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

SCOTT A GRANDSTAFF
121 EAST ST
GRINNELL IA 50112-2508

JELD-WEN INC
C/O TALX EMPLOYER SERVICES
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-06986-DT
OC: 05/28/06 R: 02
Claimant: Respondent (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:

Jeld-Wen, Inc. (employer) appealed a representative's July 28, 2006 decision (reference 01) that concluded Scott A. Grandstaff (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 2, 2006. The claimant participated in the hearing. Alyce Smolsky of TALX Employer Services appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Three were entered into evidence. Based on 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.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

After a prior period of employment with the employer, the claimant most recently started working for the employer on November 19, 2002. He worked full time as a fork truck driver in the employer's Grinnell, Iowa door system manufacturing facility. His last day of work was May 22, 2006. The employer discharged him on that date. The reason asserted for the discharge was having three safety violations in five years.

On May 11, 2004, the claimant was given an initial safety violation warning for failing to wear gloves while using a band chopper, potentially contributing to the severity of an injury to his hand. On January 26, 2006, he was given a second and final warning for reckless driving on premises after an incident in which he hit an upright on a rack, causing a bend in the rack. While the claimant denied driving recklessly or too fast, the employer concluded to the contrary. The warning specified that "further major infractions of safety regulations, reckless driving or not paying attention to his driving would result in removal from the fork truck position and pay reduction to general rate or up to termination at management's discretion."

On May 22, 2006, the claimant was on the fork truck putting a board on a roll case stack. The area in which he was working was about six feet wide and about eight feet from the wider center aisle. After placing the board on the stack, the claimant looked behind him and saw two coworkers talking about eight feet down the center aisle. He then proceeded to back up the fork truck. However, right after the claimant had checked and seen the coworkers, the two parted ways and one of them began backing down the center aisle pulling a load. Just as the claimant entered the center aisle, he saw the coworker approaching from the side, but it was too late to stop the fork truck. Despite the fact that the claimant's fork truck's backing up beeper was beeping, the coworker stepped back and the tire of the claimant's fork truck went over the toe of the coworker's foot. The coworker was taken to the hospital, but fortunately the only injury was a bruise. The claimant rode with the coworker to the hospital, during which time the coworker acknowledged to the claimant that the accident was his fault, that he had not been paying attention to where the claimant was or to the beeping of the fork truck. However, the employer concluded that the claimant had failed to check to see where the coworker was before backing the fork truck, issued him the third safety warning and concluded to discharge him.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the incident on May 22, 2006 after the two prior warnings. The mere fact that an employee might have various incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra; Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). There is no direct evidence the claimant intentionally failed to exercise proper care and check for pedestrians before backing the fork truck; the claimant provided a plausible alternative scenario in which he properly checked for pedestrian traffic but moments later that pedestrian suddenly left where he had been standing and quickly closed the short distance between where he had been and where the claimant was going, disregarding the warning beeper of the fork truck. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's June 28, 2006 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/pjs