IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ALAN J BUNTING
Claimant

VALERO SERVICES INC
Employer

APPEAL NO: 15A-UI-07715-LDT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/31/15
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

Alan J. Bunting (claimant) appealed a representative's July 1, 2015 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Valero Services, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 4, 2015. This appeal was consolidated for hearing with one related appeal, 15A-UI-07716-LDT. The claimant participated in the hearing. The employer's third-party representative received the hearing notice and responded on July 23, 2015 by making an on-line entry into the Appeals Bureau's conference call system to register the name and number of a witness, Bob Abbott, indicating that Mr. Abbott would be available at the scheduled time for the hearing at the specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the number was not valid; therefore, the employer did not participate in the hearing. The record was closed at 1:25 p.m. At 1:28 p.m., Mr. Abbott called the Appeals Bureau, provided the correct phone number, and requested that the record be reopened. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Should the hearing record be reopened? Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The employer's representative received the hearing notice prior to the August 4, 2015 hearing. The instructions inform the parties that they are to provide the proper number at which they can be reached and to be available at the specified time for the hearing, and that if they cannot be

reached at the time of the hearing at the number they provided, the judge may decide the case on the basis of other available evidence. The number entered by the employer's representative into the Appeals Bureau's conference call system was incorrect. The employer's witness did not contact the Appeals Bureau and correct the error until after the hearing had concluded.

The claimant started working for the employer on July 27, 2009. He worked full time as a shipping and receiving operator at the employer's Albert City, Iowa ethanol plant. His last day of work was May 29, 2015. The employer discharged him on that date. The reason asserted for the discharge was because of an incident of supposed failure to respond to commands on May 17 or May 20.

On May 29, Abbott, an off-site human resources representative, came to the Albert City plant and discharged the claimant, telling the claimant that there had been a "near miss" when the claimant was operating a yard train on the date of the incident. No details were provided as to what type of "near miss" was alleged to have occurred. The claimant denied that there had been a "near miss"; he was unaware of there having been any issues on the date of the supposed incident. Abbott further told him at that time that he had failed to respond to commands that had been radioed to him at that time; the claimant denied that he had failed to respond to any radioed commands at that time.

The claimant had not previously been given any written warnings regarding the type of incident that was asserted to have occurred in May. He had been given a warning and suspension for an incident in December 2014 where he had called in an absence due to illness which was not a bona fide absence due to illness, and had been given a verbal warning in September 2014 for having his cell phone in a work area. Because the employer believed the claimant had failed to comply with radio instructions in May leading to a "near miss," the employer discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied. After a hearing record has been closed the administrative law judge may not take evidence from a non-participating party but can only reopen the record and issue a new notice of hearing if the non-participating party has demonstrated good cause for the party's failure to participate. Rule 871 IAC 26.14(7)b. The record shall not be reopened if the administrative law judge does not find good cause for the party's late contact. *Id*. Failing to read or follow the instructions on the notice of hearing are not good cause for reopening the record. Rule 871 IAC 26.14(7)c.

The first time the employer provided the correct number at which its witness could be reached for the hearing was after the hearing had been closed. Although the employer intended to participate in the hearing, the employer failed to read or follow the hearing notice instructions and did not provide a correct phone number to the Appeals Bureau prior to the hearing. 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. The employer did not establish good cause to reopen the hearing. Therefore, the employer's request to reopen the hearing is denied.

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 § 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). The question 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 matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the claim that he had failed to follow radio commands leading to a "near miss" in May 2015. The employer provided no testimony, and notably, the testimony that would have been provided by Abbott would have been at least second-hand; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the employer might have been mistaken, whether the supposed witnesses were credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of the reports. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant in fact failed to follow radio commands or did anything that caused a "near miss." 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 July 1, 2015 decision (reference 01) is reversed. 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.

_____
Lynette A. F. Donner
Administrative Law Judge

_____
Decision Dated and Mailed

ld/pjs