

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFREY L SHUGAR
Claimant

APPEAL NO. 09A-UI-14729-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FARNER-BOCKEN CO
Employer

**Original Claim: 08/30/09
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jeffrey Shugar filed an appeal from a representative's decision dated September 21, 2009, reference 01, which denied benefits based upon his separation from Farner-Bocken Company. After due notice was issue, a telephone conference hearing was scheduled for and held on October 28, 2009. The claimant participated personally. Participating on behalf of the claimant was Robert Green, attorney at law. The employer participated by Amy Ross, Dave Holdsworth, and Lonnie Lehrkamp. Employer's Exhibits One through Four and Claimant's Exhibits A through D were received into evidence.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Jeffrey Shugar was employed as a full-time route delivery driver for Farner-Bocken Company from November 17, 2008, until September 2, 2009, when he was discharged from employment.

Mr. Shugar was discharged when the employer believed that the claimant had not fully disclosed a previous back injury that limited his capabilities to perform his duties at Farner-Bocken Company. At the time of his application for employment, the claimant indicated that he had had previous back surgery but was not limited by the condition. Subsequently, in May of 2009, Mr. Shugar experienced pain in his groin and was examined by a physician. It was later determined that the claimant required hernia surgery under a workers' compensation claim. Although the claimant had been released from hernia surgery to return to work, he was not allowed to do so, as the company's workers' compensation carrier had reported to the company that a Dr. Durwood had reported to the medical case manager that previous restrictions imposed in 2002 were still in place. Based on this information, the employer believed that the claimant had not been entirely truthful during his pre-employment interview and a management decision was made to terminate Mr. Shugar from his employment.

The claimant had been fully released to return and had passed a DOT medical examination for commercial drivers' fitness.

It is the claimant's position that he was fully candid in explaining his previous back surgery at the time of the hiring interview, volunteering information to the employer. It is the claimant's further position that he was fully able and capable to perform the duties of his job and was not aware of any lifting requirements in his job description that would have violated any limitations previously imposed as the claimant understood them.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate,

intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The evidence in the record establishes that Mr. Shugar was truthful in his statements to Farner-Bocken Company at the time of his pre-employment interview, volunteering that he had previous back surgery and indicating that he did not believe that he had any limitations that would prevent him from performing his job duties. The claimant had taken a DOT medical examination and had passed without restrictions; and, based upon previous information given to him by the physicians involved in his previous back surgery, the claimant believed that he had been fully released for full duty. Although the claimant had been released by his workers' compensation physicians to return to work following hernia surgery, he was not allowed to do so by the company, as the company believed that the claimant had not fully disclosed a previous medical condition.

Based upon the evidence in the record, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing intentional disqualifying misconduct on the part of this claimant. The claimant reasonably believed, based upon information given to him and medical reports, that he had been fully released and he was candid in explaining his circumstances to the employer at the time of hire. The employer relies on a hearsay statement from a previous physician in answer to a workers' compensation investigator's inquiry to show that the claimant had not been fully released and that he was aware of that fact. While hearsay is admissible in administrative proceedings, it cannot be accorded the same weight as sworn direct testimony. Based upon the totality of the evidence in the record, the administrative law judge concludes that the claimant was truthful in his assertions to the employer regarding his abilities to work. Intentional disqualifying misconduct has not been shown. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated September 21, 2009, reference 01, is reversed. The claimant was dismissed for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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