IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

EDWARD CAVANH
Claimant

CONSTRUCTION PRODUCTS INC
Employer

APPEAL NO. 06A-UI-09546-DT

ADMINISTRATIVE LAW JUDGE AMENDED DECISION

OC: 08/13/06 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Construction Products, Inc. (employer) appealed a representative's September 14, 2006 decision (reference 01) that concluded Edward Cavanh (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 11, 2006. The claimant participated in the hearing. Luke Gray appeared on the employer's behalf and presented testimony from two other witnesses, Doug Stefani and Al Rasmussen. One other witness, John Milledge, was available on behalf of the employer but did not testify. Chris Chung served as interpreter. During the hearing, Employer's Exhibit One was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision. The amended decision is issued to correct a typographical error in the decision paragraph on the last page of original decision issued October 16, 2006, which incorrectly stated that the representative's decision was reversed, rather than affirmed.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on April 22, 1991. He worked full-time as a CNC operator (computer numerical control machine operator) in the employer's business manufacturing metal forms for use in a related employer's concrete construction business. His last day of work was August 10, 2006. The employer discharged him on that date. The reason asserted for the discharge was having four disciplinary actions within a 12-month period.

The claimant's first disciplinary action of the four was on November 28, 2005 for incompetence for failing to report a broken tool to the tooling engineer after a training the month prior where the employees were instructed to report broken tools. His second warning was on May 23, 2006 for clocking off a job while the job was still running so that his incentive pay for doing more work in less time would be enhanced. He received his third warning on August 3 for a safety violation for prematurely removing his gloves, resulting in a cut to his finger. After that third

warning, the employer further advised the claimant by letter on August 4 that if he had another disciplinary action prior to November 28, 2006 he would be discharged.

On August 9, the employer discovered a work order discrepancy from July 21. The claimant was working on a job using aluminum for a u-head blank. He worked on essentially the same function for about nine days, some of them before and some of them after July 21. He usually completed 176 parts per day, which was 150 percent of the production goal, resulting in qualification for incentive pay. For most of the days the claimant was working on a single work order the entire day for which 176 was the total production entered at the end of the day into the employer's computer system. On July 21, the claimant had two work orders, one for the morning and one for the afternoon.

When the claimant completed the work on the morning work order, he manually wrote "86," the actual number of pieces produced in the morning, on the paperwork order and entered "86" into the computer system. At the end of the afternoon work, the claimant wrote "90," the actual number of pieces produced in the afternoon, on the paperwork order, but entered "176" into the computer system. Thus, he had actually over-entered the number of pieces done by 86, essentially double entering the morning pieces, so that the day's production number would show as 262, rather than 176 (86 plus 90).

The overall project was not completed due to a lack of raw product, but the employer did not realize until August 9 that it would be an extended time before more raw product would become available. While waiting for more raw product, the employer had allowed the paperwork orders to remain at the machines, but when on August 9 it was realized that it could be months before the project could resume, the paperwork orders were collected. In seeking to reconcile those paperwork orders against the information entered into the computer, the claimant's discrepancy for July 21 was discovered. The employer concluded that the claimant had incorrectly reported the number of pieces to increase his incentive pay. The claimant denied this intent; while he did not specifically recall entering 176 in the afternoon rather than 90, he asserted if he did so it was in error and out of habit from only having one work order for most other days for which he had entered the total of 176.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

Iowa Code § 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

> 1. Willful and wanton disregard of an employer's interest, such as found in:
>
> a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
>
> b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
>
> 2. Carelessness or negligence of such degree of recurrence as to:

a. Manifest equal culpability, wrongful intent or evil design; or

b. Show an intentional and substantial disregard of:

1. The employer's interest, or

2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is having four disciplinary actions in a 12-month period. The mere fact that an employee might have various incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra; Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). There is no evidence the claimant intentionally failed to properly enter the correct number of pieces produced on the afternoon of July 21, 2006. The fact that the claimant admitted seeking to enhance his incentive pay by clocking out of a job early on May 23, 2006 does not establish that his intent on July 21 was also to increase his incentive pay; the fact that the claimant manually wrote the correct figure on the paperwork order suggests that he was not seeking to conceal the actual production figure. Rather, under the circumstances of this case, the claimant's misentry was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, or was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 14, 2006 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

_____
Lynette A. F. Donner
Administrative Law Judge

_____
Decision Dated and Mailed

ld/cs/pjs