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

JOSHUA SMOUSE	:	
	:	HEARING NUMBER: 09B-UI-04017
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
PELLA CORPORATION	:	
Employer.		

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 claimant, Joshua Smouse, worked for Pella Corporation from September 24, 2007 through January 7, 2009 as a full-time department manager. (Tr. 2-3) As department manager, Mr. Smouse is responsible for training employees on the company's lock out/tag out policy. (Tr. 3-4) Failure to properly follow this procedure would result in a employer issuing a " … class two corrective action letter… two [such] letters within two years [would] result in termination. (Tr. 4)

On January 7th, a co-worker named Dan Deercoop saw Mr. Smouse " … inside a guard on the hot melt silicone applicator. " (Tr. 5) Mr. Deercoop could tell the machine was still on because he could see the windows conveying. (Tr. 3, 5) The co-worker reported the matter to Nick Schultz who came down to

question Mr. Smouse. The claimant admitted not following the proper lockout/tagout procedure. (Tr. 5-6, 7) The employer called him into the office with Jeff Heuton (Human Resources) to discuss the incident. (Tr. 6) The claimant explained that he did not lockout/tagout because he sought "… to minimize the downtime and minimize the amount of windows that would not be produced…" by taking the same action he witnessed Andy Rollings (Pella process engineer) take a few days before. (Tr. 7) The employer issued a class two corrective action letter for this safety violation. Mr. Smouse had already received a class two letter less than two months prior on November 26, 2008 for "… by-passing known documented quality processes…" (Tr. 4, 6) when he knowingly used "… an unauthorized fastener to fix a gap … on some of [the employer's] window units…" (Tr. 4)

The employer terminated the claimant for having two corrective action letters within a short period of time. The employer's policy provides for termination of employees who receive two class two letters within two years. (Tr. 4)

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:
>
> 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).

This case revolves around a safety issue and a repeated failure to follow authorized procedures. Naturally, the employer should treat an employee's failure to follow proper lockout/tagout procedures that are set in place for the protection of not only the employee working on a machine, but for the safety of those around him and the machinery as a serious matter. Mr. Smouse's admission and rationale for failing to follow the lockout/tagout procedure (to save time and because the process engineer did it) does not mitigate the fact that he violated company policy. If he would have injured himself in the process, he would have undoubtedly cost the employer in numerous ways, i.e., worker's compensation, manpower and company morale should the injury have been fatal.

Ms. Smouse's implied argument that he only received one safety violation discipline is irrelevant. Besides both parties agree that he received two class II corrective letters and in accordance with company policy, he should be terminated. (Tr. 4) His failure to act in this one instance should not be dismissed as an "error in judgment." A single good faith error in judgment is not misconduct; however, a single incident would be misconduct where it showed deliberate disregard of the employer's interests. See, Henry v. Iowa Department of Job Service, 391 N.W.2d 731 (Iowa App. 1986). Moreover, as department manager who was not only trained in proper lockout/tagout procedures and who was charged with the responsibility of training his subordinates, there is no doubt that Mr. Smouse had knowledge of the employer's policy. (Tr. 7) Thus, he is held to a higher standard of care and his failure to follow protocol renders his behavior more culpable than a nonmanagerial employee having committed the same action. See, Ross v. Iowa State Penitentiary, 376 N.W.2d 642 (Iowa App. 1985). Additionally, Mr. Smouse's admission that he "should've known that he needed to perform the procedure correctly (Tr. 6) is probative that his action was, in fact, deliberate and willful and that he engaged in a material breach of the duties and obligations he owed to the employer. See, 871 IAC 24.32(1)"a", supra. For these reasons, we conclude that the employer satisfied their burden of proving their case.

DECISION:

The administrative law judge's decision dated April 17, 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