IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRANDON FLINT
Claimant

MCANINCH CORP
Employer

APPEAL NO: 16A-UI-07066-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/20/15
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the June 20, 2016, reference 07, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 14, 2016. The claimant participated in the hearing. Dave Stitz, Vice-President of Finance, participated in the hearing on behalf of the employer. Employer's Exhibits One through Three were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time seasonal laborer for McAninch Corporation from March 2, 2015 to May 23, 2016. He was discharged for failing a random drug test.

The employer requires random drug-tests of construction employees, in safety sensitive positions, on an annual basis. The employees to be tested are selected by a third party, independent provider, which uses a computer generated numbering system when choosing who will be tested in accordance with Iowa Code section 730.5. On May 11, 2016, the claimant's number was picked for a random drug test and the test was done at the beginning of his shift in the safety trailer at the worksite. The third party company who administers the tests sends a technician to conduct the testing. The testing conditions are sanitary and private and the claimant's urine sample was split at the time of collection. The claimant did not have a photo identification at the time of the test and there is no evidence his identify was verified as required by the employer's policy (Employer's Exhibit Three). The claimant was not given the opportunity to provide any information to the medical review officer that might affect the test results and was not informed of all of the drugs for which he would be tested. The temperature of the claimant's first urine sample was 92 degrees. The employer's policy states the temperature is acceptable if between 90 and 100 degrees but the technician did not accept the claimant's first test and instead instructed him to wait two hours and test again (Employer's Exhibit Three). The medical review officer called the claimant May 16, 2016, and left him a message indicating he should call back or the employer would call him. The employer's policy states the lab must notify the employer of the test results within five business days of the test.

In this case, the lab notified the employer May 19, 2016, which is the sixth business day after the claimant took the test that the claimant tested positive for marijuana (Employer's Exhibit Three). The medical review officer did not notify the claimant he tested positive May 11, 2016, before providing the employer with the same information, at which time the claimant was suspended pending further testing of his sample. A co-worker told the claimant he only had three days to request a confirmatory test. The employer's policy states if the claimant is notified the test is positive he can direct the medical review officer to test the second sample but that request must be made within 72 hours of learning the test is positive. The claimant called Great River Business Health May 19, 2016, to make that request just in case his test was positive but was told he was one day too late. After receiving the positive test results, the employer sent the claimant a certified letter, return receipt requested, notifying him of his positive test and his right to a confirmatory test at his expense. It did not state the time limit for requesting a second test or how much a confirmatory test would cost however (Employer's Exhibit Two). The claimant signed for the letter May 23, 2016, and that was the first time he knew he tested positive. The claimant also denies the use of marijuana. The employer terminated the claimant's employment May 23, 2016.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying job misconduct.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. Random drug testing is allowed provided the employees are selected by a third party company using a computer based system. The evidence in the record establishes that the employer did not meet all requirements of Iowa Code section 730.5. The employer did follow the process provided for random testing, performed the test immediately before the claimant's shift, paid the costs of the initial test, provided private and sanitary conditions for the test, and split the samples at the time of the collection, but it did not give the claimant an opportunity to provide any information that might affect the outcome of his test or inform the claimant of which drugs would be tested. It did have the confirmed positive testing done by a certified laboratory but after taking disciplinary action rather than before taking disciplinary action as is required by Iowa Code section 730.5. The employer notified the claimant of the test results by certified mail, return receipt requested, and stated his right to a confirmatory test at his own expense but did not give him a time frame of when he had to make that request or the approximate cost of a confirmatory test. The employer's drug and alcohol free workplace policies were provided to the claimant in writing but there was no information regarding the Employee Assistance Program posted.

Iowa Code section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v. Employment Appeal Board, 606 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute and held "that an illegal drug test cannot provide the basis to render an employee ineligible for unemployment compensation benefits." Thereafter, In Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003), the Iowa Supreme Court held that where an employer had not complied with the statutory requirement for the drug test, the test could not serve as a basis for disqualifying a claimant for benefits.

Because the employer failed to follow all the provisions of Iowa Code section 730.5 and its own policy, the test was not authorized by law and cannot serve as the basis for disqualifying the claimant from unemployment insurance benefits. Based upon the evidence in the record and the application of the appropriate law, the administrative law judge concludes that the claimant was discharged from employment for no disqualifying reason. Therefore, benefits must be allowed.

DECISION:

The June 20, 2016, reference 07, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

_____
Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

je/pjs