

subsequent training sessions, Mr. Gallagher received copies of the employer's drug policy. It contained information regarding the circumstances under which drug tests may be required, the drugs for which the sample will be tested, and the consequences of a positive drug screen.

On May 10, 2005, the claimant had a post-accident drug screen. The sample was taken at Medix Occupational Health, the sample was split and tested by Express Analytical Laboratory, and a medical review officer (MRO) contacted the claimant to discuss the positive test results. The sample had tested positive for amphetamine and methamphetamine. Mr. Gallagher stated he had taken an injection for a bee sting and the MRO indicated this could result in a positive test for amphetamines, but not methamphetamines. The employer received the results on May 16, 2005. The claimant acknowledged he had taken controlled substances which would account for the positive test.

Mr. Gallagher was suspended for five days under the relevant disciplinary policy and had to be evaluated by a substance abuse professional. The evaluation took longer than the five-day suspension, but the claimant was eventually returned to work by the counselor. Under the drug policy, he had to submit to a return to duty drug screen, which sample was taken on June 1, 2005, at the same clinic. It was split and sent to the same laboratory, and another MRO contacted the claimant about another positive test for the same controlled substance.

The claimant was notified of his right to have the split sample retested and he asserted this right. Another laboratory analyzed the split same with the same results. He was notified of another positive test and subsequent discharge by certified letter on June 13, 2005. A union grievance was filed and a meeting was held on July 13, 2005, with representatives from the employer, the claimant and a union representative. Mr. Gallagher asserted that he had hepatitis C and this would cause a slow-down in his metabolism which would result in the controlled substance he had taken back in early May not to have been removed from his system by the time of the second test on June 1, 2005. He left "brochures" at the meeting to support his contention.

The employer gave him ten days to provide evidence of this and on July 22, 2005, he faxed a letter dated July 15, 2005, from Maria J. Steele, ARNP, that he had a history of hepatitis B or C, and a blood test was positive for the hepatitis C antibody, "indicating either exposure in the past or current infection." Further testing was to be done with a liver biopsy scheduled July 18, 2005. After receiving the letter the employer notified the claimant that the discharge would "stand."

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is.

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 employer tested the claimant three times, and each time the test was positive. The samples were split, the MRO consulted with him about the results, he was allowed to have the split sample tested again, and was notified by certified letter that the test results were positive and that he was discharged.

His assertion that he had hepatitis C would seem to have some support in the letter from Ms. Steele, but the wording of the document is somewhat vague, only stating he had a "history" of diagnosis, and that he had the antibodies which meant "either exposure to" or a "current infection." Nothing appears to have been definitely stated that he had hepatitis C at the time, only that further tests were needed and had been scheduled.

Even if the claimant had hepatitis C, there is nothing in the record to support his contention that it was the cause of the second positive drug screen, either directly or indirectly. Mr. Gallagher admitted to consuming controlled substances which caused the first positive test, and subsequent tests, at a later date, were also positive. This is a violation of the employer's drug policy and is conduct not in the best interests of the employer. The claimant is disqualified.

DECISION:

The representative's decision of August 29, 2005, reference 01, is affirmed. Gene Gallagher is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount provided he is otherwise eligible.

bgh/kjw