

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

JOHN W EARLY

Claimant,

and

A-LERT

Employer.

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HEARING NUMBER: 09B-UI-13887

**EMPLOYMENT APPEAL BOARD
DECISION**

SECTION: 10A.601 Employment Appeal Board Review

D E C I S I O N

FINDINGS OF FACT:

A hearing in the above matter was held October 13, 2009. The administrative law judge's decision was issued October 16, 2009. That decision determined the claimant was discharged for disqualifying misconduct when he refused to take a post-accident drug screen test after he was involved in an on-the-job accident. Company policy requires that "... [a]ll vehicle, equipment operators who are involved in ... accidents will be subject to drug testing ... any employee who is significantly involved in the cause of property damage or an injury to a person while the employee is on duty will be requested to submit to alcohol and/or drug testing..." (Tr. 7)

On August 20, 2009, the claimant was involved in an accident while operating company equipment. (Tr. 10) He was operating the man-lift to access elevation to erect steel. However, due to the extreme wind conditions, the safety director directed him to bring the man-lift back down. As the claimant complied with the instruction, the man-lift dropped down into the building causing property damage. (Tr. 10-11) The claimant immediately reported the incident to the employer. The employer directed the claimant to submit to a drug test pursuant to company policy. The claimant refused because he was taking prescription drugs that he believed would result in a positive test. The employer terminated him for his refusal. There were no personal injuries that required medical treatment; nor was there any property damage amount was discussed at the hearing

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 10A.601(4) (2009) provides:

5. Appeal board review. The appeal board may on its own motion affirm, modify, or set aside any decision of an administrative law judge on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The appeal board shall permit such further appeal by any of the parties interested in a decision of an administrative law judge and by the representative whose decision has been overruled or modified by the administrative law judge. The appeal board shall review the case pursuant to rules adopted by the appeal board. The appeal board shall

promptly notify the interested parties of its findings and decision.

There is no dispute that the accident occurred. However, the record of the hearing before the administrative law judge contains no evidence as to the amount of property damage caused by the accident.

Iowa Code section 730.5(8)" f" (2009) provides:

Employers may conduct drug or alcohol testing in investigating accidents in the workplace in which the accident resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

According to the aforementioned statute, testing may occur if 1) a party was injured as a result of the accident; and 2) if the damage exceeded \$1000. The claimant testified that no injuries occurred; however, the record is lacking in more specific evidence about the property damage. As the Iowa Court of Appeals noted in Baker v. Employment Appeal Board, 551 N.W. 2d 646 (Iowa App. 1996), the administrative law judge has a heightened duty to develop the record from available evidence and testimony given the administrative law judge's presumed expertise. While the employer may have a policy requiring drug testing under such circumstances, that testing may not pass muster under Iowa law. The Board is unable to render a well-reasoned decision based on this incomplete record. For this reason, this matter is remanded for further consideration.

DECISION:

The decision of the administrative law judge dated October 16, 2009, is not vacated at this time. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section, to reopen the record for the limited purpose of taking additional evidence with regard to the property damage caused by the accident. The administrative law judge shall conduct this limited hearing following due notice. After the hearing, the administrative law judge shall issue a new decision, which provides the parties appeal rights.

John A. Peno

Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

AMG/fnv