IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MARTIN A WARBURTON
11 N QUINCY TERRACE
MASON CITY IA 50401

AG PROCESSING INC
A COOPERATIVE
C/O JOHNSON AND ASSOCIATES
NKA TALX UC EXPRESS
PO BOX 6007
OMAHA NE 68106-6007

Appeal Number: 04A-UI-03403-RT
OC: 06-08-03 R: 02
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, AG Processing, Inc., a cooperative, filed a timely appeal from an unemployment insurance decision dated March 16, 2004, reference 03, allowing unemployment insurance benefits to the claimant, Martin A. Warburton. After due notice was issued, a telephone hearing was held on April 19, 2004 with the claimant participating. Craig Mericle, Plant Manager, and Jeff Lampman, Plant Superintendent, participated in the hearing for the employer. The employer was represented by Suzanna Ettrich of Johnson and Associates, now TALX UC express. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibits 1 and 2 were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time material handler from July 7, 2003 until he was discharged on February 24, 2004. The claimant was discharged for violation of work rule no. 4, neglect of assigned duties. His discharge arises out of two incidents in which the claimant allowed a railroad tanker car to overfill and overflow with soybean oil. On February 21, 2004, when the claimant came to work, the prior shift was in the process of filling a railroad car with soybean oil. One of the claimant's responsibilities was to fill railroad cars with soybean oil. The claimant took over for the prior shift and it was his responsibility to see to the filling of the railroad car. The claimant was told by the prior shift as shown at Employer's Exhibit 1 that the railroad car was in the process of being filled with soybean oil. However, the claimant did not check the level of the soybean oil in the railroad car and it overflowed spilling approximately 100 gallons onto the ground. When the claimant arrived at work he saw the railroad tanker car under the soybean oil spout but did not check to see the level of the soybean oil because he saw no one around and assumed that the soybean oil had been shutoff. The claimant went into the office and was informed the tanker was being filled with soybean oil and the claimant again went outside and saw the tanker under the soybean oil spout but again did not check the level of the soybean oil and it spilled. When filling a railroad tanker car with soybean oil, the claimant is periodically to check the level of the soybean oil and not to rely upon the automatic shutoff which does not always work.

On November 29, 2003, the claimant allowed again a railroad tanker car to overflow with soybean oil and approximately 50 gallons spilled out onto the ground. The automatic shutoff did not work that time and the claimant did not check the level of the soybean oil. At that time the claimant was given a verbal warning with a written record as shown at Employer's Exhibit 2. The claimant was also given a verbal warning for running a grain dryer in January 2004 without a hot air fan causing damage to the unit. The claimant was informed to start the dryer before turning on the hot air fan and was not told that he had to turn the hot air fan on thereafter. Pursuant to his claim for unemployment insurance benefits filed effective June 8, 2003 and reopened effective February 22, 2004, the claimant has received unemployment insurance benefits in the amount of $2,288.00 since separating from the employer herein and reopening his claim for benefits as follows: $244.00 for benefit week ending February 28, 2004 (earnings $121.00) and $292.00 per week for seven weeks from benefit week ending March 6, 2004 to benefit week ending April 17, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.

2. Whether the claimant is overpaid unemployment insurance benefits. He is.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Although it is a close question, the administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses credibly testified that on February 21, 2004 the claimant allowed a railroad oil tanker car to overflow with soybean oil spilling

approximately 100 gallons onto the floor. The claimant does not seem to disagree with this. The claimant testified that he did not know that it was being loaded because the loading had started when he came to work. However, the claimant twice noticed the railroad tanker car under the soybean oil spout both when he came to work and after leaving the office but on neither occasion did he bother to check to see if it was on and bother to check the level of the soybean oil. The claimant was told that the railroad tanker car was being filled with soybean oil by the prior shift who had started the filling and was going off work. It was the claimant's responsibility then to take over and complete the filling of the railroad car. He allowed the soybean oil to spill onto the ground. For this the claimant was discharged. Less than three months earlier the claimant had received a verbal warning with a written record as shown at Employer's Exhibit 2 for the same thing, allowing a railroad tanker car to overflow with soybean oil. The automatic shutoff did not work on that occasion and the claimant did not check the level of the soybean oil. In order to carry out his responsibilities to fill a railroad car with soybean oil the claimant needs to check periodically the level of the oil and not trust the automatic shutoff. The claimant did not do this on November 29, 2003 and received a verbal warning. The claimant did not do this again on February 21, 2004 and was discharged.

At the outset the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's failures in checking the railroad tank cars and allowing the soybean oil to spill out on the ground was willful or deliberate. Accordingly, the administrative law judge concludes that claimant's behavior was not disqualifying misconduct as a result of any willful or deliberate behavior on the part of the claimant.

The more difficult question is whether the claimant's behavior was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Although this is a close question, the administrative law judge is constrained to conclude here that the claimant's behavior was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The evidence is clear that the claimant was warned about an incident on November 29, 2003 for allowing a railroad tanker car to overflow with soybean oil and less than three months later again allowed a railroad tanker car to overflow with soybean oil. After the warning the claimant should have been on clear notice to check the railroad tanker car but he did not do so even after noticing the railroad tanker car under the soybean oil spout on two different occasions as he came to work and after he left the office after reporting in for work. The administrative law judge must conclude that this is carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code Section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $2,288.00 since separating from the employer herein on or about February 24, 2004 and reopening his claim for benefits effective February 22, 2004, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of March 16, 2004, reference 03, is reversed. The claimant, Martin A. Warburton, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits. He has been overpaid unemployment insurance benefits in the amount of $2,288.00.

tjc/b