

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**RONALD A WELKER**  
Claimant

**APPEAL NO. 11A-UI-13755-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WEST LIBERTY FOODS LLC**  
Employer

**OC: 09/18/11**  
**Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Benefit Overpayment

**STATEMENT OF THE CASE:**

Employer filed a timely appeal from a representative's decision dated October 10, 2011, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on November 14, 2011. Claimant participated personally. The employer participated by Ms. Alendra Rojas and Mr. Gerald Davis, Production Supervisor. Employer's Exhibits One through Six were received into evidence.

**ISSUE:**

The issue is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Ronald Welker was employed by West Liberty Foods, L.L.C., from February 6, 2006 until September 22, 2011 when he was discharged for failing to follow the company's required lock-out/tag-out procedures. Mr. Welker worked as a full-time maintenance mechanic and was paid by the hour. His immediate supervisor was Wayne Coats.

Mr. Welker was discharged after it was determined that he had failed to lock-out/tag-out production machinery that used an electronic monitoring eye that Mr. Welker was working on. Company policy and training require employees to lock-out/tag-out equipment that is being worked on even if circuits have been de-energized. Company policy provides that failure to follow the company's lock-out/tag-out procedures can result in termination of employment on the first offense. Failure to follow the company's lock-out/tag-out procedures is considered to be a serious violation of its rules by the company and also a violation of OSHA regulations.

While working on the electronic eye a high voltage flash freezing apparatus was activated posing a serious risk of electrocution for Mr. Welker and the production supervisor who was working with him. Other maintenance mechanics who arrived on the scene immediately

criticized Mr. Welker for his failure to follow the lock-out/tag-out procedures emphasizing that the claimant "could have been killed." Because of the serious nature of the offense and the potential for harm, a decision was made to terminate Mr. Welker from his employment.

It is the claimant's position that he did not believe that the electronic eye apparatus required that the machine that it was attached to be locked-out/tagged-out because the electronic eye showed no voltage coming to it and because the production supervisor had attempted to adjust the electronic eye without locking or tagging the machine. It is the claimant's further position that although he signed off for training, he actually did not receive it.

### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record shows misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The employer has the burden of proof in this matter. See Iowa Code § 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

In this matter, Mr. Welker was working as a maintenance mechanic charged with the responsibility of repairing various mechanical and electrical components of machinery at the employer's production facility. As a maintenance mechanic Mr. Welker routinely worked on mechanical and electrical equipment and was aware that company policy requires that mechanical or electrical equipment be locked out and tagged out before any work on the apparatus begins. The company emphasizes this safety requirement not only for the protection of its employees but also because OSHA regulations require it. Company policy requires that even electrical equipment that has been de-energized also be locked out and tagged out. The claimant was aware of these policies and had followed them in the past.

The administrative law judge is aware that when Mr. Welker began to work on the project in question he was initially assisting a production manager in adjusting the setting of the external electronic eye. For that limited purpose it may have been reasonable for Mr. Welker to conclude that the lock-out/tag-out procedure was not required. However, when the claimant opened a panel on the conveyor itself to work with the internal wiring, the claimant knew or should have known that the possibility of electrocution and/or engaging the production line or its components might occur. At that juncture Mr. Welker could not gage his conduct on whether the production supervisor had previously locked out the machine. Mr. Welker was a trained maintenance mechanic who worked with mechanical and electronic equipment routinely and the claimant should have recognized the potential for harm. This factor was illustrated by a flash freezing apparatus being activated inadvertently resulting in a surge of high voltage electricity. Fortunately, neither Mr. Welker nor the production supervisor were injured by the electrical surge.

The administrative law judge concludes for the above-stated reasons that Mr. Welker's negligence or carelessness was of such a magnitude to be disqualifying work-related conduct. Unemployment insurance benefits are withheld.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

**DECISION:**

The representative's decision dated October 10, 2011, reference 01, is reversed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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