

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JACOB D BROWN
Claimant

APPEAL NO. 09A-UI-07544-H

**ADMINISTRATIVE LAW JUDGE
DECISION**

SCHILDBERG CONST CO INC
Employer

**OC: 12/21/08
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Schildberg Construction Company, Inc. (Schildberg) filed an appeal from a decision of May 15, 2009, reference 02. The decision allowed benefits to Jacob Brown. After due notice was issued, a hearing was held in Creston, Iowa on June 15, 2009. The claimant participated on his own behalf. The employer participated by Safety Director Michael Hopkins, Superintendent Daryl Newbury, and Personnel Manager Katherine Sher.

ISSUE:

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

FINDINGS OF FACT:

Jacob Brown was employed by Schildberg from August 11, 2005 until April 23, 2009 as a full-time breaker operator. On February 12, 2009, a government inspector from MSHA (Mining, Safety and Health Administration) inspected the facilities. The inspector declared that a person in Mr. Brown's job position needed to wear a respirator at all times due to the environment.

Safety Director Michael Hopkins trained the claimant on the use and operation of the respirator. He was told he was to wear it every day unless the plant was shut down. If the plant was shut down and not in operation it was not necessary to wear the respirator. Mr. Brown was to sign a daily sheet certifying that he had respirator equipment and was wearing it.

On April 22, 2009, the MSHA inspector came again and the claimant was not wearing his equipment. Approximately two hours later the inspector again noted that Mr. Brown was not wearing the respirator and reported the matter to Mr. Hopkins and Superintendent Daryl Newbury. The inspector said that he would have to issue a "shut down" order. The claimant would have to be retrained.

Mr. Newbury and Mr. Hopkins met with the claimant and asked him why he was not wearing the respirator and Mr. Brown said that the inspector hadn't made a big deal out of it the first time he

saw him without it and he didn't think he had to wear it. He was informed that the requirement was to wear the respirator at all times while the plant was operating and he would have to be retrained or the plant would be shut down. Both managers spoke with the claimant and emphasized the importance of wearing the respirator and then notified the inspector the claimant had been "retrained." Nonetheless the inspector issued a citation to the company which carries a minimum \$103.00 fine. The amount of the fine has not yet been determined as it must go before a governing board in Washington D.C.

Mr. Hopkins and Mr. Newbury submitted notes on the entire incident to owner, Mark Schildberg, and General Superintendent Don Minnick. This is the protocol for any disciplinary action and the owner notified Mr. Newbury to discharge the claimant for insubordination and failure to follow safety protocols.

The claimant has received unemployment insurance benefits since filing an additional claim with an effective date of April 19, 2009.

REASONING AND CONCLUSIONS OF LAW:

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 claimant had been advised it was necessary for him to wear his equipment at all times if the plant were operating. The claimant willfully neglected to do this causing the employer to be cited for safety violations and being put at risk for having the whole plant shut down. While this

appears to be a single incident, it was sufficient to warrant discharge. A single act of misconduct, in order to be disqualified from unemployment benefits, must be a deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees. *Henry v Iowa Department of Job Service*, 391 N.W.2d 731 (Iowa App. 1986). The claimant was discharged for conduct not in the best interests of the employer and he is disqualified.

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.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of May 15, 2009, reference 02, is reversed. Jacob Brown is disqualified and benefits are withheld until he has requalified by earning ten times his weekly benefit amount, provided that he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs