IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

DANIEL W LIND
329 N HANCOCK ST
OTTUMWA IA 52501-4325

MILLARD REFRIGERATED SERVICES INC
C/O TALX UCM SERVICES
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-06109-HT
OC: 05/21/06 R: 03
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Daniel Lind, filed an appeal from a decision dated June 7, 2006, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on July 5, 2006. The claimant participated on his own behalf and was represented by Attorney Joe Walsh. The employer, Millard, participated by General Manager Kevin Van Asten.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Daniel Lind was employed by Millard from March 3,

2003 until May 17, 2006. He was a full-time checker/sorter. At the time he was hired, the claimant received a copy of the employer's drug policy. It calls for testing of anyone who reports an on-the-job injury and sets out the substances for which the test will screen. If the test results are positive, the employee will be put on suspension and given the opportunity to have a split sample retested at their own expense. If the second test is positive, or if the employee declines a second test, the employee is discharged. If the test is negative the employee is reimbursed for the cost of the second test and will receive back pay.

In May 1, 2006, the claimant reported an on-the-job injury and was taken to the occupational health clinic at the hospital in Ottumwa, Iowa. The sample was given in private and sanitary conditions and split. It was sent to Express Analytical Laboratory and a medical review officer contacted Mr. Lind on May 5, 2006. The doctor notified him he tested positive for amphetamines, methamphetamine and THC. Mr. Lind gave the doctor a list of the supplements he was taking, including steroids, and was told none of those would result in a false positive.

The claimant contacted General Manager Kevin Van Asten, who had already been notified of the positive test. He was on suspension pending further investigation which consisted of the employer sending him a certified letter outlining his rights under the law and the company policy. The letter notified him he could have the split sample retested at his own expense at a certified laboratory of his choice and that he must contact Millard within seven days of the receipt of the letter if he wished to have this done. Mr. Lind contacted an attorney who recommended he have the split sample retested, and on May 16, 2006 he called Mr. Van Asten to request this. During the discussion it was made clear to him that the same sample would be tested, not a new sample.

The claimant decided not to have the split sample retested because he believed the employer was telling him no matter what the results were, he would not "get his job back." However, he had not been discharged as of that date, only on suspension pending the next step of either retesting or refusal and there had been no separation from employment and, therefore, no issue of "getting his job back." The claimant believed the supplements he was taking could account for the positive test results, but had no laboratory analysis to support this. Some supplements were purchased off of the internet and their contents were unknown.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes 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 claimant was tested in accordance with the company policy and the applicable provisions of the Iowa Code. He was given the opportunity to have the split sample retested and declined. Mr. Lind apparently believed he had been discharged and would not "get his job back" even with a negative result on the second test, but there is no evidence that this was the case. He apparently misunderstood the employer's comment that the same sample would likely result in another positive, but he had not been fired, only suspended pending the outcome of the second test or the refusal. His refusal, under the applicable policy, resulted in the discharge. The evidence of the drug screening shows he was under the influence of controlled substances in the workplace and this is a violation of law as well as the employer's policy. It is conduct not in the best interests of the employer and the claimant is disqualified.

DECISION:

The representative's decision of June 7, 2006, reference 01, is affirmed. Daniel Lind is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible.

bgh/cs