

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BANDAK W DENG

Claimant

APPEAL NO. 12A-UI-04534-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 02/05/12

Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Swift, filed an appeal from a decision dated April 11, 2012, reference 01. The decision allowed benefits to the claimant, Bandak Deng. After due notice was issued, a hearing was held by telephone conference call on May 15, 2012. The claimant did not provide a telephone number where he could be contacted and did not participate. The employer participated by Human Resources Manager Aureliano Diaz.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Bandak Deng was employed by Swift from November 7, 2011 until January 5, 2012 as a full-time production worker. At the time he was hired, the claimant was trained on the company policies and procedures. One such procedure is the lock-out/tag-out (LOTO) procedure. This is a serious safety procedure that requires workers to shut off the power to any moving piece of equipment before working on it. In addition to shutting off the power, the switch must be "locked" with a lock specifically assigned to that employee and can only be removed by them. Failure to LOTO is a serious safety violation because the equipment, if it were to inadvertently and unintentionally start, can kill the worker.

Mr. Deng was trained in the LOTO procedure and notified that failure to comply with this safety policy will result in immediate discharge. The claimant was discovered by his supervisor on December 2, 2011, not performing the LOTO while he was working on a moving rail cart. He was suspended immediately and his supervisor reported the incident to human resources.

In such cases, the human resources must do an investigation and also consult with the corporate offices before discharging an employee. It took until January 4, 2012, for the corporate office to notify Human Resources Manager Aureliano Diaz of the decision to discharge and the claimant was notified the next day.

Bandak Deng has received unemployment benefits since filing a claim with an effective date of February 5, 2012.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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 claimant had been thoroughly trained on the LOTO procedure, as well as the consequences of failing to follow it. Because the claimant did not participate in the hearing, he did not give any explanation for his failure to observe and follow this very important policy. The employer has the obligation to provide a safe work environment for all employees. The claimant willfully jeopardized his own safety and the safety of any other employees who might have been close to this piece of equipment. His conduct interfered with the employer's ability to provide a safe environment in the work place. This is conduct not in the best interests of the employer and the claimant is disqualified.

Iowa Code section 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.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of April 11, 2012, reference 01, is reversed. Bandak Deng is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw