

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MITCHELL D OLSEN
Claimant

APPEAL NO. 10A-UI-00260-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIDWEST UNDERGROUND SUPPLY LLC
Employer

OC: 04/12/09
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

Midwest Underground Supply, LLC filed a timely appeal from a representative's decision dated December 30, 2009, reference 03, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 16, 2010. The claimant participated personally. The employer participated by Mr. Michael Huth, Service Manager. Exhibits One, Two and Three were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having considered the evidence in the record the administrative law judge finds Mitchell Olsen was employed as a full-time shop mechanic for Midwest Underground Supply LLC from May 26, 2009 until December 3, 2009 when he was discharged from employment. Mr. Olsen was paid by the hour. His immediate supervisor was the service manager, Michael Huth.

The claimant was discharged after he made an error in reassembling a power tree chipper causing substantial damage to the unit. Mr. Olsen had disassembled the unit and upon reassembling it had hooked up hydraulic hoses incorrectly. The claimant did not tag or otherwise mark the hoses for reassembly. When the unit was started the improper reassembly caused excessive pressure in the hydraulic system causing the hydraulic lines to blow apart and ruining two motors on the chipper unit.

Because Mr. Olsen had previously been warned for unsafe work practices, a decision was made to terminate Mr. Olsen from his employment. The claimant was warned on September 25, 2009 that another serious safety error could result in his termination from employment. (See Exhibit One).

It is the claimant's position that he did not intentionally cause the damage to the chipper unit but got mixed up in reassembling the unit because he was in "a hurry."

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes misconduct 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.

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 evidence in the record establishes that Mr. Olsen was discharged after a second incident where negligence or carelessness resulted in potential serious harm or damage. The claimant had been warned by his employer to take his time and properly insure that his work was done properly and in a safe manner. Mr. Olsen was further warned on September 25, 2009 that another serious safety error could result in his termination from employment. Although the evidence in the record establishes that Mr. Olsen was not under any specific time constraints the claimant did not take the time to properly mark the hydraulic lines to insure their proper reassembly and that the improper reassembly of the unit caused substantial damage and a potential for physical harm to the claimant and other employees near the machine. The Court in the case of Greene v. Employment Appeal Board, 326 N.W.2d 659 (Iowa App. 1988) held that carelessness amounting to misconduct occurs when an employee commits repeated instances of ordinary carelessness and not when an employee commits a single careless act after repeated instructions. While it is clear that Mr. Olsen did not intend to improperly reassemble

the mechanical chipper unit, his negligence or carelessness was of such a degree in recurrence so as to manifest equal culpability under the provisions of the Employment Security Law.

The claimant has received unemployment insurance benefits to which he is not entitled.

Iowa Code section 96.3-7, 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.

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 section 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 section 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 state pursuant to section 602.10101.

DECISION:

The representative's decision dated December 30, 2009, reference 03, is reversed. The claimant is disqualified. 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, providing that he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs