

call before the hearing was over and the record was closed. The hearing began when the record was opened at 3:05 p.m. and ended when the record was closed at 3:22 p.m. and the claimant had not called during that time. John Huot, President, participated in the hearing for the employer. Jennifer Rasmussen, Office Manager, was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time lot attendant from October 15, 2003 until he was discharged on September 10, 2005. The claimant left the employment of the employer on January 3, 2004, but was rehired on June 10, 2004. The claimant was discharged because the employer's insurance company would not insure the claimant at all. When the claimant was first hired, he knew he needed to have a driver's license and he had an active driver's license at the time. Part of the claimant's duties involved driving cars in and around the lot, so that they could be worked on and maintained. On September 12, 2004, the claimant lost his driver's license as a result of a conviction for operating a motor vehicle under the influence of alcohol (OMVUI). The employer was able to convince the insurance company to continue insurance on the claimant as long as he did not drive. The employer was able to keep the claimant employed as a lot attendant, but the claimant was not supposed to drive. The employer went out of its way to have others do any driving required of the claimant and allow the claimant to keep his job. During this time the claimant still drove occasionally even against the explicit instructions of the employer. During this time the claimant knew that he could have no more problems with his driving.

On October 28, 2004, the claimant was arrested for a second OMVUI. Although the claimant ultimately was not convicted of this offense, the employer's insurance company learned about it when it reviewed the employer's policy in August of 2005. On August 12, 2005, the insurance company notified the employer that it would not insure the claimant at all, whether the claimant was driving or otherwise. The claimant would not be insured for anything and the employer would have to bear any losses caused by the claimant. At that time the employer was forced to discharge the claimant and the claimant was discharged on September 10, 2005. The employer even investigated changing insurance companies to keep the claimant employed but the new insurance company would not insure the claimant.

Pursuant to his claim for unemployment insurance benefits filed effective September 11, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,585.00 as follows: \$317.00 per week for five weeks, from benefit week ending September 17, 2005 to benefit week ending October 15, 2005. Of that amount \$196.00 was offset against an overpayment from 2004.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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.

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 employer's witness, John Huot, President, credibly testified, and the administrative law judge concludes, that the claimant was discharged on September 10, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Although it is a close question, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and the disqualifying misconduct was not a past act. Mr. Huot credibly testified that the claimant was hired as a lot attendant on October 15, 2003 and rehired on June 10, 2004. When the claimant was hired and again rehired, the claimant was aware that he needed to have an active valid driver's license to work for the employer. His job necessitated that the claimant drive vehicles around the lot so that they could be worked on and maintained. On September 12, 2004, the claimant lost his driver's license as a result of a conviction for operating a motor vehicle while under the influence of alcohol (OMVUI). The employer was able to keep the claimant insured so long as the claimant did not drive and therefore was able to keep the claimant employed. Other employees would drive any vehicles for the claimant so that the claimant could remain employed. The employer made every effort to keep the claimant employed. Nevertheless the claimant still occasionally drove a vehicle against the explicit

instructions of the employer. Finally, on October 28, 2004, the claimant was arrested for a second OMVUI. When the employer's insurance company reviewed the employer's policy in August of 2005, the insurance company determined that it could not insure the claimant at all whether the claimant was driving or otherwise. At that point, the employer could no longer afford to keep the claimant employed and discharged the claimant.

The administrative law judge is constrained to conclude that the loss of the claimant's license on or about September 12, 2004 for an OMVUI conviction and then his subsequent arrest for the same thing on October 28, 2004 is disqualifying misconduct. In Cook v. Iowa Department of Job Service, 299 N.W.2d 698 (Iowa 1980), the Iowa Supreme Court held that a claimant who had repeated traffic violations rendering him uninsurable and thus unemployable, was disqualified to receive unemployment insurance benefits reasoning that his driving citations, even during non-work hours, all bore directly on his ability to work for the employer and the claimant was aware of this. The claimant was not forced to violate the laws of the road by the employer. The administrative law judge concludes that that case is applicable here. At all material times hereto, the claimant was aware that he needed to have a driver's license, nevertheless he lost his driver's license on September 12, 2004 and was even arrested for a second OMVUI on October 28, 2004. The claimant's loss of his license and then his subsequent arrest for a second OMVUI rendered the claimant uninsurable without fault to the employer. In fact, the employer did everything possible to keep the claimant employed and insured. Ultimately the employer was unable to keep the claimant insured at all even if the claimant did not operate a vehicle. The administrative law judge concludes that this case is distinguishable from Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395 (Iowa App. 1989), because in that case once the claimant was notified that his driving record was a problem he had no further violations. Here, the claimant was aware that his driving record was or could be a problem when he was hired and certainly no later than September 12, 2004 when he lost his license. Accordingly, the administrative law judge concludes that the claimant's loss of his license and his second arrest were deliberate acts constituting a material breach of his duties and obligations arising out of his workers' contract of employment and evince a willful and wanton disregard of the employer's interest and are, at the very least, carelessness or negligence of such a degree of recurrence, all as to establish disqualifying misconduct.

The more difficult issue here is whether the claimant's acts were past conduct. A discharge for misconduct cannot be based on past acts. See 871 IAC 24.32(8). Although it is a close question, the administrative law judge is constrained to conclude that the claimant was not discharged here for past acts. The employer did not learn that the claimant would be uninsurable until August of 2005 and then made efforts to attempt to get the claimant insured, including changing insurance companies. However, the employer was not successful and could not obtain insurance for the claimant. Under these circumstances, although it is a close question, the administrative law judge concludes that the claimant was not discharged for a past act. The administrative law judge notes that the claimant was arrested for a second OMVUI just a little over one month after losing his license and this rendered the claimant uninsurable but did not come to the attention of the insurance company until August of 2005.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and it was not for a past act of disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,585.00 since separating from the employer herein on or about September 10, 2005 and filing for such benefits effective September 11, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions Iowa law.

**DECISION:**

The representative's decision of October 6, 2005, reference 01, is reversed. The claimant, Curtis R. Sorensen, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$1,585.00.

dj/kjw