IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOHN KINDLER
Claimant

SOLON FEED MILL INC
Employer

APPEAL NO: 09A-UI-11598-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/14/09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

John Kindler (claimant) appealed a representative's August 4, 2009 decision (reference 01) that concluded he was not qualified to receive benefits, and the account of Solon Feed Mill, Inc. (employer) would not be charged because he voluntarily quit his employment for reasons that do not qualify him to receive benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 27, 2009. The claimant participated in the hearing with his attorney, Mary Hoefer. The employer responded to the hearing notice but was not available for the hearing.

After the hearing had been closed and the claimant and his attorney had been excused, the employer called the Appeals Section. The employer requested that the hearing be reopened. Based on the employer's request to reopen the hearing, 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:

Is there good cause to reopen the hearing?

Did the claimant voluntarily quit his employment of reasons that qualify him to receive benefits, or did the employer discharge him for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on November 4, 1988. The claimant worked as a full-time production manager – driving a truck and making feed. The last day the claimant worked full time was October 6, 2008. He then had surgery on an ankle. In February 2009 the claimant's physician released him to work only a seated job. The claimant worked two and one-half days for the employer, but the work did not meet the claimant's work restriction that he could only do work that allowed him to sit-down all the time.

On March 26, 2009, the claimant received a letter indicating that when the claimant's employment was terminated he could remain on the insurance policy if he paid for it. The letter

indicated his insurance coverage expired on April 1, 2009. The claimant called the employer to find out if he was terminated. The employer told the claimant he was not terminated but he needed to get a DOT physical to return to work. The claimant did not try to pass a DOT physical because his physician had not yet released him to work. The claimant received a second letter. In June the claimant contacted the insurance company to find out if he was still considered an employee. An insurance company representative later told the claimant that after contacting the employer, the employer no longer considered him an employee as of April 1, 2009. As of April 1, 2009, the claimant's physician had not released him to return to work.

The claimant established a claim for benefits during the week of June 14, 2009. The record indicates the claimant has not filed any weekly claims as of the date of the hearing, August 27, 2009.

As of August 27, the claimant is restricted to work that allows him to work sitting down and has limited walking. The claimant currently cannot drive and is unable to pass a DOT physical. The claimant asserted he could do computer work but he has no computer training. The claimant also can work as a customer service representative as long as he can sit and does not have to be on his feet.

The employer received the hearing notice and followed the hearing notice instructions by calling the Appeals Section prior to the hearing. The employer provided a phone number, a cell phone number, to contact the employer. On August 27, the employer took the wrong cell phone with him to work. When the employer was called for the 8:00 a.m. hearing, the employer did not have the cell phone that he told the Appeals Section to call. The employer was busy with work and was unable to call or did not think to call the Appeals Section until 9:00 a.m. The employer requested that the hearing be reopened.

REASONING AND CONCLUSIONS OF LAW:

If a party responds to a hearing notice after the record has been closed and the party who participated at the hearing is no longer on the line, the administrative law judge can only ask why the party responded late to the hearing notice. If the party establishes good cause for responding late, the hearing shall be reopened. 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. 871 IAC 26.14(7) (b) and (c).

The employer made a mistake and picked up the wrong cell phone when he left for work. Unfortunately, the employer then became involved in business matters and did not call the Appeals Section until 9:00 a.m. to participate in an 8:00 a.m. scheduled hearing. Under these facts, the employer did not establish good cause to reopen the hearing. The employer's request to reopen the hearing is denied.

A claimant is not qualified to receive unemployment insurance benefits if he voluntarily quits employment without good cause attributable to the employer, or an employer discharges him for reasons constituting work-connected misconduct. Iowa Code §§ 96.5-1, 2-a. The facts establish the claimant had to stop working when he had surgery on his ankle. While the claimant worked a few hours for the employer in February 2009, the claimant was restricted to only doing a sit-down job and the claimant's job as a production manager was not a sit-down job. As of April 1, the claimant's physician had not released him to return to work, but the evidence establishes the employer considered the claimant's employment terminated as of April 1, 2009.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The employer had justifiable business reasons for ending the claimant's employment. The claimant had not been medically able to work for over six months. Since the claimant's physician had not released the claimant to return to work as of April 1, the fact he was unable to work does not constitute work-connected misconduct. Therefore, the reasons for the claimant's employment do not disqualify him from receiving benefits.

Each week a claimant files a claim for benefits, he must be able to and available for work. Iowa Code § 96.4-3. Since the claimant has not filed any weekly claims, he legally does not have to establish his availability for work at this time. However, if the claimant reopens his claim, he must then establish that he is able to and available for work. To do so, he must demonstrate that if he has work restrictions he is looking for work that he has work experience doing and that could provide him meaningful employment. The claimant's assertion that he could do computer work without computer training does not establish that he is able to and available for work. Also, if the claimant can only do sit-down work or work that requires limited walking, he must show what specific jobs he is capable of performing. He does not have to be able to drive a truck again, but he must establish he is capable of performing a job that he has experience doing without looking for a tailor-made job.

Even though the issue of availability was listed as an issue on the hearing notice, to decide this issue now would be premature since the claimant has not filed any weekly claims and availability must be established each week a claimant files a claim for benefits.

DECISION:

The employer's request to reopen the hearing is denied. The representative's August 4, 2009 decision (reference 01) is reversed. The claimant did not voluntarily quit his employment. Instead, the employer discharged him for reasons that do not constitute work-connected misconduct. As of June 14, 2009, the claimant is qualified to receive benefits. However, before the claimant is eligible to receive benefits, he must reopen his claim because he has not filed

any weekly claims and must establish that he is able to and available for work. The employer's account may be charged for benefits paid to the claimant.

_____
Debra L. Wise
Administrative Law Judge

_____
Decision Dated and Mailed

dlw/css