

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANDREW J LELIEFELD
Claimant

APPEAL 23A-UI-08685-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KLOECKNER METALS
Employer

**OC: 12/25/22
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 730.5 – Private Sector Drug-free Workplaces

STATEMENT OF THE CASE:

The employer, Kloeckner Metals Corporation, filed an appeal from the August 30, 2023, (reference 03) unemployment insurance decision that granted benefits the claimant was discharged, but misconduct was not shown. The parties were properly notified of the hearing. A telephone hearing was held on September 27, 2023 at 1:00 p.m. The claimant did not participate. The employer, Kloeckner Metals, participated through Operations Manager Jeff Bortscheller, Safety Manager Michael Miller, and Human Resources Manager Melissa Lenhart. The employer was represented by Hearing Representative Marideliz Ortiz. The administrative law judge received exhibits 1-7 into the record. The administrative law judge also took official notice was taken of the administrative record.

ISSUES:

Was the claimant discharged for work-connected misconduct?

Whether the claimant has been overpaid benefits? Whether the claimant is excused from repayment of benefits due to the employer's non-participation?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds:

The claimant worked as a crane operator loader from June 5, 2023, until he separated from employment on August 10, 2023, when he was terminated. The claimant did not require a certified driver's license to perform his job.

The Drug and Alcohol Policy

The employer has a written drug and alcohol policy. The claimant received a copy of employer's drug and alcohol use policy. (Exhibit 7) The policy states that "being under the influence of alcohol, illegal drugs or inhalants" is strictly prohibited. If an employee tests positive for one of these substances or refuses to cooperate, then they are to be terminated. (Exhibit 7) The policy states that employees are subject to drug testing if a senior employer representative or supervisor reasonably suspects intoxication. It further states these management employees

will attend training regarding uniform methods of assessing reasonable suspicion. The policy further states that if an employer is suspected of intoxication, then they should be interviewed immediately and taken for testing at a facility used for pre-employment alcohol and drug testing. The employee is to remain away from work until the testing is completed.

Illegal drugs are defined by the policy as all drugs prohibited by the Federal Department of Transportation's rule regarding Procedures for Transportation Workplace Drug and Alcohol Testing Programs.¹ It does not forbid the use of prescription drugs, so long as the employee provides work restrictions for safe work after consultation with their doctor. (Exhibit 7)

The policy defines "refuse to cooperate" as "(1) obstructing the collection or testing process, (2) not promptly proceeding directly to a collection site when told to do so, (3) failing to remain at the testing site until the testing process is complete, (4) attempting to provide or providing an adulterated [sic] specimen, (5) failing to provide sufficient specimens, (6) failing to sign testing and other required forms, and (7) any other conduct that disrupt or interferes with the collection and testing process."

In the week preceding his termination, Mr. Miller thought he saw the claimant demonstrating signs of intoxication.

On August 10, 2023, two fellow yard workers reported the claimant appeared to be intoxicated. Both reported the claimant stumbled and had a very disorganized manner of dressing with overly large pants and no belt. One of them reported the claimant had poor coordination and struggled for ten minutes to create a makeshift belt for himself. Both observed the claimant wore sunglasses that day, so it was impossible to tell if his eyes were symptomatic of intoxication. The claimant also fell down that day. These reports were brought to the attention of Mr. Bortscheller. The employer provided these witness statements. (Exhibits 4, 5, and 6)

On August 10, 2023, Mr. Bortscheller drove the claimant to the employer's designated laboratory for testing. Mr. Miller met the claimant at the laboratory. At the laboratory, the claimant was given liquids to urinate. The claimant said he needed to urinate, but he was unable to provide a sample after repeated attempts. The employer provided a screening sheet that shows the claimant was given four attempts between 3:00 p.m. and the closing time of 5:30. The claimant's last attempt was at 4:33 p.m. The employer provided a copy of the drug screen. (Exhibit 3) He was only given a certain amount of time to fill the specimen cup with the idea that he may otherwise tamper with the urine sample. The claimant was beginning to get frustrated and scraped the rim of the specimen jar. The claimant became increasingly agitated. Mr. Miller informed the claimant that he would need to have a witness to proceed. The testing site then informed Mr. Miller that they would not be able to get a witness into the testing site by 5:30 p.m. Mr. Miller then construed this series of events as the claimant's refusal to cooperate under the policy. Mr. Miller terminated the claimant. The employer provided a copy of the termination notice dated August 10, 2023. (Exhibit 1)

The following section shows the findings of facts necessary to resolve the overpayment and participation issue:

The claimant has not received benefits after this separation.

¹ 49 C.F.R. Part 40.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied. The claimant has not received benefits after this separation, so the overpayment issue need not be analyzed.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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. For the purposes of this rule, "misconduct" is defined as a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 a 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. Misconduct by an individual includes but is not limited to all of the following:

(1) Willful and deliberate falsification of the individual's employment application.

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

(3) Intentional damage of an employer's property.

(4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.

(5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a

combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

(7) Incarceration for an act for which one could reasonably expect to be incarcerated that results in missing work.

(8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.

(9) Excessive unexcused tardiness or absenteeism.

(10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.

(11) Failure to maintain any license, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.

(12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.

(13) Theft of an employer's or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

The employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Iowa Code § 730.5 allows drug testing of an employee upon "reasonable suspicion" that an employee's state of mind is impaired on the job or on an unannounced random basis. It also allows testing as a condition of continued employment or hiring. Iowa Code § 730.5(4). Iowa Code § 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Iowa Code § 730.5(7)(i)(1) mandates that an employer, upon a confirmed positive drug or alcohol test by a certified laboratory, notify the employee of the test results by certified mail return receipt requested, and the right to obtain a confirmatory or split-sample test before taking disciplinary action against an employee.

The Iowa Supreme Court has held that an employer may not "benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton v. Iowa Emp't Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

Drug screening for CDL holders in a safety sensitive position is covered by federal DOT rules. Others, such as claimant in his job as crane operator, fall under state jurisdiction; in the state of Iowa, private sector drug-free workplaces are governed by Iowa Code § 730.5. Since the

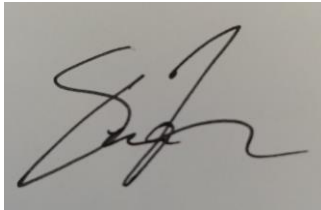
claimant did not have a CDL and did not drive a commercial vehicle on public roadways, he is not subject to DOT rules.

The employer has met the requirements of Iowa Code § 730.5. The claimant did receive a copy of the employer's drug and alcohol use policy. The policy provides for uniform standards for determining reasonable suspicion. It also provides for consistent application of the rule when an employee either refuses to cooperate or has a positive test result.

The record reflects that the claimant's behavior prior to being brought to the testing site would constitute reasonable suspicion of intoxication. The employer has also provided credible evidence that the claimant's behavior at the testing site demonstrated a refusal to cooperate. Benefits are denied.

DECISION:

The August 30, 2023, (reference 03) unemployment insurance 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. The overpayment issue need not be analyzed because the claimant has not received benefits after the separation.



Sean M. Nelson
Administrative Law Judge II

September 29, 2023
Decision Dated and Mailed

SMN/jkb

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.