

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN M OGDEN
Claimant

APPEAL NO. 11A-UI-05330-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

DENVER FINDLEY & SON INC
Employer

**OC: 03/13/11
Claimant: Respondent (5)**

Section 96.5-2-a – Discharge
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated April 11, 2011, reference 01, that held the claimant offered to return to work after a job-related-injury employment separation on August 16, 2010 but no work was available and which allowed benefits. A hearing was held on May 17, 2011. The claimant and his attorney, Siobhan Schneider, participated. Jack Findley, owner, and Glenda Warner, secretary, participated for the employer. Claimant Exhibits A and B and Employer Exhibit C were received as evidence.

The parties agreed to a hearing notice waiver to consider the employment separation issue.

ISSUES:

Whether the claimant was discharged for misconduct in connection with employment

Whether the claimant was able and available for work

FINDINGS OF FACT:

The administrative law judge, having heard the witness testimony and having considered the evidence in the record, finds that: The claimant worked as a seasonal truck driver for the employer's construction company beginning April 17, 2010. Claimant was required to have a Class A CDL with medical certificate in order to drive truck for the employer.

Claimant had a roll-over accident while driving for the employer on August 16, 2010, and he was hospitalized for three days. The claimant began receiving workers' compensation (TTD) of \$205.17 on a weekly basis. Claimant received an unrestricted release to return to work from his doctor dated March 14, 2011. When he contacted the employer about his return to work, he was advised that no work was available. Claimant still has his Class A CDL, and he is looking for driving work.

A short time later, the employer advised claimant he could not return to work, as its motor vehicle insurance provider was excluding him due to an MVR report.

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.

The administrative law judge concludes the employer failed to establish claimant was discharged for misconduct on March 21, 2011.

The moving cause for employer's termination of claimant was its motor vehicle insurance carrier disqualifying claimant from its insurance coverage. There is no evidence of any moving violation or driving misconduct regarding claimant's August accident. Although the coverage termination notice makes reference to an MVR, there is no evidence of a license suspension/revocation and/or moving violation record that would support misconduct.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge further concludes there is no availability disqualification, because the claimant made himself available for work to the employer on March 14, 2011.

Claimant received an unrestricted work release on March 14 and the employer had not started up from its seasonal non-construction period. The employer discharged claimant a week later, so he was not offered any work. He is looking for driver work.

DECISION:

The decision of the department representative dated April 11, 2011, reference 01, is modified with no effect. The claimant's separation from employment effective March 21, 2011, is a discharge without misconduct. The claimant is able and available for work. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw