

8-18-2008

Dypwick v. Swift Transp. Co., Inc. Respondent's Brief Dckt. 35027

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IN THE SUPREME COURT OF THE STATE OF IDAHO

KURT J. DYPWICK,

Claimant/Appellant,

vs.

SWIFT TRANSPORTATION CO., INC.,

Employer/Respondent,

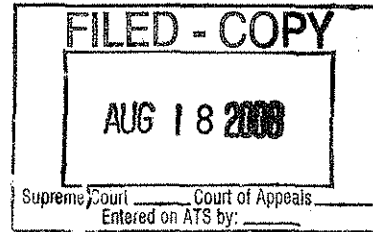
and

STATE OF IDAHO,
DEPARTMENT OF LABOR,

Respondent.

SUPREME COURT NO. 35027

BRIEF OF RESPONDENT
DEPARTMENT OF LABOR



ON APPEAL FROM THE INDUSTRIAL COMMISSION
STATE OF IDAHO
JAMES F. KILE, CHAIRMAN

CLAIMANT KURT J. DYPWICK

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IDAHO DEPARTMENT OF LABOR

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STATEMENT OF THE CASE

(1) Nature of the Case:

Claimant, Kurt J. Dypwick (hereinafter "Claimant"), appeals a Decision and Order of the Idaho Industrial Commission (hereinafter "Commission") holding that Employer, Swift Transportation Company, Inc. (hereinafter "Employer"), discharged him for misconduct in connection with his employment, which made Claimant ineligible for benefits under Idaho Code § 72-1366(5). Appendix A.

(2) Course of the Proceedings Below:

After his separation from employment on June 11, 2007, Claimant filed a claim for unemployment benefits. Tr. p. 6, Ll. 13-14. On August 8, 2007, a claims examiner for the Idaho Department of Labor (hereinafter "Department") issued an Eligibility Determination finding Claimant ineligible for unemployment benefits and that Employer's account was not chargeable for experience rating purposes. R. p. 10. Claimant filed an appeal with the Department's Appeals Bureau on August 21, 2007. Exhibit 5. After a telephone hearing in the matter, Department Appeals Examiner, Gregory Stevens, (hereinafter "Appeals Examiner"), issued a Decision on September 11, 2007, affirming the Eligibility Determination. Appendix B.

On September 25, 2007, Claimant filed an appeal with the Commission. R. pp. 7-20. After conducting a *de novo* review of the record pursuant to Idaho Code § 72-1368(7), the Commission issued a Decision and Order on November 15, 2007, affirming the Appeals Examiner's Decision. Appendix A, p. 20. The Commission adopted the Appeals Examiner's findings of fact and set out its own conclusions of law. Appendix A, p. 14. The Commission

subsequently denied Claimant's motion for reconsideration. R. pp. 75-76. Claimant now brings an appeal to this Court.

(3) Statement of Facts:

After going through training, Claimant began working for Employer as an over-the-road truck driver on July 10, 2006. Tr. p. 6, Ll. 4, 8-9; p. 25, Ll. 2-3. On November 19, 2006, Claimant had an accident while driving for Employer in Helena, Montana. Tr. p. 7, Ll. 6-7. Claimant hit a traffic signal while making a right turn. Tr. p. 7, Ll. 7-9. On March 29, 2007, Claimant had a second accident while backing into a loading dock in Spanish Fork, Utah. Tr. p. 7, Ll. 11-13; p. 16, Ll. 20-25. Employer considered both accidents preventable. Exhibit 3 pp. 9-10, 16.

After his second accident, Claimant attended a National Safety Counsel Course on April 26, 2007, taught by Employer's Safety Manager, Brett Hadley. Tr. p. 9, Ll. 2-6. At the end of that training course, Claimant spoke to Mr. Hadley and asked where he stood with Employer after having two accidents. Tr. p. 9, Ll. 2-9. Mr. Hadley warned Claimant that his next accident would result in his termination and that he needed "to be squeaky clean." Tr. p. 9, Ll. 9-13; p. 25, Ll. 15-19; p. 32, Ll. 16-20.

In June 2007, Claimant picked up a trailer from the Shopko Distribution Center in Boise, Idaho, to haul it to Salt Lake City, Utah. Tr. p. 7, Ll. 20-22; p. 34, Ll. 1-2. Claimant performed a pre-trip inspection of the trailer. Tr. p. 26, Ll. 1-6. Prior to leaving for Salt Lake City, Claimant did not report any damage to the trailer in his log book, nor did he report any trailer damage to Employer. Tr. p. 26, L. 25; p. 27, Ll. 1-10. Claimant acknowledged that during a pre-

trip inspection, he was required by federal law to note equipment damage in his log book. Tr. p. 17, Ll. 24-25; p. 18, Ll. 1-7; p. 28, Ll. 12-25; p. 29, Ll. 1-3. After he arrived in Salt Lake City on June 8, 2007, Claimant called his home terminal in Lewiston, Idaho, and reported that he had picked up a damaged trailer in Boise. Tr. p. 7, Ll. 20-21; p. 26, L. 25; p. 27, Ll. 18-21.

When Claimant turned the trailer over to the repair shop in Salt Lake City, Employer's shop foreman reported the damage to Mr. Hadley, Employer's Safety Manager. Tr. p. 7, Ll. 20-25. Mr. Hadley drove to the repair shop in Salt Lake City and physically inspected the damage. Tr. p. 8, Ll. 2-6. Mr. Hadley testified that he could see a good portion of insulation from the inside of the trailer and the damage was "fresh." Tr. p. 8, Ll. 2-9. Claimant testified that the trailer had a two foot by two foot section missing from the side of it. Tr. p. 28, Ll. 7-10; p. 33, Ll. 22-25.

Employer had a policy and procedure handbook for its drivers entitled "Driver Manual." Appendix C, p. 28. Employer submitted portions of that Manual for the record. Appendix C. On July 5, 2006, Claimant acknowledged in writing that he received a copy of Employer's "Driver Manual" and that he understood he would be bound by the rules and policies in the Manual. Appendix C, p. 28; Tr. p. 14, Ll. 1-3. In the Manual, Employer warned its drivers that "failure to report an incident or accident regardless of its severity, or multiple incidents or accidents while driving a Company vehicle" was prohibited. Appendix C, p. 30; Appendix D, p. 34. Under the heading "Accidents/Cargo Claims," the Manual provided, in part, "A driver shall be considered in an 'ACCIDENT' if any motor vehicle which he/she is driving or of which he/she is in charge; shall come into contact with any person, animal, other vehicle, or inanimate

object in a manner that results in death, injury, or property damage.” Appendix C, p. 32. Employer also had a section in its Manual entitled “Equipment Damage” that provided an employee finding damaged equipment must report the damage immediately before leaving with the equipment or risk being charged with the damage. Appendix C, p. 29. Employer discharged Claimant for having a third preventable accident on June 11, 2007. Tr. p. 6, Ll. 13-16; p. 7, Ll. 20-23; p. 25, L. 14.

ISSUE ON APPEAL

Is there substantial and competent evidence in the record to support the Idaho Industrial Commission’s findings and conclusion that Employer discharged Claimant for misconduct in connection with his employment?

STANDARD OF REVIEW

When the Court reviews a Commission decision, “it exercises free review over questions of law, but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings.” Oxley v. Medicine Rock, 139 Idaho 476, 479, 80 P.3d 1077, 1080 (2003). Whether an employee’s conduct constitutes misconduct is a factual determination that will be upheld unless not supported by substantial and competent evidence. Harris v. Electrical Wholesale, 141 Idaho 1, 3, 105 P.3d 267, 269 (2004). Where conflicting evidence is presented that is supported by substantial, competent evidence, the findings reached by the Commission will be sustained regardless of whether the Court may have reached a different conclusion. Harris, 141 Idaho at 3, 105 P.3d at 269. Substantial and competent evidence is relevant evidence which a reasonable mind might accept to support a conclusion.

Oxley, 139 Idaho at 479, 80 P.3d at 1080. The Court has described the appropriate test for substantial and competent evidence for the purposes of judicial review as requiring a court to determine whether an agency's findings of fact are reasonable. Steen v. Denny's Restaurant, 135 Idaho 234, 237, 16 P.3d 910, 913 (2000).

It is for the Commission to determine the credit and weight to be given to the testimony admitted. Bullard v. Sun Valley Aviation, Inc., 128 Idaho 430, 432, 914 P.2d 564, 566 (1996). The Commission's conclusions regarding the credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous. In reviewing a decision of the Commission, the Court views all facts and inferences in the light most favorable to the party who prevailed before the Commission. Oxley, 139 Idaho at 479, 80 P.3d at 1080.

Appellate court review is limited to the evidence, theories and arguments that were presented below. Obenchain v. McAlvain Construction, Inc., 143 Idaho 56, 57, 137 P.3d 443, 444 (2006). The Court will not consider arguments raised for the first time on appeal. Excell Construction, Inc. v. State Department of Labor, 141 Idaho 688, 693, 116 P.3d 18, 23 (2005).

ARGUMENT

There is substantial and competent evidence in the record to support the Industrial Commission's findings and conclusion that Employer discharged Claimant for misconduct in connection with his employment, which made Claimant ineligible for unemployment insurance benefits.

There is no dispute in the record that Employer discharged Claimant on June 11, 2007. Employer's Safety Manager, Brett Hadley, testified that Employer discharged Claimant because he had a third preventable accident. Tr. p. 6, Ll. 15-16; p. 16, Ll. 12-17. Idaho's Employment Security Law provides that "an employee who has been discharged on grounds of work-related

misconduct is ineligible for unemployment compensation. Roll v. City of Middleton, 105 Idaho 22, 25, 665 P.2d 721, 724 (1983); Idaho Code § 72-1366(5) (2006). Misconduct is defined as the willful, intentional disregard of an employer's interests; a deliberate violation of an employer's rules; or a disregard of the standards of behavior an employer has the right to expect of its employees. Desilet v. Glass Doctor, 142 Idaho 655, 657, 132 P.3d 412, 414 (2006). The burden of proving misconduct by a preponderance of the evidence is on the Employer. Harris, 141 Idaho at 3, 105 P.3d at 269.

In its Decision and Order, the Commission concluded Claimant's conduct met all three definitions of misconduct, but ultimately discussed only one, whether or not Claimant disregarded the standards of behavior Employer had a right to expect of him. Appendix A, pp. 15-19. The standards of behavior test of employee misconduct is a two part inquiry of (1) whether the employee's conduct fell below the standards of behavior the employer had a right to expect, and (2) whether the employer's expectations were objectively reasonable under the circumstances. Folks v. Moscow School District #281, 129 Idaho 833, 837, 933 P.2d 642, 646 (1997). An employer's expectations are ordinarily reasonable where they have been communicated to an employee. Folks, 129 Idaho at 838, 933 P.2d at 647. Unlike the other definitions of misconduct, a claimant's disregard of an employer's standards of behavior need not be subjectively intentional or deliberate. Folks, 129 Idaho at 837, 933 P.2d at 646.

There is substantial and competent evidence in the record to support the Commission's conclusion that Claimant failed to meet the standards of behavior Employer had a right to expect. The record reflects Claimant never disputed Mr. Hadley's testimony that he had been involved in

two preventable accidents prior to June 2007. Nor did Claimant dispute that Hadley warned him his next accident would lead to his discharge. Tr. p. 25, Ll. 15-19. On June 8, 2007, Claimant reported the trailer he had been hauling was damaged. Tr. p. 27, Ll. 18-24.

At the hearing, Claimant maintained that he was not responsible for the trailer damage that led to his discharge. He argued the trailer was damaged before he picked it up in Boise and that he failed to report the damage prior to taking custody of the trailer because he did not have any idea Employer would blame him for the damage he failed to report. Tr. p. 26, Ll. 1-25; p. 27, L. 1. Both the Appeals Examiner and the Commission failed to find Claimant's assertions credible. Appendix A, pp. 18-19; Appendix B, pp. 24-25. It is for the Commission to determine the credit and weight to be given to the testimony admitted. Bullard v. Sun Valley Aviation, Inc., 128 Idaho 430, 432, 914 P.2d 564, 566 (1996).

Employer submitted a portion of its Driver Manual containing a policy entitled "Equipment Damage" for the record. In that policy, Employer required its drivers to report damage immediately. Claimant testified that he had an old and outdated copy of Employer's Manual without a policy entitled "Damaged Equipment" and therefore, he could not have known Employer would expect him to immediately report equipment damage. Tr. p. 27, L. 25; p. 28, Ll. 1-2; p. 30, Ll. 17-20. Claimant submitted portions of the Manual that he testified he received from Employer to support his testimony.

The Commission found both Claimant's testimony and the selected portions of the Manual he submitted unpersuasive. The Commission found that it could not conclude the provisions in the Manual regarding damaged equipment were missing from Claimant's copy of

the Manual. In its discussion, the Commission noted the typefaces and pagination varied between the pages both parties submitted, but the Commission found the language that both excerpts had in common was identical. Appendix A, p. 17. The Commission also noted the page with the provision in Employer's excerpts entitled "Damaged Equipment" appeared between a section entitled "Prohibition of Spinner Knobs and/or Suicide Knobs" and a section entitled "Tractor Assignment." Appendix A, pp. 17-18; Appendix C, p. 29. The Commission found the single page excerpt Claimant submitted was insufficient because the excerpt began with the section entitled "Tractor Assignment," leading the Commission to conclude that the provision on equipment damage could have been on the previous page, a page Claimant did not submit. Appendix A, p. 18; Appendix D, p. 37.

Under the standards of behavior analysis, an employer's expectations need not be specifically communicated if they flow normally from the employment relationship. Folks, 129 Idaho at 838, 933 P.2d at 647. Both the Appeals Examiner and the Commission found that even if not specifically communicated to Claimant in the form of a policy, Employer communicated its expectations to Claimant. The Appeals Examiner found and the Commission agreed that even without an express directive from Employer to report damage immediately, common sense dictated that a reasonable and responsible person would have done so anyway. Appendix A, pp. 18-19; Appendix B, pp. 24-25.

The Employer's Safety Manager, Brett Hadley, told Claimant just a few weeks earlier that his third preventable accident would result in his discharge and that he needed to be "squeaky clean." Tr. p. 9, Ll. 9-13; p. 25, Ll. 15-19; p. 32, Ll. 16-20. Claimant acknowledged

that during pre-trip inspections he was required by federal law to note equipment damage in his log book. Tr. p. 17, Ll. 24-25; p. 18, Ll. 1-7; p. 28, Ll. 12-25; p. 29, Ll. 1-3. Further, Claimant acknowledged during the hearing that he should have noted the damage to the trailer in his log book before hauling the damaged trailer from Boise to Salt Lake City. Tr. p. 28, Ll. 12-14; p. 33, Ll. 8-13.

The Appeals Examiner concluded that the fact that Claimant failed to report the damage to Employer or note it in his log book was “not the act of a reasonably, prudent person and does not support the [C]laimant’s contention that the damage existed prior to *his taking the trailer.*” Appendix B, p. 25. The Commission agreed. The Commission concluded that Claimant’s log book suggested the trailer was damage-free when Claimant picked it up and the lack of a report during Claimant’s pre-trip inspection further suggested that the trailer became damaged while Claimant was hauling it. Appendix A, p. 18. According to the Commission, the lack of a log book entry and an equipment damage report allowed Employer to reasonably conclude that Claimant was responsible for the damage and that the damage was the result of a preventable accident. Appendix A, p. 19. As a result, the Commission concluded that because Claimant’s conduct failed to meet Employer’s expectations, it was employment related misconduct. Appendix A, p. 19; Appendix B, pp. 24-25.

Claimant also argues that Employer should have reprimanded rather than discharged him. Tr. p. 36, Ll. 6-10. The Commission concluded Claimant’s belief he was treated unfairly was not relevant. Appendix A, p. 19. The Court has addressed this argument in Alder v. Mountain States Telephone and Telegraph Company, 92 Idaho 506, 446 P.2d 628 (1968). In that case, the

claimants also argued that their employer had a duty to warn them rather than fine, suspend, discharge, or prosecute them. Alder, 92 Idaho at 512, 446 P2d at 634. The Court concluded the claimants' argument was not relevant because the only issue before the Industrial Accident Board, now the Industrial Commission, was the issue of whether the claimants were discharged for misconduct. Id. In this matter, the Commission concluded Claimant was discharged for employment related misconduct. Applying the Court's holding in Alder, Claimant's argument that he should have been reprimanded rather than discharged is not relevant.

What is relevant is that Employer advised Claimant less than six weeks before he took the trailer from Boise to Salt Lake City that he would be discharged for another preventable accident. If the trailer had been damaged prior to Claimant taking it, it would only be reasonable for an employee in Claimant's position to make sure someone knew about the damage prior to taking it. At the very least, Claimant should have noted the damage in his log book. The fact that he failed to do either is not the act of a reasonably prudent person and does not support Claimant's contention that the damage existed prior to Claimant taking the trailer. Under these circumstances, Employer reasonably concluded that Claimant was responsible for the damage to the trailer and that the damage was preventable.

CONCLUSION

Because the record contains substantial and competent evidence to support the Commission's conclusion that Employer discharged Claimant for misconduct in connection with his employment, making Claimant ineligible for benefits pursuant to Idaho Code § 72-1366(5), the Department asks this Court to affirm the Commission's Decision.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tracey K. Rolfsen', is written over a horizontal line. The signature is stylized and cursive.


Tracey K. Rolfsen
Deputy Attorney General
Idaho Department of Labor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 18th day of August, 2008, I served two true and correct copies of the foregoing Brief of Respondent Department of Labor upon each of the following by depositing said copies in the United States mail, first class, postage prepaid:

KURT J DYPWICK
1901 MOUNT STREET UNIT C
MISSOULA MT 59801

SWIFT TRANSPORTATION COMPANY INC
c/o Employers Advantage
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Karen Rash

Appendix A

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RECEIVED

NOV 15 2007

ID DEPT. OF LABOR
LEGAL

KURT J. DYPWICK,)
)
 Claimant,)
)
 vs.)
)
 SWIFT TRANSPORTATION CO., INC.,)
)
 Employer,)
)
 and)
)
 IDAHO DEPARTMENT OF LABOR.)
 _____)

IDOL #3378-2007
DECISION AND ORDER

FILED
NOV 15 2007
INDUSTRIAL COMMISSION

Appeal of a Decision issued by an Appeals Examiner with Idaho Department of Labor denying benefits. AFFIRMED.

Claimant, Kurt J. Dypwick, appeals to the Industrial Commission a Decision issued by an Appeals Examiner with Idaho Department of Labor (IDOL or Department) finding him ineligible for unemployment insurance benefits. The Appeals Examiner concluded that (1) Employer discharged Claimant for misconduct connected with employment; and (2) Employer's account is not chargeable for experience rating purposes. None of the interested parties has asked for a new hearing before the Commission. Nor do we find that one is necessary to further the interests of justice. However, Claimant sought an opportunity to file an additional written argument and we granted that request in an Order Establishing Briefing Schedule entered on October 19, 2007.

The undersigned Commissioners have conducted a *de novo* review of the record as provided for in Idaho Code § 72-1368(7). In re Guajardo, 119 Idaho 639, 641, 809 P.2d 500, 502 (1991). The Commission has relied on the audio recording of the hearing the Appeals Examiner held on September 11, 2007, along with the exhibits [1 through 7] admitted into the

record during that proceeding. In accordance with Idaho Code § 72-1368(7), the Commission affirms the Decision of the Appeals Examiner.

FINDINGS OF FACT

Based on the testimony and evidence in the record, the Commission concurs with and adopts the Findings of Fact as set in the Appeals Examiner's Decision.

DISCUSSION

The evidence in the record establishes that Employer discharged Claimant. Pursuant to Idaho Code § 72-1366(5), a claimant is ineligible for unemployment insurance benefits if his or her unemployment resulted from the employer's discharge for the claimant for employment-related misconduct. However, what constitutes "just cause" in the mind of an employer for dismissing an employee is not the legal equivalent of "misconduct" under Idaho's Employment Security Law. The two issues are separate and distinct. In a discharge, an employer's interpretation of the term "misconduct" does not dictate the outcome of a claimant's application for benefits. Our primary concern is whether the reasons for discharge constituted "misconduct" connected with the claimant's employment such that the claimant can be denied unemployment benefits. Beaty v. City of Idaho Falls, 110 Idaho 891, 892, 719 P.2d 1151, 1152 (1986).

The burden of proving misconduct by a preponderance of the evidence falls strictly on the employer. Appeals Examiner of Idaho Dept. of Labor v. J.R. Simplot Co., 131 Idaho 318, 320, 955 P.2d 1097, 1099 (1998). A "preponderance of the evidence" simply means that when weighing all of the evidence in the record, the evidence on which the finder of fact relies is more probably true than not. Edwards v. Independence Services, Inc., 140 Idaho 912, 915, 104 P.3d 954, 957 (2004). If the discharging employer does not meet that burden, the adjudicator must award benefits to the claimant. Roll v. City of Middleton, 105 Idaho 22, 25,

DECISION AND ORDER - 2

665 P.2d 721, 724 (1983); Parker v. St. Maries Plywood, 101 Idaho 415, 419, 614 P.2d 955, 959 (1980).

The Idaho Supreme Court has set out a three-prong definition of the term “misconduct” as it applies to a claimant’s eligibility for unemployment benefits. “Misconduct” is established when the employer demonstrates that the claimant’s discharge resulted from a willful, intentional disregard of the employer’s interest; a deliberate violation of the employer’s rules; or a disregard of standards-of-behavior which the employer has a right to expect of its employees. Kivalu v. Life Care Centers of America, 142 Idaho 262, 265, 127 P.3d 165, 167 (2005)(citing Harris v. Electrical Wholesale, 141 Idaho 1, 5-6, 921 P.2d 178, 182-183 (2004)). Although we have sufficient evidence in the record to evaluate Claimant’s conduct under any of the prongs of the Idaho Supreme Court’s definition of “misconduct,” the most logical starting point is the “standards-of-behavior.”

Under the “standards-of-behavior” analysis, the employer must show by a preponderance of the evidence that it communicated its expectations to the claimant, or that its expectations “flowed normally” from the employment relationship. Further, the employer must demonstrate that those expectations were objectively reasonable as applied to the claimant. As the Idaho Supreme Court has pointed out, an “employer’s expectations are ordinarily reasonable only where they have been communicated to the employee.” Folks v. Moscow School District No. 281, 129 Idaho 833, 838, 933 P.2d 642, 647 (1997).

Notably, there is no requirement that the employer must demonstrate that the employee’s behavior was subjectively willful, intentional, or deliberate in his or her disregard of a particular standard of behavior. Welch v. Cowles Publishing Co., 127 Idaho 361, 364, 900 P.2d 1372, 1375 (1995). Because the employer need not demonstrate some form of “malice” on the part of the employee, what communication did or did not take place between the employer and the

claimant becomes a key element in these cases. An employee can only be held accountable for breaching those expectations that he or she understood, explicitly or implicitly, and was capable of satisfying. Puckett v. Idaho Department of Corrections, 107 Idaho 1022, 695 P.2d 407 (1985).

Claimant in this case became an over-the-road truck driver in 2006 after finishing his education at a training academy. Upon completion of that initial training, Claimant accepted a job with Employer commencing on July 10, 2006. Claimant underwent additional training and orientation on Employer's policies and procedures before he was put on the road with a mentor. (Audio recording). Claimant completed a simulation training class in late October 2006 and a class in log keeping in January 2007. (Exhibit 3, p. 8).

Claimant incurred his first preventable accident in November 2006 and his second preventable accident in late March 2007. Therefore, Employer directed Claimant to attend a National Safety Course in late April 2007. Brett Hadley, Employer's safety manager, taught the course that Claimant attended. Claimant and Mr. Hadley agree that at the conclusion of that class, Claimant asked Mr. Hadley about his future with Employer considering his accident record. The parties also agree that Mr. Hadley informed Claimant that Employer would discharge Claimant if he incurred a third preventable accident. (Audio recording).

Employer discharged Claimant on July 25, 2007, for "multiple preventable accidents/log violations and/or traffic violations." (Exhibit 3, p. 1). However, the parties disagree considerably about the significance of the final event. The parties also disagree about Employer's expectations and whether those expectations were adequately communicated.

Claimant picked up a trailer at the Shopko distribution center in Boise. Claimant testified that during his pre-trip inspection, he noticed an area of damage on the exterior of the trailer where some of the insulation was exposed. Claimant did not note the damage on his log. Claimant explained that because he did not consider the damage to be of a safety concern, he did

not think it necessary to report until he reached his destination in Salt Lake City. Had the damage compromised the safe operation of the truck, Claimant would have taken it to the local mechanic for repair before taking it out on the road. (Audio recording).

When Claimant arrived in Salt Lake City on June 7, 2007, Claimant called his safety manager at his home terminal in Lewiston, Idaho for instructions regarding the trailer damage. According to Claimant, Shawn Marks instructed him to write a note describing the damage, put the note in a waterproof bag, and tape it near the hook-up so that the mechanic and the next driver would see it. (Audio recording). The mechanic discovered the damage the following day and reported it to Mr. Hadley who went to the terminal himself to inspect the damage. Mr. Hadley reported the matter to Employer's office in Phoenix. (Audio recording).

Employer maintains that Claimant had a duty to report the damage as soon as he discovered it as described in Employer's Driver Manual. (Audio recording, Exhibit 3, p. 12). Claimant asserts that the Driver Manual Employer issued him was an old, outdated copy and did not include the provision regarding the reporting of damage. Therefore, Claimant argues, he had no way of knowing that expectation. Had he known, Claimant maintains he would have complied. (Audio recording).

The excerpts of the Driver Manual Claimant submitted for the record differ from those Employer submitted. We note that the typefaces and pagination vary among the two examples. However, the two excerpts are not dissimilar enough to lead us to the conclusion that Claimant's copy of the Manual lacked key provisions. For example, the text of the discussion under "Standards of Conduct" appears on different pages of the two examples, that discussion is identical in both Employer's exhibit (Exhibit 3, p. 13) and Claimant's exhibit (Exhibit 5, p. 9).

Admittedly, the provisions governing damaged equipment in section 3, page 23 of Employer's excerpt (Exhibit 3, p. 12) are missing from the section 3, page 23 Claimant

submitted from his handbook (Exhibit 7, p. 3). However, Claimant's example starts with "Tractor Assignment" and follows the same text from that point as in Employer's example. Given that the typeface of Claimant's example is different, it would be reasonable to conclude that the information under the headings "Prohibition of Spinner Knobs And/Or Suicide Knobs" and "Damaged Equipment" appearing before "Tractor Assignment" near the top of Employer's page 23 are probably included on page 22 of Claimant's manual. Because we do not have page 22 or page 21 from Claimant's manual, we cannot conclude that the provisions under "Damaged Equipment" are indeed missing from Claimant's copy of his Driver Manual, as Claimant asserts.

Nevertheless, even if we conclude that Employer did not make Claimant aware of the need to report the damage to the trailer before he left Boise rather than at the conclusion of his trip, Claimant concedes that he should have noted the damage in his logbook during his pre-trip inspection. (Audio recording). However, Claimant argues in his appeal that because he mails his logs to Employer while he is on the road, several days would have lapsed between the time he made a notation in his log about the damage and the time someone read it and addressed the problem. By calling his safety manager from Salt Lake City, Claimant contends that his report was quicker than a log notation. (Claimant's appeal, filed September 25, 2007). That may be true, but Claimant misunderstands the importance of noting such damage in his log during his pre-trip inspection. Although there is no evidence in this record to establish that Claimant caused the damage or was responsible for the damage to the trailer, the lack of a notation in Claimant's log suggests that the trailer was damage-free when Claimant picked it up. The lack of a report during Claimant's pre-trip inspection further suggests that the trailer became damaged while Claimant was hauling it.

Employer argues that even if Claimant did not know Employer had a specific requirement regarding the immediate reporting on damage upon discovery, common sense

should have led Claimant to that conclusion. (Audio recording). Employer's point has merit. Because Claimant neither reported the damage nor noted it in his log, Employer could reasonably conclude that Claimant was responsible for the damage and that it was the result of a preventable accident. Considering that, Claimant was on notice that a third preventable accident would result in his discharge from employment, it was in Claimant's interest to report the damage as soon as he discovered it to ensure that he would not bear the blame for it.

At the very least, Employer had a reasonable expectation that Claimant would complete his pre-trip inspection in accordance with DOT procedures and Employer's policies and would make proper notations in his driver's log. Claimant understood that the responsibility for the accuracy of the logbook was his alone. At the very least, Claimant's behavior fell below that standard Employer reasonably expected. That conduct resulted in his discharge. Therefore, we agree with the Appeals Examiner's conclusion that Employer discharged Claimant for employment-related misconduct. Claimant is ineligible for unemployment benefits.

Claimant argues that his discharge was unwarranted. Rather, he should have been given a specific warning consistent with Employer's policy of progressive discipline. (Audio recording). As the Idaho Supreme Court has ruled, "it is wholly within the employer's discretion to mete out various forms of discipline for misconduct. This Court has no legal basis upon which it could interfere with the internal disciplinary matters of an employer once employee misconduct has been found. Fairness in these circumstances will not suffice for legal authority." Alder v. Mountain States Tel. & Tel. Co., 92 Idaho 506, 512, 446 P.2d 628, 634 (Idaho 1968). In other words, because we conclude that Employer has demonstrated that Claimant was discharged for misconduct, Claimant's belief that he was treated more severely than he thinks was justified or fair is not relevant.

CONCLUSIONS OF LAW

The Commission sets forth its own Conclusions of Law as follows:

I

Based on our analysis above, we conclude that Employer discharged Claimant for employment-related misconduct.

II

We further conclude that Employer's account is not chargeable for experience rating purposes.

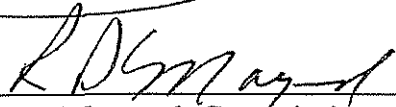
ORDER

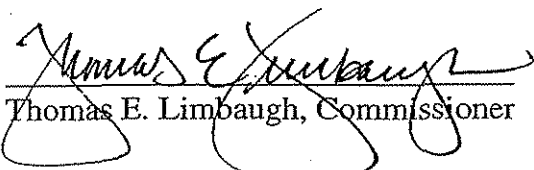
The Decision of the Appeals Examiner is AFFIRMED and Claimant is ineligible for unemployment benefits. This is a final order under Idaho Code § 72-1368(7).

DATED this 15th day of November 2007.

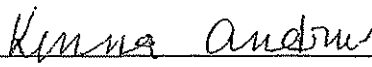
INDUSTRIAL COMMISSION


James F. Kile, Chairman


R.D. Maynard, Commissioner


Thomas E. Limbaugh, Commissioner

ATTEST:


Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November 2007, a true and correct copy of **Decision and Order** was served by regular United States mail upon each of the following:

KURT J DYPWICK
1901 MOUNT STREET UNIT C
MISSOULA MT 59801

SWIFT TRANSPORTATION CO INC
C/O EMPLOYERS ADVANTAGE
PO BOX 493683
REDDING CA 96049-3683

and hand-delivered to:

DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF LABOR
317 W MAIN STREET
BOISE ID 83735

cjh

Kenna Andrews

Appendix B

IDAHO DEPARTMENT OF LABOR
APPEALS BUREAU
317 WEST MAIN STREET
BOISE, IDAHO 83735-0720
(208) 332-3572 / (800) 621-4938
FAX: (208) 334-6440

KURT J. DYPWICK,)	
SSN: [REDACTED])	
Claimant)	
)	
vs.)	DOCKET NUMBER 3378-2007
)	
SWIFT TRANSPORTATION CO INC,)	DECISION OF APPEALS EXAMINER
Employer)	
)	
and)	
)	
IDAHO DEPARTMENT OF LABOR.)	

DECISION

Benefits are **DENIED** effective July 15, 2007. The claimant was discharged for misconduct in connection with employment as defined by Section 72-1366(5) of the Idaho Employment Security Law.

The employer's account is **NOT CHARGEABLE** for experience rating purposes, in accordance with Section 72-1451(20(a) of the Idaho Employment Security Law.

The Eligibility Determination dated August 8, 2007, is hereby **AFFIRMED**.

HISTORY OF THE CASE

The above-entitled matter was heard by Gregory Stevens, Appeals Examiner with the Idaho Department of Labor, on September 11, 2007, by telephone in the City of Boise, in accordance with §72-1368(6) of the Idaho Employment Security Law.

The claimant, Kurt J. Dypwick, appeared for the hearing and provided testimony.

The employer, Swift Transportation Co Inc, was represented by Bonnie Salyer. Brett Hadley appeared as a witness on behalf of the employer.

Exhibits #1 through #7 were entered into and made a part of the record.

ISSUES

The issues before the Department are (1) whether unemployment is due to the claimant quitting voluntarily and, if so, whether with good cause connected with the employment -OR- being discharged and, if so, whether for misconduct in connection with the employment, according to § 72-1366(5) of the Idaho Employment Security Law; and (2) whether the employer's account is properly chargeable for experience rating purposes for benefits paid to the claimant, according to § 72-1351(2)(a) of the Idaho Employment Security Law.

FINDINGS OF FACT

Additional facts or testimony may exist in this case. However, the Appeals Examiner outlines only those that are relevant to the decision and those based upon reliable evidence. Based on the exhibits and testimony in the record, the following facts are found:

1. The claimant worked for this employer as a truck driver from July 10, 2006, through June 11, 2007. In the first four of the five calendar quarters preceding the one in which the claimant applied for benefits, this employer paid more wages than any other.
2. The employer has a policy that provides for immediate termination for "multiple incidents or accidents while driving a Company vehicle."
3. On November 19, 2006, the claimant was involved in his 1st preventable accident, when he hit a traffic turn signal while making a right turn.
4. On March 29, 2007, the claimant was involved in his 2nd preventable accident, when he came in contact with another vehicle while pulling way from a side-by-side loading dock.
5. Following a National Safety Course on April 26, 2007, the claimant was advised by safety manager, Brett Hadley, that a 3rd preventable accident would result in his termination.
6. On June 8, 2007, Mr. Hadley received a report from an on-site mechanic about a damaged trailer that the claimant had just unhooked for unloading. The claimant stated that the damage was already done before he hooked up the trailer in Boise and transported it to the location in Salt Lake City, but failed to report it during his pre-trip inspection in his log book, due to an oversight. The claimant admitted that, in hindsight, he should have noted the damage in his log book.
7. The employer has a policy requiring a driver to immediately report a damaged trailer before leaving with the equipment and any unreported damage may be charged to the driver. The claimant stated he was not aware of this policy.
8. The claimant stated he reported the damaged trailer upon arrival in Salt Lake to his safety coordinator, Shawn Marks, in Lewiston, and attached a written note to the trailer itself.
9. The employer stated that the claimant's failure to report the trailer damage in his log book was a violation of policy that, in and of itself, could have resulted in the claimant's discharge.

AUTHORITY

Section 72-1351(2)(a) of the Idaho Employment Security Law provides in part that for experience rating purposes, no charge shall be made to the account of such covered employer

with respect to benefits paid to a worker who terminated his services voluntarily without good cause attributable to such covered employer, or who had been discharged for misconduct in connection with such services.

Section 72-1366(5) of the Idaho Employment Security Law provides that a claimant shall be eligible for benefits provided unemployment is not due to the fact that the claimant left employment voluntarily without good cause, or was discharged for misconduct in connection with employment.

An employer may discharge an employee for any reason. However, only a discharge that is found to constitute misconduct for unemployment insurance purposes makes an employee ineligible for benefits.

Misconduct within the meaning of an unemployment compensation act excluding from its benefit an employee discharged for misconduct must be an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer. Rasmussen vs. Employment Security Agency, 83 Idaho 198, 360 P.2d 90 (1961).

Whether an employee should have been warned, suspended or discharged for an offense is irrelevant for unemployment insurance purposes. The discipline appropriate in a particular case is wholly within the employer's discretion. The only issues to be decided are whether there was a discharge, and if so, whether the discharge was for misconduct within the meaning of the unemployment insurance law. Alder vs. Mountain States Telephone and Telegraph Co., 92 Idaho 506, 446 P.2d 628 (1968).

CONCLUSIONS

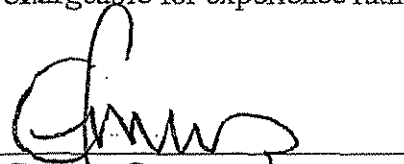
An employee has an obligation to perform job duties in a proficient and conscientious manner. Here, the claimant was discharged following a 3rd preventable accident resulting in damage to the employer's property. Following the claimant's 2nd preventable accident, the employer advised the claimant that a 3rd accident would result in his termination and, further, made it clear they expected the claimant to exercise due care and caution in the performance of his duties.

On June 8, 2007, the employer was advised by an on-site mechanic of damage on a trailer the claimant had just unhooked and dropped for unloading. The result was a finding by the employer of the claimant's 3rd preventable accident and the claimant was discharged. The claimant asserts that he did not cause the damage to the trailer and that the damage existed even prior to his having hooked up the trailer in Boise and his taking it to Salt Lake City. The claimant admits, however, that he did not record the damage following his pre-trip inspection in his log book as he was required to do. The claimant also admitted that he made no attempt to advise anyone of the damage and argues that he was not aware of any policy or requirement that he do so. He further argues that he advised his employer of the damage upon his arrival and delivery in Salt Lake.

The Appeals Examiner finds the claimant's assertions unpersuasive. Even without an understanding of the employer's policy requiring the claimant to report the damage prior to his taking the trailer, common sense would dictate that a reasonable and responsible person would have

done so anyway. The claimant had been advised less than six weeks previously that he could and would be terminated upon another preventable accident. If the trailer had been damaged prior to the claimant taking it, as he asserts, it would only be reasonable for an employee in the claimant's position, to make sure that someone knew about the damage prior to his having taken it. At the very least, the claimant should have made a record of it in his log book. The fact that he failed to do either is not the act of a reasonably, prudent person and does not support the claimant's contention that the damage existed prior to his taking the trailer.

The claimant was aware of his employer's expectations. Those expectations were clearly outlined to him. The Appeals Examiner finds that the employer's expectations were reasonable. The Examiner also finds the claimant's conduct fell below this employer's expectations. As such the employer has shown by a preponderance of the evidence that the claimant was discharged for misconduct. The claimant is not eligible for benefits. The employer's account is not held chargeable for experience rating purposes.



Gregory Stevens
Appeals Examiner

Date of Mailing September 11, 2007

Last Day To Appeal September 25, 2007

APPEAL RIGHTS

You have **FOURTEEN (14) DAYS FROM THE DATE OF MAILING** to file a written appeal with the Idaho Industrial Commission. The appeal must be taken or mailed to:

Industrial Commission
Attn: Unemployment Appeals
317 W. Main St. 2nd Floor
P.O. Box 83720
Boise, Idaho 83720-0041

Or transmitted by facsimile to (208) 334-2321.

If the appeal is mailed, it must be postmarked no later than the last day to appeal. An appeal filed by facsimile transmission must be received by the Commission by 5:00 p.m., Mountain Time, on the last day to appeal. A facsimile transmission received after 5:00 p.m. will be deemed received by the Commission on the next business day. A late appeal will be dismissed. Appeals filed by any means with the Appeals Bureau or a Job Service office will not be accepted by the Commission. ***TO EMPLOYERS WHO ARE INCORPORATED:*** *If you file an appeal with the Idaho Industrial Commission, the appeal must be signed by a corporate officer or legal counsel licensed to practice in the State of Idaho and the signature must include the individual's title. The Commission will not consider appeals submitted by employer representatives who are not attorneys. If you request a hearing before the Commission or permission to file a legal brief, you must make these requests*

through legal counsel licensed to practice in the State of Idaho. Questions should be directed to the Idaho Industrial Commission, Unemployment Appeals, (208) 334-6024.

If no appeal is filed, this decision will become final and cannot be changed. **TO CLAIMANT:** If this decision is changed, any benefits paid will be subject to repayment. If an appeal is filed, you should continue to report on your claim as long as you are unemployed.

IDAHO DEPARTMENT OF LABOR
APPEALS BUREAU
317 WEST MAIN STREET
BOISE, IDAHO 83735-0720
(208) 332-3572 / (800) 621-4938
FAX: (208) 334-6440

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2007, a true and correct copy of **Decision of Appeals Examiner** was served by regular United States mail upon each of the following:

KURT J DYPWICK
1901 MOUNT STREET UNIT C
MISSOULA MT 59801

SWIFT TRANSPORTATION COMPANY INC
c/o EMPLOYERS ADVANTAGE
PO BOX 493683
REDDING CA 96049-3683

cc: Idaho Department of Labor Boise Local Office – Decision of Appeals Examiner



Appendix C

JUL 25 2007 11:25AM HP LASERJET FAX
07/24/2007 14:28 FAX

P. 3
002

Swift Transportation Co., Inc. - Driver Manual

ACKNOWLEDGE AND AGREEMENT

I hereby acknowledge that I have received and read a copy of the Swift Transportation Co., Inc., Driver's Manual and understand that it sets forth the terms and conditions of my employment as well as the duties, responsibilities and obligations of employment with Swift. I understand and agree to abide by and be bound by the rules, policies and standards set forth in the Driver's Manual. If I do not clearly understand any part of the Driver's Manual, I will contact my Driver Manager for clarification as soon as possible.

I also acknowledge that my employment with Swift is not for a specified period of time and can be terminated at any time for any or no reason, with or without cause or notice, by me or by Swift. I acknowledge that no statements or representations regarding my employment can alter the foregoing. As to the circumstances in which employment may be terminated, this is the entire agreement between me and Swift; there are no oral or collateral agreements of any kind. I also acknowledge that no supervisor or employee has the authority to enter into an employment agreement - express or implied - providing for employment other than at will.

I also acknowledge that, except for the policy of at-will employment, Swift reserves the right to revise, delete, and add to the provisions of this Driver's Manual. All such revisions, deletions, or additions must be in writing and will be given to me for inclusion in the Driver's Manual. No oral statements or representations can change the provisions of this Driver's Manual. I also acknowledge that, except for the policy of at-will employment, terms and conditions of employment with Swift may be modified at the sole discretion of Swift with or without cause or notice at any time. No implied contract concerning any employment-related decision or term and condition of employment can be established by any other statement, conduct, policy, or practice.

I understand that the foregoing agreement concerning my employment-at-will status and Swift's right to determine and modify the terms and conditions of employment is the sole and entire agreement between me and Swift concerning the duration of my employment, the circumstances under which my employment may be terminated, and the circumstances under which the terms and conditions of my employment may change. I further understand that this agreement supersedes all prior agreements, understandings, and representations concerning my employment with Swift.

[Signature]
Employee's Signature

KURT DYANWICK
Employee's Name (printed)

231661
Driver Code

7-5-06
Date

Swift Transportation Co., Inc. - Driver Manual

- suspension, revocation or cancellation of certain driving privileges which resulted from the conviction(s);
- (5) Indication whether the violation was in a commercial motor vehicle;
 - (6) Location of the offense; and
 - (7) Driver's signature

PROHIBITION OF SPINNER KNOBS AND/OR SUICIDE KNOBS

The use of steering accessories commonly known as spinner knobs and suicide knobs have been identified by Swift Transportation as hazards and pose a risk to the safe operation of a commercial highway vehicle and the safety of the driver. Thus, Swift prohibits the installation and use of these devices on commercial vehicles being operated in the Swift fleet. Drivers of vehicles with spinner knobs must remove or have them removed immediately. Failure to comply with the Spinner Knob policy may result in disciplinary action up to and include the termination of employment or contract.

Although these devices may be beneficial while used on equipment in spotting operations and on forklifts, they have no significant use on a commercial highway vehicle. In fact, spinner knobs, mounted on a steering wheel, spinning out of control from the loss of power steering due to mechanical failure and/or the steering tire striking a fixed object, has broken fingers, hands and arms. Spinner knobs are also obstructions when trying to bring a vehicle under control in panic situations.

Exception: The spinner knob may be used when making an accommodation for a handicapped driver and in accordance with ADA requirements.

DAMAGED EQUIPMENT

If you find a damaged tractor or trailer you are going to use, call Claims immediately and report the damage before leaving with the equipment. Get the claim number in case you are contacted later. If you do not report it you may be charged with the damage.

TRACTOR ASSIGNMENT

After you are assigned a truck it should be inspected and inventoried before you move it. The same process should be followed when you are returning a truck or swapping out trucks. You must fill out Tractor Equipment Check In/Out Sheet. Fill out the sheet completely, listing and diagramming all damage no matter how small. In addition to damage, list any equipment that is missing, or out of place. Anything that you do not want to be held responsible for must be listed on this form. A copy of this form should be sent to your Driver Manager. You should keep a copy of this form for each tractor you are assigned to as long as employed by Swift.

SEAT BELTS

Section 392.16 of the D.O.T. Federal Motor Carrier Safety Regulations states as follows:

"A COMMERCIAL MOTOR VEHICLE WHICH HAS A SEAT BELT ASSEMBLY INSTALLED AT THE DRIVER'S SEAT SHALL NOT BE DRIVEN UNLESS THE DRIVER HAS PROPERLY RESTRAINED HIMSELF OR HERSELF WITH THE SEAT BELT ASSEMBLY"

It is Company policy for all Drivers and passengers to wear seat belts while driving, or riding. Sleeper safety belts are required to be used while vehicle is moving.

WORK RELATED INJURIES

Steps to follow if you are injured on the job:

- Call the Claims Department at 800-457-2793 immediately. The phones are monitored 24 hours a day, seven days a week. This call opens the claim so our insurance company may arrange to initiate any treatment needed.
- If the injury is a non-emergency, you may be referred to a medical center for medical attention as needed.
- If the injury is an emergency situation, seek medical assistance first, then call the Claims Department as soon as you can safely do so.
- The Claims Department will assist you with the insurance carrier that will handle your claim and will direct any additional actions needed by you or Swift.



STANDARDS OF CONDUCT

The Performance Improvement Process is designed to let employees know when their conduct or job performance does not meet acceptable standards and advise them that immediate and sustained improvement to meet standards must be attained.

Swift Drivers are expected to demonstrate the highest level of personal conduct and job performance during scheduled work hours, when on Company property, when representing the Company and when operating Company vehicles. Should a Driver's conduct or job performance not meet the Company's high standards, Managers will review the situation, and if warranted, will counsel the Driver to raise conduct or job performance to an acceptable level.

If a Driver is involuntarily terminated, it will be the result of his or her inability or unwillingness to modify conduct or improve job performance to an acceptable level.

Management reserves the right to immediately terminate employment or lease without following the Performance Improvement Process for conduct or job performance incidents that are of an extremely serious nature.

GENERALLY, the process is designed to let Drivers know when their conduct or job performance does not meet acceptable standards and advise them that immediate and sustained improvement to meet standards must be attained.

GENERALLY, the process will begin with one or more verbal counselling sessions. If the Driver's conduct or job performance does not improve, the process will GENERALLY progress to more serious steps, up to and including termination of employment, such as formal (written) Performance Counselling Reports (PCR's). Formal PCR's become a permanent part of your Driver Personnel file. If a Driver disagrees with a PCR, he or she may file an appeal by following the Complaint Procedure.

With prior Human Resources or Safety (for safety related issues) approval, a suspension with, or without pay, for a period of up to one week is an option that may be used at any step in the process to correct substandard performance.

With prior Safety or Human Resources approval, a Driver Manager may suspend a Driver for a reasonable period of time to permit the Company to investigate whether the facts surrounding serious policy violations or misconduct should lead the Company to summarily terminate the Driver. Suspensions should normally last no longer than one workweek. A final decision involving disciplinary action including termination involving Safety, Security, Compliance, Training and losses involving accidents or cargo issues will be determined by the Vice President of Safety.

PROHIBITED CONDUCT

There are many employees working together at Swift, and we need to safeguard our security, personal safety, welfare and Company operations. The following prohibited conduct will not be tolerated by Swift and may lead to immediate termination of employment. This list of prohibited conduct is ILLUSTRATIVE ONLY. Other types of conduct detrimental to security, personal safety, employee welfare and the Company's interests may also be prohibited:

1. A violation of the DOT and/or Company Drug and Alcohol Policy.
2. Failure to report to the Driver's Driver Manager within 72 hours the loss, revocation, or suspension of CDL or any other license or certification required to perform a job (or required by the job description).
3. Failure to report an incident or accident regardless of its severity, or multiple incidents or accidents while driving a Company vehicle.
4. The destruction, abuse, misuse, theft, or unauthorized removal, use or possession of property belonging to the Company, another employee, or a Swift account or customer. May be subject to criminal prosecution.
5. Disregard for the safety of one's self or other employees, or committing unsafe acts.
6. Tampering with Company equipment (e.g. engine management systems; fuel pump; etc).



7. Destruction of Company equipment or property. May be subject to criminal prosecution.
8. Committing or threatening to commit an unsafe act that results in, or may result in serious injury of one's self or other employees or destruction of Company property.
9. Concealing, carrying or possessing weapons or explosive devices while on Company time, business, property (includes tractor and trailer) or while representing the Company. May be subject to criminal prosecution.
10. Threats, coercion or use of insulting, offensive, or abusive language or conduct toward others, including employees, Managers or customers.
11. Insubordination, including refusal or failure to perform work in accordance with instruction.
12. Dishonesty.
13. Unauthorized passenger(s) or pet(s) in a Company vehicle.
14. Improper completion, misrepresentation, omission or falsification of employment application, expense reports, timecards or any other Company records or reports.
15. Refusal to work required hours, to include overtime, as scheduled.
16. Unauthorized absence from work for three (3) or more consecutive scheduled workdays. This will be considered a voluntary resignation.
17. A pattern of harassment or an extremely serious single incident of harassment
18. Deviation from assigned work schedule, leaving the job or work area without Driver Manager's approval, or sleeping on duty (sleeper berth time - is not on duty time).
19. Solicitation or distribution of materials during work time or in work areas.
20. Failure to cooperate in a Company investigation.
21. Possessing a radar detector and/or jamming device in any Company owned vehicle
22. Failure to provide, 'Yearly Violation Statement,' or failure to be medically certified as required by DOT.
23. Flagrant or willful falsifying or missing logs.
24. Failure to obtain Terminal Manager's approval prior to working a second job outside of the transportation industry, or working a second job related to the transportation industry.
25. Dropping a loaded trailer at any location other than a secured terminal or secured drop yard, or failing to obtain consignee's signature prior to dropping at a consignee's yard.
26. Failure to maintain visual contact at all times with any HIGH VALUE load trailer; dropping a HIGH VALUE load trailer at any unsecured terminal or drop yard; failure to follow the King Pin and Padlock procedure.
27. Failure to report ANY citation for ANY REASON, or being convicted of more than one moving traffic violation within a twelve-month period.
28. Posting notices, signs or writings in any form on official Company bulletin boards or property, or removing any Company placed notices, signs or writings from Company bulletin boards or property.
29. Gambling, lottery or any other games of chance on Company or customer property (includes tractor or trailer), time or while representing the Company.
30. Offering to sell, selling, offering to buy or buying while in the course and scope of employment, what a 'reasonable person,' would believe to be stolen or misappropriated merchandise; attempting to remove or removing, attempting to accept or accepting any product being transported. May result in criminal prosecution.
31. Having three or more reportable/written Customer Service Failures within a twelve-month period or flagrant service failure that results in monetary penalties for the Company.
32. Disclosure of trade secrets or other confidential information.
33. Performing other work, whether or not it is self-employment or the Driver's own business enterprise, while on any leave of absence (except military duty while on military leave of absence) or during scheduled work hours.
34. Unauthorized physical contact or threats with a Swift employee, customer, vendor or a member of the motoring public; assault, battery, violence or threats of violence against one's self or others. May be subject to criminal prosecution.
35. At no time will a student driver operate any Swift tractor without a Driver Trainer being present.

This statement of prohibited conduct does not alter the Company's policy of employment at-will. Either you or the Company may terminate the employment relationship at any time, for any or no reason, with or without cause or with or without prior notice.



ACCIDENTS/CARGO CLAIMS

The following policy covers the definition of accident and cargo claim, the consequences, and the responsibilities of the Driver.

ACCIDENT: A Driver shall be considered in an "ACCIDENT" if any motor vehicle which he/she is driving or of which he/she is in charge, shall come into contact with any person, animal, other vehicle, or other inanimate object in a manner which results in death, injury, or property damage. Any such incident shall be considered an "ACCIDENT" regardless of who was killed or injured, what property was damaged or to what extent, where the "ACCIDENT" occurred, whether on public thoroughfare or on private property.

MAJOR ACCIDENT: Any vehicle operating under Swift Authority that is involved in an accident which results in death or results in \$5,000.00 or more damages.

PREVENTABLE ACCIDENT: Every accident in which a Driver is involved shall be considered preventable unless it is established by investigation and review that there was no option which a Driver could have reasonably taken to avoid the accident and that his/her action in no way contributed to the occurrence of the accident.

DRIVER REVIEW PROCESS: Any Driver involved in one of the following incidents will have his/her performance file reviewed by the Safety Department if:

- He/she has an accident with damages exceeding \$3,500.00.
- He/she has multiple accidents in a 12 month period.
- He/she receives a negative incident report or negative road report.
- He/she has a DOT reportable accident.

Preventable accidents or incidents do not just happen, they may be the direct result of an "ERROR IN JUDGEMENT" by the Driver. Reviewing the Drivers performance file after such incidents occur helps us identify what additional training or disciplinary actions may be required to change the Driver's behavior. Not only do driving techniques need to be addressed, so does the Drivers attitude towards compliance, rules and regulations. After reviewing the Driver's performance file, he/she could be assigned to the Smith System DDC or other training as directed, National Safety Council, Local Close Quarter Training (8 hour) or log class. He/she may also be placed on probationary work period of up to one year, or placed on suspension pending further investigation of an incident.

Certain behavior or losses outlined in the Swift Driver Manual may still require immediate dismissal from employment or Owner Operator placed out of service.

If an accident occurs the Driver must:

1. Notify the Claims Department immediately and follow their instructions.
2. Fill out an accident report.
3. Take photos of the accident or incident.
4. Notify the Claims Department immediately.
5. DO NOT discuss the accident with anyone other than Company personnel.
6. DO NOT admit guilt or liability to anyone.
7. DO NOT sign any kind of statement of guilt.
8. Cooperate with Safety, Federal, State, and local authorities.

STANDARDS OF CONDUCT

The Performance Improvement Process is designed to let employees know when their conduct or job performance does not meet acceptable standards and advise them that immediate and sustained improvement to meet standards must be attained.

Swift Drivers are expected to demonstrate the highest level of personal conduct and job performance during scheduled work hours, when on Company property, when representing the Company and when operating Company vehicles. Should a Driver's conduct or job performance not meet the Company's high standards, Managers will review the situation, and if warranted, will counsel the Driver to raise conduct or job performance to an acceptable level.

If a Driver is involuntarily terminated, it will be the result of his or her inability or unwillingness to modify conduct or improve job performance to an acceptable level.

Management reserves the right to immediately terminate employment or lease without following the Performance Improvement Process for conduct or job performance incidents that are of an extremely serious nature.

GENERALLY, the process is designed to let Drivers know when their conduct or job performance does not meet acceptable standards and advise them that immediate and sustained improvement to meet standards must be attained.

GENERALLY, the process will begin with one or more verbal counseling sessions. If the Driver's conduct or job performance does not improve, the process will GENERALLY progress to more serious steps, up to and including termination of employment, such as formal (written) Performance Counseling Reports (PCR's). Formal PCR's become a permanent part of your Driver Personnel file. If a Driver disagrees with a PCR, he or she may file an appeal by following the Complaint Procedure.

With prior Human Resources or Safety (for safety related issues) approval, a suspension with, or without pay, for a period of up to one week is an option that may be used at any step in the process to correct substandard performance.

With prior Safety or Human Resources approval, a Driver Manager may suspend a Driver for a reasonable period of time to permit the Company to investigate whether the facts surrounding serious policy violations or misconduct should lead the Company to summarily terminate the Driver. Suspensions should normally last no longer than one workweek. A final decision involving disciplinary action including termination involving Safety, Security, Compliance, Training and losses involving accidents or cargo issues will be determined by the Vice President of Safety.

Prohibited Conduct

There are many employees working together at Swift, and we need to safeguard our security, personal safety, welfare and Company operations. The following prohibited conduct will not be tolerated by Swift and may lead to immediate termination of employment. This list of prohibited conduct is ILLUSTRATIVE ONLY. Other types of conduct detrimental to security, personal safety, employee welfare and the Company's interests may also be prohibited:

1. A violation of the DOT and/or Company Drug and Alcohol Policy.

2. Failure to report to the Driver's Driver Manager within 72 hours the loss, revocation, or suspension of CDL or any other license or certification required to perform a job (or required by the job description).
3. Failure to report an incident or accident regardless of its severity, or multiple incidents or accidents while driving a Company vehicle.
4. The destruction, abuse, misuse, theft, or unauthorized removal, use or possession of property belonging to the Company, another employee, or a Swift account or customer. May be subject to criminal prosecution.
5. Disregard for the safety of one's self or other employees, or committing unsafe acts.
6. Tampering with Company equipment (e.g. engine management systems; fuel pump; etc).
7. Destruction of Company equipment or property. May be subject to criminal prosecution.
8. Committing or threatening to commit an unsafe act that results in, or may result in serious injury of one's self or other employees or destruction of Company property.
9. Concealing, carrying or possessing weapons or explosive devices while on Company time, business, property (includes tractor and trailer) or while representing the Company. May be subject to criminal prosecution.
10. Threats, coercion or use of insulting, offensive or abusive language or conduct toward others, including employees, Managers or customers.
11. Insubordination, including refusal or failure to perform work in accordance with instruction.
12. Dishonesty.
13. Unauthorized passenger(s) or pet(s) in a Company vehicle.
14. Improper completion, misrepresentation, omission or falsification of employment application, expense reports, timecards or any other Company records or reports.
15. Refusal to work required hours, to include overtime, as scheduled.
16. Unauthorized absence from work for three (3) or more consecutive scheduled workdays. This will be considered a voluntary resignation.
17. A pattern of harassment or an extremely serious single incident of harassment
18. Deviation from assigned work schedule, leaving the job or work area without Driver Manager's approval, or sleeping on duty (sleeper berth time - is not on duty time).
19. Solicitation or distribution of materials during work time or in work areas.
20. Failure to cooperate in a Company investigation.
21. Possessing a radar detector and/or jamming device in any Company owned vehicle
22. Failure to provide, 'Yearly Violation Statement,' or failure to be medically certified as required by DOT.
23. Flagrant or willful falsifying or missing logs.
24. Failure to obtain Terminal Manager's approval prior to working a second job outside of the transportation industry, or working a second job related to the transportation industry.
25. Dropping a loaded trailer at any location other than a secured terminal or secured drop yard, or failing to obtain consignee's signature prior to dropping at a consignee's yard.
26. Failure to maintain visual contact at all times with any HIGH VALUE load trailer; dropping a HIGH VALUE load trailer at any unsecured terminal or drop yard; failure to follow the King Pin and Padlock procedure.
27. Failure to report ANY citation for ANY REASON, or being convicted of more than one moving traffic violation within a twelve-month period.
28. Posting notices, signs or writings in any form on official Company bulletin boards or property, or removing any Company placed notices, signs or writings from Company bulletin boards or property.
29. Gambling, lottery or any other games of chance on Company or customer property (includes tractor or trailer), time or while representing the Company.

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- He/she has multiple accidents in a 12 month period.
- He/she receives a negative incident report or negative road report.
- He/she has a DOT reportable accident.

Preventable accidents or incidents do not just happen, they are the direct result of an "ERROR IN JUDGEMENT" by the Driver. Reviewing the Drivers performance file after such incidents occur helps us identify what additional training or disciplinary actions may be required to change the Driver's behavior. Not only do driving techniques need to be addresses, so does the Drivers attitude towards compliance, rules and regulations. After reviewing the Driver's performance file, he/she could be assigned to the Smith System DDC (2 hour), National Safety Council (6 hour), Local Close Quarter Training (8 hour) or log class. He/she may also be placed on probationary work period of up to one year, or placed on suspension pending further investigation of an incident.

Certain behavior or losses outlined in the Swift Driver Manual may still require immediate dismissal from employment or termination of an Owner Operator lease.

This policy states importance of notifying the Safety Department immediately when and where is an accident or incident and to understand the importance of following all Company and DOT rules and regulations while operating a commercial vehicle. For Drivers to understand the consequences of what will happen when those rules, regulations, policies and procedures are broken.

Driver must:

1. Fill out an accident report.
2. Take photos of the accident or incident.
3. Notify the Safety Department immediately.
4. DO NOT discuss the accident with anyone other than Company personnel.
5. DO NOT admit guilt or liability to anyone.
6. DO NOT sign any kind of statement of guilt.
7. Cooperate with Safety, Federal, State, and local authorities.

Log Rules & Regulations

As a professional Driver, it is important to understand proper logging rules and regulations. Hours of service are regulated to ensure safe trucking operations. In simple terms, a tired Driver is not a safe Driver. The regulations are designed to keep a tired Driver from driving, not from working.

The hours of service rules and regulations governing Drivers are part of the Federal Motor Carrier Safety Regulations (FMCSR), Part 395 are as follows:

"No motor carrier shall permit or require a Driver of a commercial vehicle to drive for any period having been on duty seventy (70) hours in any eight (8) consecutive days."

For commercial Drivers operating locally within a 100 air mile radius from their home terminal the period is sixty (60) hours in any seven (7) consecutive days.

Commercial Drivers may also not drive more than ten (10) hours or drive and be on duty more than fifteen (15) hours without having eight (8) consecutive hours off duty.

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CONCLUSION

Many Company policies and Driver benefits have been treated only briefly in this Driver Handbook. If you have any questions or want more information, your Driver Manager will be glad to fill in the details for you. The Vice President/Director of Human Resources or Vice President/Director of Safety will also be happy to help you with questions or problems.

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TRACTOR ASSIGNMENT

After you are assigned a truck it should be inspected and inventoried before you move it. The same process should be followed when you are returning a truck or swapping out trucks. You must fill out Tractor Equipment Check in/Out Sheet. Fill out the sheet completely, listing and diagramming all damage no matter how small. In addition to damage, list any equipment that is missing, or out of place. Anything that you do not want to be held responsible for must be listed on this form. A copy of this form should be sent to your Driver Manager. You should keep a copy of this form for each tractor you are assigned to as long as employed by Swift.

SEAT BELTS

Section 392.16 of the D.O.T. Federal Motor Carrier Safety Regulations states as follows:

"A COMMERCIAL MOTOR VEHICLE WHICH HAS A SEAT BELT ASSEMBLY INSTALLED AT THE DRIVER'S SEAT SHALL NOT BE DRIVEN UNLESS THE DRIVER HAS PROPERLY RESTRAINED HIMSELF OR HERSELF WITH THE SEAT BELT ASSEMBLY"

It is Company policy for all Drivers and passengers to wear seat belts while driving, or riding. Sleeper safety belts are required to be used while vehicle is moving.

WORK RELATED INJURIES

Steps to follow if you are injured on the job:

- Call the Claims Department at 800-467-2793 immediately. The phones are monitored 24 hours a day, seven days a week. This call opens the claim so our insurance company will initiate any treatments needed.
- If the injury is a non-emergency, you may be referred to a medical center for medical attention as needed.
- If the injury is an emergency situation, seek medical assistance first, then call the Claims Department as soon as you can safely do so.
- The Claims Department will connect you with the insurance carrier that will handle the remainder of your claim and direct any additional actions needed by you or Swift.

TEAMS

Any time there is more than one person in the truck, the person not driving MUST be buckled in the 2nd seat or sleeping in the bottom bunk. The top bunk is NEVER to be used when the truck is in motion!

30F4

DOCKET # 3378-200

CLAIMANT/KURT Dypwic

APPEALS EXAMINER/GREGORY B. STEU

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