

**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**

**KELLY L WELCH
650 – 1ST ST SE
HARTLEY IA 51346**

**AG PROCESSING INC
% TALX UC EXPRESS
PO BOX 6007
OMAHA NE 68106-6007**

**Appeal Number: 04A-UI-03771-CT
OC: 02/29/04 R: 01
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Ag Processing, Inc. filed an appeal from a representative's decision dated March 24, 2004, reference 02, which held that no disqualification would be imposed regarding Kelly Welch's separation from employment. After due notice was issued, a hearing was held by telephone on April 26, 2004. Mr. Welch participated personally. The employer participated by David Nestor, Plant Manager, and Phil Abels, Plant superintendent. The employer was represented by Lynn Corbeil, Attorney at Law. Exhibits One and Two were admitted on the employer's behalf.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Mr. Welch was employed by Ag Processing, Inc. from July 28, 2003 until February 17, 2004 as a full-time utility worker. He was discharged from the employment due to negligence in the performance of his duties.

On February 4, Mr. Welch was to load soy bean oil into a rail car. He was to make sure that there was an unbroken seal on the opening before starting the process of introducing product into the car. This procedure is intended to insure that there are no contaminants in the car. Mr. Welch failed to check for the seal before pumping oil into the car and did not note his error until he was completing the paperwork. The car was approximately one-fourth loaded before he realized his error. As it turned out, the car had contained molasses, which contaminated the oil. Because the oil was no longer marketable as a food product, it had to be sold on the secondary market at a loss to the employer. Mr. Welch was suspended from work for three days as a result of the incident.

The final act which precipitated the discharge occurred on February 15 as Mr. Welch was using a trackmobile, a small locomotive, to move rail cars. He was on his way to pick up an additional car and believed the track was headed in the direction he intended to travel. However, the track had been switched to the main line, a fact that was not noticed by Mr. Welch. When he went through the switch, he hit a derailer which caused one of the cars he was moving to derail. It is not possible to see the switch when one is operating the trackmobile. One has to go up to the switch to observe which line it is switched to. Employees of Ag Processing, Inc. are rarely required to use the switch as it is usually only used by Union Pacific personnel. Because of this incident, Mr. Welch was discharged on February 17, 2004.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Welch was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct in connection with the employment. The employer had the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Welch was discharged because of the incidents of February 4 and February 15. The administrative law judge is satisfied that he did not intend to cause a contamination of product or to cause a derailment. However, he was negligent on both occasions. Negligence constitutes disqualifying misconduct only if it is sufficiently recurrent as to manifest a substantial disregard for the employer's interests or standards. See 871 IAC 24.32(1).

The administrative law judge does not consider Mr. Welch's two incidents of negligence to be so recurrent as to establish misconduct within the meaning of the law. In so concluding the administrative law judge has considered the fact that the switch involved in the February 15 incident was not one regularly used by Mr. Welch in the normal course of his duties. The employer testified that the switch in question was usually used by Union Pacific personnel and not by employees of Ag Processing, Inc. This factor lends credence to Mr. Welch's position that he did not even think of the switch when he was moving the cars.

After considering all of the evidence and the contentions of the parties, the administrative law judge concludes that the employer has failed to establish disqualifying misconduct. While the employer may have had good cause to discharge Mr. Welch because of his costly mistakes,

conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). For the reasons stated herein, benefits are allowed.

DECISION:

The representative's decision dated March 24, 2004, reference 02, is hereby affirmed. Mr. Welch was discharged but misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

cfc/kjf