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**APPEAL TRIBUNAL
DECISION**

State of Wisconsin
Department of Workforce Development
Unemployment Insurance

Hearing No. 14000914MD

Mailed to:

In the matter of:

Employee: MICHAEL H WARREN, RESPONDENT

B.C. & S.S. No.: 05/***-**-9622

vs.

Employer: WASTE MANAGEMENT - MADISON,
APPELLANT

UI Account No.: 051557 AB

DANIELLE SCHRODER
HAWKS QUINDEL, S.C.
PO BOX 2155
MADISON WI 53701-2155

APPEAL RIGHTS

THIS DECISION WILL BECOME FINAL UNLESS A WRITTEN PETITION FOR REVIEW BY THE LABOR AND INDUSTRY REVIEW COMMISSION IS FILED WITHIN 21 DAYS FROM THE DATE OF THIS DECISION. (SEE DATE BELOW.) THE REQUIRED PROCEDURES TO FILE A PETITION FOR COMMISSION REVIEW ARE DESCRIBED ON THE BACK OF THIS PAGE. THE COMMISSION WILL REVIEW THE EVIDENCE ALREADY PRESENTED AT THE HEARING TO MAKE A DECISION. NO FURTHER HEARING WILL BE HELD UNLESS THE COMMISSION SO ORDERS.

A CLAIMANT WHO IS STILL UNEMPLOYED SHOULD CONTINUE TO FILE CLAIMS WHILE THE REVIEW IS PENDING. IF THIS DECISION ALLOWS BENEFIT PAYMENT, PAYMENTS WILL BE MADE AND WILL CONTINUE UNLESS A LATER DECISION DENIES BENEFIT PAYMENT. IF THIS DECISION OR ANY HIGHER LEVEL DECISION REVERSES AND RESULTS IN A DENIAL OF BENEFIT PAYMENT, THE CLAIMANT WILL BE REQUIRED TO REPAY PREVIOUSLY PAID BENEFITS.

ANOTHER HEARING WILL NOT BE SCHEDULED UNLESS A PARTY WHO FAILED TO APPEAR SHOWS GOOD CAUSE FOR NOT APPEARING AT THE HEARING ORIGINALLY SCHEDULED. THE REQUEST FOR RESCHEDULING MUST BE IN WRITING, MUST EXPLAIN THE REASON FOR FAILING TO APPEAR, AND SHOULD BE MAILED IMMEDIATELY TO THE UI HEARING OFFICE ABOVE. IF YOU DO NOT UNDERSTAND THE PROCEDURE, CALL THE UI HEARING OFFICE FOR ASSISTANCE.

DECISION: SEE ATTACHED DECISION WHICH AFFIRMS THE INITIAL DETERMINATION.

Employee appeared by:

Employer appeared by:

IN PERSON

JON FOX
ROUTE MANAGER

Administrative Law Judge	Dated and Mailed	Petition Must Be Received or Postmarked By:
STEPHANIE N. BLOECHLANDERSON	MAY 16, 2014	JUNE 6, 2014

(SEE REVERSE FOR ADDITIONAL INFORMATION)

Decision mailed to:

MICHAEL H WARREN, 621 SYCAMORE ST, SAUK CITY, WI 53583-1358
DANIELLE SCHRODER, HAWKS QUINDEL, S.C., PO BOX 2155, MADISON, WI 53701-2155
WASTE MANAGEMENT - MADISON, WASTE MANAGEMENT OF WISCONSIN INC, % TALX UCM
SRV, PO BOX 283, SAINT LOUIS, MO 63166-0283

APPEAL TRIBUNAL DECISION INFORMATION

- APPEAL RIGHTS:** The attached decision will become final unless a written petition for review is **received or postmarked** within 21 days from the date of this decision (see "Petition Must Be Received or Postmarked By" date on the front of this decision). You may mail, fax, or deliver your petition for review to this hearing office or the commission, or file your petition over the Internet by following the directions at <http://dwd.wisconsin.gov/lirc/petition.htm>. Petitions filed on other on-line forms will not be accepted. If the petition is timely, the commission will review the evidence already presented at the hearing to make a decision. No further hearing will be held unless the commission so orders.
- BENEFIT PAYMENT:** A claimant who is still unemployed should continue to file *claims promptly while the review is pending*. If this decision allows benefit payment, payments will be made and will continue unless a later decision denies benefit payment. If this decision or any higher level decision reverses and results in a denial of benefit payment, the claimant will be required to repay previously paid benefits.
- FAILURE TO APPEAR AT HEARING:** Another hearing will not be scheduled unless a party who failed to appear shows good cause for not appearing at the hearing originally scheduled. The request for rescheduling must be in writing, must explain the reason for failing to appear, and should be mailed immediately to the UI hearing office listed on the front of this form. If you do not understand the procedure, call the UI hearing office for assistance.
- REISSUED DECISION:** A reissued decision is issued and mailed when a previous decision was not mailed to the last-known address of one of the parties. A reissued decision may be appealed (see appeal rights above).
- WITHDRAWAL DECISION:** The appellant may submit a request to retract the withdrawal and to reinstate the prior request for hearing. This request must be in writing, must be received within 21 days from the date of the withdrawal decision, and must include the reasons for the retraction.
- FEES:** No attorney or agent may charge the claimant more than ten percent (10%) of the benefits at issue in the administrative proceeding without prior approval from the department.
- HEARING RECORDS:** You may request a copy of the hearing recording(s) from the Bureau of Legal Affairs by calling (608) 266-3174.

THE DEPARTMENT'S DETERMINATION HELD: that in week 5 of 2014 (week ending February 1), the employee was discharged, but not for misconduct or substantial fault connected with the employee's work. As a result, benefits were allowed.

The issue before this appeal tribunal is whether the employee was discharged for misconduct connected with the employee's work. If the employee's discharge was not for misconduct, a secondary issue is whether the employee's discharge was for substantial fault connected with the employee's work.

Based on the applicable records and evidence in this case, the appeal tribunal makes the following

FINDINGS OF FACT and CONCLUSIONS OF LAW

The employee worked as a truck driver for approximately eight years for the employer, a refuse and recycling business, until the employer discharged him on January 30, 2014 (week 5).

The employer's written policy states that four "failures" within a rolling 12-month time period, will result in termination. A failure is a safety rule violation, a preventable incident, or a life critical rules violation. The employee received and was aware of this policy.

Within a rolling 12-month period, the employee was involved in four "failures" as defined by the employer. On June 27, 2013, while driving the employer's truck, he struck a parked vehicle while attempting to turn right. The vehicle was illegally parked in a "do not park" area and ticketed by the police. The employee did not receive a ticket for the incident. The vehicles sustained an unspecified amount of damage. On July 2, 2013, the employer gave the employee a written warning for this incident. On August 6, 2013, the employee made a left-hand turn into a driveway and then realized that he was too close to the house. He called his supervisor, who came to the site, asked him if there was any damage done yet and the employee replied that there was none. The employee asked for the supervisor's help but the supervisor replied that he had gotten himself into the situation and needed to get himself out. In doing so, the truck struck the building's awning and sustained an unspecified amount of damage. On August 13, 2013, the employer issued him a written warning for the August 6 incident.

On January 13, 2014, the employee had to drive a different type of truck that he had not been trained on and he did not feel comfortable doing so. On that day, while backing out of a narrow driveway, the employee allegedly side-swiped the business's building wall. The business notified the route manager that one of its truck drivers had hit its wall and suffered an unspecified amount of damage. On January 17, 2014, the employer issued the employee another written warning. The employee denied side-swiping the business's wall. On January 23, 2014, while backing out of the same business's parking lot, the employee accidentally drove over and damaged a PVC pipe sticking out of the wall. The pipe was buried under the snow and the employee did not know it was there. An unspecified amount of damage was done to the PVC pipe. On January 30, 2014, the route manager discharged the employee for having four "failures" within a rolling 12-month period.

The statutes generally provide that if an employee is discharged from employment with an employer due to actions that constitute disqualifying "misconduct" or due to some less culpable behavior amounting to "substantial fault," the employee will not be eligible for any unemployment benefits until at least seven weeks have elapsed after the end of the week of discharge and only after the employee has earned wages in covered employment after the discharge of at least 14 times the employee's applicable weekly benefit rate.

The legal standard for "misconduct" under Wis. Stat. § 108.04(5), generally provides, in relevant part, as follows:

For purposes of this subsection, "misconduct" means one or more actions or conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees, or in carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful intent, or evil design of equal severity to such disregard, or to show an intentional and substantial disregard of an employer's interests, or of an employee's duties and obligations to his or her employer. "Misconduct" specifically includes the following:

(b) Theft of an employer's property or services with intent to deprive the employer of the property or services permanently, theft of currency of any value, felonious conduct connected with an employee's employment with his or her employer, or *intentional or negligent conduct by an employee that causes substantial damage to his or her employer's property.*

The legal standard for "substantial fault" under Wis. Stat. § 108.04(5g), provides as follows:

"[S]ubstantial fault" includes those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does not include any of the following:

1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction.
2. One or more inadvertent errors made by the employee.
3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment.

Workers are presumed to be eligible for unemployment insurance. The party resisting the payment of benefits has the burden of establishing that the case comes within one of the disqualifying provisions of the unemployment insurance law. Consolidated Const. Co., Inc. v. Casey, 71 Wis. 2d 811, 820 (1976); Kansas City Star Co. v. ILHR Department, 60 Wis. 2d 591, 602 (1973); Transport Oil, Inc. v. Cummings, 54 Wis.2d 256, 268 (1972).

Wisconsin Statute § 108.04(5)(b) specifically defines misconduct as "intentional or negligent conduct by an employee that causes substantial damage to his or her employer's property." Here, while the employee's conduct on August 6, 2013 and January 13, 2014 is arguably negligent, the employer has not provided any competent and persuasive evidence of substantial damage to either the businesses' or the employer's property. Moreover, the employee was not at fault in the June 27, 2013 incident and denied involvement in the January 13, 2014 incident. The employer also failed to provide any competent and persuasive evidence of substantial damage for these incidents. Therefore, the employee's discharge was not for misconduct under Wis. Stat. § 108.04(5)(b).

The employer has also not met its burden of proof for misconduct under Wis. Stat. § 108.04(5). The record establishes that the incidents on June 27 and August 6 of 2013 and January 23, 2014, were all accidental. Further, the employee credibly denied any involvement in the January 13, 2014 incident. No evidence was presented to establish that the employee's actions were intentional or grossly negligent so as to rise to the level of misconduct. Therefore, the employee's discharge was not for misconduct under Wis. Stat. § 108.04(5).

The employee's discharge must also be analyzed under the "substantial fault" standard as defined in Wis. Stat. § 108.04(5g). Here, the employee's accidents on June 27 and August 6 of 2013 and January 23, 2014, fall within the exception in Wis. Stat. § 108.04(5g)(2) for "inadvertent errors." By definition, an accident is inadvertent, meaning no intent. Further, as indicated above, the employee credibly denied his involvement in the January 13, 2014 incident. The route manager's testimony regarding this incident was hearsay as he was not a firsthand witness to that incident. As such, no substantial fault connected with the employee's employment has been established.

The appeal tribunal therefore finds that in week 5 of 2014 (week ending February 1), the employee was discharged, but not for misconduct, within the meaning of Wis. Stat. § 108.04(5).

The appeal tribunal further finds that in week 5 of 2014 (week ending February 1), the employee was discharged, but not for substantial fault connected with the employee's work, within the meaning of Wis. Stat. § 108.04(5g).

DECISION

The department's determination is affirmed. Accordingly, the employee is *eligible* for benefits beginning in week 5 of 2014 (week ending February 1), if otherwise qualified.

APPEAL TRIBUNAL

By: 

Stephanie Bloechl-Anderson
Administrative Law Judge