

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JOHN S MITCHELL
601 4TH ST
RIPPEY IA 50235

TYSON FRESH MEATS INC
C/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-11557-RT
OC: 07-17-05 R: 02
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Tyson Fresh Meats, Inc., filed a timely appeal from an unemployment insurance decision dated November 1, 2005, reference 03, allowing unemployment insurance benefits to the claimant, John S. Mitchell. After due notice was issued, a telephone hearing was held on November 30, 2005, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the Notice of Appeal. Tom Barragan, Employment Manager at the employer's facility in Perry, Iowa, where the claimant was employed, and Randy Leesley, Maintenance Superintendent at the same facility, participated in the hearing for the

employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full time maintenance person from August 15, 2005 until he was discharged on September 29, 2005. The claimant was discharged for a violation of the employer's safety core mandated policies, in particular failing to lock out and tag out a piece of equipment upon which he was working. On September 28, 2005, the claimant was working on a piece of equipment, attempting to put a large chain on a tumbler. The claimant had not locked out and tagged out this equipment. If the equipment had started it would have pulled the chain and could have caused severe injuries to the claimant's hand. The claimant was in a hurry and forgot to lock out and tag out the equipment. Just earlier that day the claimant had worked on the same equipment and had locked out and tagged out the equipment properly. The employer's safety core mandates and in particular the lock out tag out policy is reviewed with appropriate personnel, including the claimant at orientation and in training. The supervisor stresses to appropriate personnel, including the claimant, the importance of the lock out, tag out policy. This is a very important safety policy for the employer to prevent injuries to employees. Pursuant to his claim for unemployment insurance benefits filed effective July 17, 2005 and reopened effective October 2, 2005, the claimant has received unemployment insurance benefits in the amount of \$409.00 since reopening his claim effective October 2, 2005 as follows: \$324.00 for benefit week ending October 8, 2005; zero benefits for benefit week ending October 15, 2005 (vacation pay \$370.00) and \$85.00 for benefit week ending October 22, 2005 (earnings \$320.00).

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer's witness, Tom Barragan, Employment Manager at the employer's facility in Perry, Iowa, where the claimant was employed, credibly testified, and the administrative law judge concludes, that the claimant was discharged on September 29, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses credibly testified that on September 28, 2005, the claimant failed to lock out and tag out a piece of equipment upon which he was working in violation of the employer's safety core mandated safety policies. The lock out tag out policy is to protect employees from injuries when working on a piece of equipment. The claimant was working on a piece of equipment attempting to put a large chain on a tumbler and the claimant had not locked out and tagged out the equipment. If the equipment had been started it would have pulled the chain and could have caused severe injuries to the claimant's hand. Just earlier that day the claimant had worked on that same equipment and had locked out and tagged out the equipment properly. The employer's safety policies including the lock out tag out policy is covered in orientation and in training and is stressed by the supervisor. The claimant received this orientation and the training and also the emphasis from his supervisor about the importance of the lock out tag out policy. The claimant had performed it properly on other occasions. Because of the emphasis by the employer on safety and in particular, the lock out tag out policy, and because of the orientation and training and stress by the supervisors, the administrative law judge is constrained to conclude that the claimant's violation of the lock out tag out policy on September 28, 2005, was a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is, at the very least, carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$409.00 since separating from the employer herein on or about September 29, 2005 and reopening his claim for benefits effective October 2, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of November 1, 2005, reference 03, is reversed. The claimant, John S. Mitchell, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$409.00.

kkf/tjc