

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOHN D LAUE**  
Claimant

**APPEAL NO: 10A-UI-13653-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**  
Employer

**OC: 03/28/10  
Claimant: Respondent (2)**

Section 96.6-2 – Timeliness of Protest  
871 IAC 24.35(2) – Protest Delay  
Section 96.5-2-a – Discharge  
871 IAC 24.32(1) – Definition of Misconduct

**STATEMENT OF THE CASE:**

The employer appealed a department decision dated September 27, 2010, reference 02, that it failed to file a timely protest, and benefits are allowed. A telephone hearing was held on November 2, 2010. The claimant did not participate. Eloisa Baumgartner, Employment Manager, and Brandi Henry, Representative, participated for the employer. Employer Exhibits 1, 2 and 3 was received as evidence.

**ISSUES:**

Whether the employer protest is timely.

Whether the claimant was discharged for misconduct in connection with employment.

**FINDINGS OF FACT:**

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The employer representative received the department notice of claim. The employer mailed the notice of claim protest to the department on April 12 due date, but the department did not receive it. When the representative received a statement of charges, it protested and appealed the claimant's claim on October 1.

The claimant began employment on September 5, 2006, and last worked for the employer as a full-time maintenance employee on March 30, 2010. The employer has a Core Safety Mandate policy. The claimant was issued a warning in 2007 for violating the policy by failing to follow the lock-out/tag-out procedure. The policy states that the minimum penalty for a first offense is a three-day suspension or employment termination.

On March 26, the claimant failed to place locks on the D.M. Ball valves, and the employer investigated the issue. The claimant had the necessary locks, but failed to apply them to the valves. The claimant admitted the policy violation that is considered a serious issue, because it

can result in physical harm to an employee. The claimant was discharged for the most recent policy violation in light of the prior offense.

The claimant failed to respond to the hearing notice.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

871 IAC 24.35(2) provides:

(2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The department shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

The administrative law judge concludes the employer affected a timely protest.

The department did not receive the employer protest mailed on April 12 due most probably to a US Postal Service delivery err or department err in misplacing it. When the employer received the statement of charges, it immediately submitted a second protest.

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 administrative law judge concludes the employer has established claimant was discharged for misconduct in connection with employment on March 30, 2010.

The claimant was previously warned and committed a recent safety policy violation that constitutes job disqualifying misconduct.

**DECISION:**

The department decision dated September 27, 2010, reference 02, is reversed. The claimant was discharged for misconduct on March 30, 2010.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

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