

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RUSSELL D COLE
Claimant

APPEAL NO. 07A-UI-01143-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WILSON GRADING/RUBBISH HAULING INC
Employer

**OC: 12-24-06 R: 04
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed an appeal from the January 11, 2007, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on February 15, 2007. Claimant participated. Employer participated through Kris Wilson. Jeff Wilson, vice president, was not available to participate. Department's Exhibit D-1 was received.

ISSUE:

The issue is whether employer's appeal is timely and if claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Employer filed its appeal on January 15, 2007 and had not heard about a date for a hearing by January 31, so employer contacted the local office, which told employer to fax the appeal again on that date.

Claimant was employed as a full-time route driver from March 22, 2006 until November 21, 2006, when he was discharged. Most recently he rear-ended a truck on November 21, 2006 and claimed the brakes failed. He recalled the brakes being "spongy" earlier in the day but did nothing about it and did not report his concern to employer. Jeff Wilson visually examined the brakes and found no problem and had Andrew Wilson drove it 10 miles back to the shop with no apparent problems.

On April 6, 2006, Heritage Property Management claimed damage to the side of the garage after claimant backed into it. On July 5, 2006, Ellis Handimart reported claimant backed up to dump a dumpster and hit a car. On November 8, 2006, Gateway Gardens reported that a cleaning lady observed a black car shaking and saw claimant standing there looking around. He then got in the truck and left without reporting the accident. The police investigated and determined the impact points matched. Claimant's claim of a different measurement came after

he had driven the rest of the day and added more weight to the truck. After each incident, employer verbally warned claimant to pay more attention and report incidents. On November 15, 2006, claimant called to report he forgot to put the truck in neutral and while running the packer, the truck took off and hit a power pole. On November 17, 2006, Midwest Janitor reported claimant backed into a gate and ruined it.

The claimant has received unemployment benefits since filing a claim with an effective date of December 24, 2006.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the employer's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The employer filed an appeal in a timely manner but it was not received. Immediately upon receipt of information to that effect, a second appeal was filed. Therefore, the appeal shall be accepted as timely.

The remaining issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits. The administrative law judge concludes that he was.

Iowa Code § 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.

Claimant's repeated negligence in operating employer's truck, resulting in property damage to employer, its customers, and members of the general public, rises to the level of disqualifying misconduct. Benefits are denied.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The January 11, 2007, reference 01, decision is reversed. Employer's appeal is timely. 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 claimant is overpaid benefits in the amount of \$2,131.00.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw