

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DERRICK V WARREN
Claimant

APPEAL NO. 13A-UI-13232-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRIDGESTONE AMERICAS TIRE
Employer

OC: 06/30/13
Claimant: Respondent (2)

Section 96.5(2)a – Discharge
Section 96.3(7) – Overpayment
871 IAC 24.10 – Employer Participation

STATEMENT OF THE CASE:

The employer, Bridgestone, filed an appeal from a decision dated November 25, 2013, reference 05. The decision allowed benefits to the claimant, Derrick Warren. After due notice was issued, a hearing was held by telephone conference call on January 8, 2014. The claimant participated on his own behalf. The employer participated by Division Human Resources Manager Jim Funcheon, Labor Relations Manager Jeff Higgins and Medical Manager Pete Goshorn.

ISSUE:

The issue is whether was discharged for misconduct sufficient to warrant a denial of unemployment benefits, whether the claimant is overpaid unemployment insurance benefits and whether the employer's account is charged due to non-participation at the fact-finding interview.

FINDINGS OF FACT:

Derrick Warren was employed by Bridgestone from April 23, 2012 until October 30, 2013 as a full-time production worker. He had received the employer's policies and procedures at the time of hire and was aware of the drug testing policies.

Mr. Warren was found sleeping on the job by two supervisors on September 11, 2013. He was sent to the medical office to give a urine sample for drug testing. The sample was split and sent to Clinical Reference Lab. The test results came back positive for cocaine and marijuana. He acknowledged using marijuana but denied using cocaine, asserting he had had a dental procedure a few days before which might have given a false positive. The on-site medical review officer told him he could provide something in writing from his dentist verifying the procedure and specifying any medications used which might cause a false positive. Mr. Warren never provided any such information.

The claimant was notified of the drug test results by certified mail, return receipt requested, which he received. The letter informed him had the right to have the split sample retested at a

lab of his choice and the cost of that test. He was told to contact Medical Manager Pete Goshorn if he wanted the sample retested but he elected not to have the retest.

Per company policy Mr. Warren was sent to the employee assistance program (EAP) for evaluation and recommendation for treatment. He was to attend classes once a week and maintain the rehab program in order to retain his job. The agreement further provided that he could be randomly tested for drugs over the next six years and any further positive tests would result in discharge.

On September 26, 2013, he met with Labor Relations Manager Jeff Higgins, a union representative and his department manager about the sleeping on the job September 11, 2013. As the claimant had not been allowed on site September 11, 12, 16 and 17, 2013, while waiting for the test results, Mr. Higgins ruled that those days would also constitute a suspension for sleeping on the job.

On October 21, 2013, a random drug test was required and the claimant provided another urine sample. Before the test result came back Mr. Higgins had another meeting with Mr. Warren about a letter received from the EAP that he had not been attending the classes as required and missed two of them. Mr. Warren was told dropping out of the program was considered "non-compliance" with the treatment. He said he had a "lot going on" with a death in the family and he was not sleeping well. He had made arrangements to attend a class that evening.

On October 25, 2013, the second random test came back positive for cocaine. He was again notified in person and given a two day "cooling off" period to collect any information before the disciplinary meeting. Mr. Warren again maintained he had had dental procedure the week before the second sample was given. He did not make any attempt whatsoever to contact his dentist to get documentation to support his contention. The employer again sent him a certified letter with all the required information contained in it. Mr. Warren had decided to stay with his girlfriend sometime around October 1, 2013, and did not go home to check his mail more than once a week. He did not get the second certified letter because he had not notified the employer of this secondary address. The letter was returned unopened.

A meeting was scheduled for Mr. Warren to meet with the employer to discuss the second drug test results. His union representative notified him of the meeting but he elected not to go because had a job interview he did not want to miss. The union representative notified him later he had been discharged. The employer sent a certified letter informing the claimant of the discharge but again he was not at his address of record for extended periods of time and did not sign for it.

Derrick Warren has received unemployment benefits since filing an additional claim with an effective date of November 3, 2013. The employer's representative did send the name and phone number of Mr. Higgins to Iowa Workforce Development to participate in the fact-finding interview. There is nothing to establish whether the Workforce representative attempted to call. But the employer did submit a substantial amount of documentary evidence, including copies of the drug policy, the drug test results, the certified letters regarding his rights under the drug testing law, MRO notes on the case and the termination letter

REASONING AND CONCLUSIONS OF LAW:

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 claimant was discharged for testing positive for controlled substances twice in six weeks. He had also not been complying with the rehab program he agreed to follow in order to maintain his job. While Mr. Warren denied taking cocaine he provided no evidence to the employer, or to the administrative law judge supporting his contention that he did, in fact, have dental appointments around the time both urine samples were given, what drugs were administered during the dental procedure, and whether or how those drugs might have caused false positives.

The judge finds is especially telling that the claimant declined to get the dentist's note after the first drug test because he did not believe he was going to be tested again so soon. And the fact the amount of cocaine detected in the second test was higher than the amount in the first test, would indicate he may have thought he had a "safe" period in which to continue taking the controlled substance.

Given the substantial evidence provided by the employer and the lack of rebuttal evidence from the claimant, the administrative law judge must conclude he had, in fact, consumed a controlled substance which was still in his system while at work. This is a violation of a known company policy. The employer has the obligation to provide a safe work environment for all employees and the claimant's conduct interfered with its ability to do so. This is conduct not in the best interests of the employer and the claimant is disqualified.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award

benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The administrative law judge finds the amount of documentary evidence submitted for the fact-finding interview is sufficient, if un rebutted, to have been sufficient to establish misconduct and therefore, constitutes participation.

DECISION:

The unemployment insurance decision dated November 25, 2013, reference 05, is reversed. Derrick Warren is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible. The claimant is overpaid unemployment benefits in the amount of \$3,964.00. This must be recovered in accordance with the provisions of Iowa law.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css