

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**WILMER R PINEDA**

Claimant

**APPEAL NO: 13A-UI-06676-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TRINITY STRUCTURAL TOWERS INC**

Employer

**OC: 05/05/13**

**Claimant: Respondent (2/R)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Recovery of Overpayment of Benefits  
871 IAC 26.14(7) – Late Call

**STATEMENT OF THE CASE:**

Trinity Structural Towers, Inc. (employer) appealed a representative's May 23, 2013 decision (reference 01) that concluded Wilmer R. Pineda (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 at 9:00 a.m. on July 30, 2013. The claimant received the hearing; he had contacted the Appeals Section prior to the hearing and had indicated that he would be available for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, he did not participate in the hearing. Christine appeared on the employer's behalf. During the hearing, Employer's Exhibits One, Two, and Three were entered into evidence. The record was closed at 9:22 a.m. At 10:38 a.m., the claimant called the Appeals Section and requested that the record be reopened. 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.

**ISSUES:**

Should the hearing record be reopened? Was the claimant discharged for work-connected misconduct?

**OUTCOME:**

Reversed. Benefits denied.

**FINDINGS OF FACT:**

The parties were properly notified of the scheduled hearing on this appeal. The claimant received the hearing notice prior to the July 30, 2013 hearing. The claimant failed to be available at the scheduled day and time set for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. The reason the

claimant was unavailable was that he had forgotten about the hearing and was asleep at the time for the hearing. Because he had forgotten about the hearing, he did not make any other arrangement to be sure that he was awake by the time for the hearing. When the administrative law judge called the claimant for the hearing, the claimant did not awaken, either because his phone did not ring, or because he was too asleep to hear the phone ring. The claimant did not follow the instructions that he had been given that if he did not receive a call from the judge within five minutes after the scheduled time for the hearing that he was to call back into the Appeals Section, because he was still asleep.

The claimant started working for the employer on June 13, 2012. He worked full time as a welder at the employer's Newton, Iowa wind turbine manufacturing facility. His last day of work was May 2, 2013. The employer discharged him on that date. The stated reason for the discharge was poor attendance.

Between June 13, 2012 and April 29 the claimant was allowed to lose no more than six points. By April 29 he had already lost 4.5 points, primarily due to tardiness. He was verbally warned that if he lost 1.5 more points, he would be discharged.

On May 1 the claimant was a no-call, no-show for work. When he reported for work on May 2, he provided no reason for either the absence or the failure to call in to report the absence. The employer's policies assess two points for a no-call, no-show. As this occurrence then removed all of the claimant's remaining attendance credits, the employer discharged the claimant.

The claimant established a claim for unemployment insurance benefits effective May 5, 2013. The claimant has received unemployment insurance benefits after the separation.

#### **REASONING AND CONCLUSIONS OF LAW:**

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied. After a hearing record has been closed the administrative law judge may not take evidence from a non-participating party but can only reopen the record and issue a new notice of hearing if the non-participating party has demonstrated good cause for the party's failure to participate. 871 IAC 26.14(7)b. The record shall not be reopened if the administrative law judge does not find good cause for the party's late contact. *Id.* Forgetting or failing to read or follow the instructions on the notice of hearing are not good cause for reopening the record. 871 IAC 26.14(7)c.

The claimant was not available for the July 30, 2013 hearing until after the hearing had been closed. Although the claimant intended to participate in the hearing, the claimant forgot or failed to read or follow the hearing notice instructions and was not available at the scheduled time and day for the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

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); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's no-call, no-show absence on May 1 after the prior issues and warnings for attendance shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

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 was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (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 whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

#### **DECISION:**

The representative's May 23, 2013 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of May 2, 2013. This disqualification continues until the

claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs