IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

TIVON J BRANCH
Claimant

OLYMPIC STEEL IOWA INC
Employer

APPEAL NO. 18A-UI-09391-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/12/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Olympic Steel Iowa (employer) appealed a representative's August 29, 2018, decision (reference 01) that concluded Tivon Branch (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 26, 2018. The claimant participated personally. The employer participated by Tracy Delathouwer, Operations Manager, and Mark Dawson, Operations Project Manager. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 18, 2017, as a full-time crane operator. He signed for receipt of the employer's handbook on September 18, 2017. The employer has a policy that requires employees to report safety concerns. It was the claimant's experience that he would mention a concern to a supervisor and the supervisor would tell him if he needed to put the concern in writing.

The employer issued the claimant a written warning and three-day suspension on April 5, 2018, for a safety violation that he self-reported. The employer notified the claimant that further infractions could result in termination from employment.

After the warning, the employer changed the claimant's job duties. It sent the claimant to train with an inspector to perform work with an acetylene torch. The inspector told the claimant he just needed to wear sun glasses and some gloves along with his flame retardant uniform. The claimant felt he needed to wear a tinted face shield, instead of the sunglasses, and did so. The claimant performed his work for months wearing a face shield and gloves under the direction of four supervisors without comment. The employer did not point out any signs indicating the correct protective equipment for each job and the claimant did not see any such signs.

On August 10, 2018, the claimant was cutting steel with an acetylene torch. A piece of wood under the steel caught fire. The claimant asked the crane operator to move the steel so he could manage the situation and move the wood. From the crane operator's vantage point, it appeared the claimant put his hand under the steel, but he did not. Later, as the claimant passed the operations manager he mentioned the dispute. He was looking for direction from the operations manager about whether to file written documentation of the event. The operations manager did not hear the claimant and did not comment on the dispute. She talked to him about cleaning up the burned wood. The claimant did not file a written report of the incident because he felt there was no safety concern.

On August 14, 2018, the claimant was tasked with showing a trainee how to cut samples. The claimant showed the trainee how to cut samples in the same manner he was taught. The claimant wore a tinted face mask and gloves.

On August 14, 2018, the employer terminated the claimant for putting his hand under a sheet of steel on August 10, 2018, and not reporting the incident to the employer. He was also terminated for not wearing safety sleeves or having the trainee wear safety sleeves on August 14, 2018.

The claimant filed for unemployment insurance benefits with an effective date of August 12, 2018. The employer participated personally at the fact-finding interview on August 28, 2018, by Tracy Delathouwer and Mark Dawson.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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. "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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The claimant's poor work performance was a result of his lack of training and the employer's lack of attention to detail. The claimant had been performing his work with the same protective gear for months without comment. A word or additional training from a helpful supervisor would have kept this employee safe. The employer did not provide any evidence of intent at the hearing. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's August 29, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs