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

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| JOHN R WHITVER<br><br>Claimant,<br><br>and<br><br>CAREER OPTIONS INC<br><br>Employer. | : | HEARING NUMBER: 09B-UI-10722<br><br>EMPLOYMENT APPEAL BOARD DECISION |

## N O T I C E

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

**A REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION:** 96.5-2-a

## D E C I S I O N

**UNEMPLOYMENT BENEFITS ARE DENIED**

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The Employment Appeal Board would adopt and incorporate as its own the administrative law judge's Findings of Fact with the following addition:

The claimant's second written warning for the January 13th safety violation included a caveat that any further infraction would result in termination. (Tr. 25, 33, 36, 44-45, Exhibit 4)

Farmland Foods conducted an investigation during the time the claimant was on leave for the twelve days after the April 16th, 2009 accident. (Tr. 17) The employer (Career Options) was present as the employees were interviewed. (Tr. 18)

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The final act that triggered the claimant's termination occurred on April 16, 2009. (Tr. 14, 19, 28, 31, 32, 39-41) The weight of the evidence in the record indicates that Mr. Whitver willfully failed to follow the lock-out/tag-out procedure on that day. Mr. Whitver was well familiar with the procedure having participated in trainings on both September 4, 2008 and January 31, 2009. (Tr. 20-21, 23, 24,

25-26, 34, 44, Exhibits 6-8, Exhibits 10-12, Exhibits 15-20) He knew he was required to follow the lock-out/tag-out procedure before he commenced working on a machine. (Tr. 27, 40, 41) The claimant's tools along

with his locks were some distance away and he purposely chose not to collect his locks before he started work on the machine. (Tr. 24, 27, 40, 54) Mr. Whitver knew the power was not shut off at the time he put his hand in the machine and suffered injury.

As the lead maintenance mechanic, the claimant was responsible not only for following the safety rules, but also for modeling compliance for other employees under his supervision. There is no doubt that his failure to comply with proper procedures placed him and others at risk. (Tr. 23) We agree that Whitver's final act was disqualifying misconduct; however, we disagree that the termination was not based on a current event.

The employer's delay in deciding to sever the employment relationship until April 28th was reasonable. (Tr. 17, 28, 32, 35, 36, 50, 52) The court in Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988) held that in order to determine whether conduct prompting the discharged constituted a "current act," the date on which the conduct came to the employer's attention and the date on which the employer notified the claimant that said conduct subjected the claimant to possible termination must be considered to determine if the termination is disqualifying. *Any delay in timing from the final act to the actual termination must have a reasonable basis*. Here, the employer provided a wholly rational basis for the delay.

As soon as the incident occurred, an investigation ensued, which required the interviewing of several employees. (Tr. 17-18) This occurred while the claimant was off work tending to and recovering from his injury. Whitver had been in enough pain that he was hospitalized (after exiting the plant's first aid station) and on significant pain medication for the subsequent week of Saturday (April 19th- 26th). The claimant continued on medical leave through Monday April 27th when the claimant had a doctor's appointment and obtained a medical release to return to work on Tuesday, April 28th. It was upon his return that he was terminated. The delay between the incident on April 16th comprised a total of seven working days (1st - April 17th, then Monday through Friday, April 20th-24th) and lastly, Monday, April 27th) during which time the claimant was on medical leave and taking medication. Seven workings days is not an unreasonable delay when the claimant is on leave. Whitver had a culmination of three safety violations [June 30th (Tr. 22, 45, 47, 67) January 31st (Tr. 23, 33) and April 16th] in 10-month period. (Tr. 25) The warning he received on January 13th put him on notice that his job was in jeopardy should he acquire another safety infraction. Thus, the claimant is attributed knowledge that the final incident subjected him to termination. We conclude that substantial evidence supports the employer's case and that the final act was current in light of the circumstances.

## DECISION:

The administrative law judge's decision dated September 1, 2009 is **REVERSED**. The claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/fnv

## DISSENTING OPINION OF JOHN A. PENO:

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.

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John A. Peno

AMG/fnv