establishes misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

In discharge cases, the employer has the burden of proof to establish disqualifying conduct on the part of a claimant. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant a denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In the case at hand the evidence in the record establishes that the employer had investigated and determined based upon the statements of a number of witnesses that Mr. Snyder had chosen not to follow required procedure on the evening preceding his rollover accident, and that the claimant's failure to clean out the dump body of his tractor trailer caused the tractor trailer to roll over the following morning when Mr. Snyder attempted to dump a new load. The frozen materials left inside the dump trailer caused the tractor trailer unit to overturn causing substantial damage. Mr. Snyder was aware of the requirement that each dump trailer be cleaned out and personally checked by the driver assigned to the tractor trailer unit each night during winter weather. The employer concluded that the claimant's omission was intentional, and that the claimant had chosen not to clean out the trailer as required. The employer was reasonable in concluding that the claimant's willful omission was the proximate cause of the rollover accident and the substantial damage to company equipment.

Mr. Snyder was reasonable in concluding that he had been discharged from employment because Mr. Hayes had been cloaked with management authority by the company, and because Mr. Hayes had clearly articulated to the claimant that he had been terminated from employment. He had not understood the limits on Mr. Hayes' management authority at the worksite versus the management authority that Mr. Stranathan had over drivers that were managed from the company headquarters.

For these reasons the administrative law judge concludes that the claimant had been discharged from employment and was reasonable in believing Mr. Hayes' statements to that affect.

Although the employer may speculate that if the claimant had remained and undergone a drug screen, a positive test may have resulted, the evidence in the record establishes misconduct on

the part of the claimant in connection with his work based on the claimant's willful omission to perform a necessary job duty. Accordingly, the claimant is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment benefits in the amount of \$4,440.31 since filing a claim with an effective date of November 30, 2014 for the beginning date of December 6, 2014 through February 14, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal.

Iowa Code section 96.3(7)a-b, 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.

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 § 96.8, subsection 5.

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 § 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 § 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 states pursuant to § 602.10101.

871 IAC 24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and otherwise was not at fault. However, the overpayment will not be recovered when it is based upon a reversal on appeal when an initial determination to award benefits on an issue regarding the claimant's employment separation is (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code section 96.3.7. In this case the claimant has received benefits but was not eligible for those benefits because the employer did participate in the fact-finding interview the claimant is obligated to repay to the Agency the benefits he received and the employer's account shall not be charged.

DECISION:

The representative's decision dated December 31, 2014, reference 01, is reversed. The claimant was discharged for misconduct in connection with his work. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and meets all other eligibility requirements of Iowa law. The claimant has been overpaid unemployment benefits in the amount of \$4,440.31, and is liable to re-pay this amount. The employer's account shall not be charged.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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