

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

vs.

R.A.A.C. Order No. 13-04567
Referee Decision No. 13-33514EC

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This cause comes before the Commission for disposition of an appeal of the decision of a reemployment assistance appeals referee pursuant to Section 443.151(4)(c), Florida Statutes. The referee's decision stated that a request for review should specify any and all allegations of error with respect to the referee's decision, and that allegations of error not specifically set forth in the request for review may be considered waived.

Upon appeal of an examiner's determination, a referee schedules a hearing. Parties are advised prior to the hearing that the hearing is their only opportunity to present all of their evidence in support of their case. The appeals referee has responsibility to develop the hearing record, weigh the evidence, resolve conflicts in the evidence, and render a decision supported by competent and substantial evidence. Section 443.151(4)(b)5., Florida Statutes, provides that any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not such evidence would be admissible in a trial in state court. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding Section 120.57(1)(c), Florida Statutes, hearsay evidence may support a finding of fact if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record. A decision of an appeals referee cannot be overturned by the Commission if the referee's material findings are supported by competent and substantial evidence and the decision comports with the legal standards established by the Florida Legislature. The Commission cannot reweigh the evidence or consider additional evidence that a party could have reasonably been expected to present to the referee during the hearing. Additionally, it is the responsibility of the appeals referee to judge the credibility of the witnesses and to resolve conflicts in evidence, including testimonial evidence. Absent extraordinary circumstances, the Commission cannot substitute its judgment and overturn a referee's conflict resolution.

Having considered all arguments raised on appeal and having reviewed the hearing record, the Commission concludes no legal basis exists to reopen or supplement the record by the acceptance of any additional evidence sent to the Commission or to remand the case for further proceedings.

The Commission has reviewed the entire record in this case and concludes that competent, substantial evidence exists to support the referee's findings of fact. This case involves an incident in which the claimant, in an effort to prevent possible damage to equipment or supplies at work, hurried into a machine while failing to ensure that both the machine's air line and electric line were properly locked out. According to the evidence, the claimant had properly secured the hasp on the air line, but the hasp on the electric line, though attached, was not properly locked. The claimant testified that this error was an oversight due to his desire to correct the problem quickly. He acknowledged, and the referee properly found that, when he went into the cage, he was not sure that he had properly locked out the machine.

It is clear that, prior to the passage of Chapter 2011-235, Laws of Florida, the claimant's actions would not have amounted to misconduct. A single isolated act of simple negligence does not constitute misconduct under subparagraph (b) of the definition of misconduct. *Spink v. Unemployment Appeals Commission*, 798 So. 2d 899, 901-02 (Fla. 5th DCA 2001); *See also Borrego v. Unemployment Appeals Commission*, 884 So. 2d 520, 522 (Fla. 3d DCA 2004). However, in 2011, the Legislature added subparagraphs (c) – (e) to Section 443.036(30), Florida Statutes (2013). Subparagraph (e) provides that misconduct includes:

- (e) A violation of an employer's rule, unless the claimant can demonstrate that:
 - 1. He or she did not know, and could not reasonably know, of the rule's requirements;

2. The rule is not lawful or not reasonably related to the job environment and performance; or
3. The rule is not fairly or consistently enforced.

This provision “expresses the legislative intent that a claimant may be disqualified from benefits where it is established he or she committed a ‘violation of an employer’s rule.’” *Crespo v. Florida Reemployment Assistance Appeals Commission*, 128 So. 3d 49, 52 (Fla. 3d DCA 2012). The Commission concludes that the finding of a violation of the rule is correct.

Once the employer has shown a violation, the claimant bears the burden to establish one of the three defenses. *Crespo, supra*. In this case, the Commission has considered whether, on these facts, the employer’s rule is fairly enforced. In doing so, we balance the culpability of the claimant, on the one hand, with the nature and purpose of the rule on the other. Here, the claimant at least attempted compliance with the work rule, and his negligence in doing so was motivated not by personal interest, but by a desire to prevent an accident or damage in the workplace. We further note that there is no evidence of a prior violation of the rule by the claimant, or a warning regarding the same. This constitutes a very low degree of culpability on the part of the claimant. On the other hand, the work rule at issue is highly significant. Although not called so in the findings, the evidence established that the employer rule here was the “energy control procedure” mandated by the Occupational Safety and Health Administration under its “lock out/tag out” standard, 29 C.F.R. §1910.147. This standard requires an employer to develop, implement and enforce procedures to ensure that powered equipment is “locked out,” i.e., the power supply to the machine is interrupted, so as to prevent accidental startup or electrocution where specified work is being performed around an off-line machine. When “lock out” is not possible, the employer must apply “tag out” procedures. Because this energy control procedure is mandatory, because the employer is subject to OSHA sanctions if it is not adopted and enforced, and, most importantly, because it is designed to save the lives and limbs of employees and avoid the accompanying losses to the employer, the Commission gives a high degree of deference to the employer’s enforcement of this rule. Given the reasons for and importance of the procedures, the employer is entitled to require strict compliance, and the Commission concludes that the procedure was fairly enforced in these circumstances. Accordingly, the decision of the referee finding the claimant disqualified is affirmed.

The Reemployment Assistance Appeals Commission has received the request of the claimant’s representative for the approval of a fee for work performed in conjunction with the appeal to the Commission, as required by Section 443.041(2)(a), Florida Statutes. In examining the reasonableness of the fee, the Commission is

cognizant that: (1) in the event a claimant prevails at the Commission level, the law contains no provision for the award of a representative's fees to the claimant's representative, by either the opposing party or the State (i.e., a claimant must pay his or her own representative's fee); and (2) the amount of reemployment assistance secured by a claimant may be very small. The legislature specifically gave referees (with respect to the initial appeal) and the Commission (with respect to the higher level review) the power to review and approve a representative's fees due to a concern that claimants could end up spending more on fees than they could reasonably expect to receive in reemployment assistance.

Upon consideration of the complexity of the issues involved, the services actually rendered to the claimant, and the factors noted above, the Commission approves a fee of \$200.

The referee's decision is affirmed. The claimant is disqualified from receipt of benefits.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Frank E. Brown, Chairman
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on

8/7/2013,

the above Order was filed in the office of the Clerk of the Reemployment Assistance Appeals Commission, and a copy mailed to the last known address of each interested party.

By: Natasha Green
Deputy Clerk



DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
POST OFFICE BOX 8697
FORT LAUDERDALE FL 33310

IMPORTANT: For free translation assistance, you may call 1-800-204-2418. Please do not delay, as there is a limited time to appeal.
IMPORTANTE: Para recibir ayuda gratuita con traducciones, puede llamar al 1-800-204-2418. Por favor hágalo lo antes posible, ya que el tiempo para apelar es limitado.
ENPÒTAN: Pou yon intèpèt asisté ou gratis, nou gendwa rélé 1-800-204-2418. Sil vou plè pa pràn àmpil tòn, paské tòn limité pou ou ranpli apèl la.

Docket No. 2013-33514EC

Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant

EMPLOYER/Appellee

APPEARANCES: CLAIMANT & EMPLOYER

LOCAL OFFICE #: 3630-0

DECISION OF APPEALS REFEREE

Important appeal rights are explained at the end of this decision.

Derechos de apelación importantes son explicados al final de esta decisión.

Yo eksplike kèk dwa dapèl enpòtan lan fen desizyon sa a.

Issues Involved:

SEPARATION: Whether the claimant was discharged for misconduct connected with work or voluntarily left work without good cause as defined in the statute, pursuant to Sections 443.101(1), (9), (10), (11); 443.036(30), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

EMERGENCY UNEMPLOYMENT COMPENSATION. Whether the claimant qualifies for emergency unemployment compensation benefits pursuant to the Worker, Homeownership, and Business Assistance Act of 2009, Public Laws 110-252 and/or 110-449, Unemployment Compensation Extension Act of 2010.

Findings of Fact: The claimant became employed by the employer, a citrus juices manufacturer company, as a forklift driver/packaging individual, on August 24, 2012. The claimant was paid at the end \$11.00 per hour. The claimant worked 7 days per week, 12 hours per day.

The claimant was aware of the company's policy and procedures. The claimant was also aware that if he failed to lockout/tag out a machine he would be terminated. On January 27, 2013, the safety technician observed that the machine was not properly locked out and the claimant was inside the cage of the machine. The claimant endangered himself by not locking out the machine properly. The claimant went in to the cage in a hurry, put

the lock and wasn't sure if he had locked it out correctly. The safety technician walked by in that moment and found that the machine had not been locked out tag out properly. The safety technician informed the claimant that he had been terminated for failing to follow the lock out tag out procedures.

Conclusions of Law: As of June 27, 2011, the Reemployment Assistance Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed in pari materia with each other:

- (a) Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.
- (b) Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.
- (c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.
- (d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.
- (e) A violation of an employer's rule, unless the claimant can demonstrate that:
 1. He or she did not know, and could not reasonably know, of the rules requirements;

2. The rule is not lawful or not reasonably related to the job environment and performance; or
3. The rule is not fairly or consistently enforced.

The hearing record shows the claimant was discharged on January 27, 2013, when the safety technician informed the claimant that he had been terminated. The employer has the right to establish policy and procedures regarding safety. The claimant's action of not being sure that he had locked out the machine before going in to the machine's cage demonstrated a material breach of his duties and obligations to the employer. The claimant not only put his life in danger but also put the other employee's life in danger for not making sure the machine was properly locked out. Therefore, the claimant was discharged for misconduct connected with the work. The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Reemployment Assistance Appeals Commission set forth factors to be considered in resolving credibility questions. These include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the hearing officer finds the testimony of the employer to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

Decision: The determination of the claims adjudicator dated April 10, 2013, which held that benefits are not payable because the discharge was for misconduct connected with the work, is AFFIRMED.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

This is to certify that a copy of the above decision was mailed to the last known address of each interested party on May 17, 2013.

ILIANA PADILLA
Appeals Referee

By: S. Moise
S. MOISE, Deputy Clerk

IMPORTANT - APPEAL RIGHTS: This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the mailing date shown. If the 20th day is a Saturday, Sunday or holiday defined in F.A.C. 73B-21.004, filing may be made on the next day that is not a Saturday, Sunday or holiday. If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Department and set forth in a separate overpayment determination. However, the time to request review of this decision is as shown below and is not stopped, delayed or extended by any other determination, decision or order.

A party who did not attend the hearing for good cause may request reopening, including the reason for not attending, at <https://iap.floridajobs.org/> or by writing to the address at the top of this decision. The date the confirmation number is generated will be the filing date of a request for reopening on the Appeals Web Site.

A party who attended the hearing and received an adverse decision may file a request for review to the Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); <https://raaciap.floridajobs.org/>. If mailed, the postmark date will be the filing date. If faxed, hand-delivered, delivered by courier service other than the United States Postal Service, or submitted via the Internet, the date of receipt will be the filing date. To avoid delay, include the docket number and claimant's social security number. A party requesting review should specify any and all allegations of error with respect to the referee's decision, and provide factual and/or legal support for

these challenges. Allegations of error not specifically set forth in the request for review may be considered waived.

IMPORTANTE - DERECHOS DE APELACIÓN: Esta decisión pasará a ser final a menos que una solicitud por escrito para revisión o reapertura se registre dentro de 20 días de calendario después de la fecha marcada en que la decisión fue remitida por correo. Si el vigésimo (20) día es un sábado, un domingo o un feriado definidos en F.A.C. 73B-21.004, el registro de la solicitud se puede realizar en el día siguiente que no sea un sábado, un domingo o un feriado. Si esta decisión descalifica y/o declara al reclamante como inelegible para recibir beneficios que ya fueron recibidos por el reclamante, se le requerirá al reclamante reembolsar esos beneficios. La cantidad específica de cualquier sobre pago [*pago excesivo de beneficios*] será calculada por la Agencia y establecida en una determinación de pago excesivo de beneficios que será emitida por separado. Sin embargo, el límite de tiempo para solicitar la revisión de esta decisión es como se establece anteriormente y dicho límite no es detenido, demorado o extendido por ninguna otra determinación, decisión u orden.

Una parte que no asistió a la audiencia por una buena causa puede solicitar una reapertura, incluyendo la razón por no haber comparecido en la audiencia, en <https://iap.floridajobs.org/> o escribiendo a la dirección en la parte superior de esta decisión. La fecha en que se genera el número de confirmación será la fecha de registro de una solicitud de reapertura realizada en el Sitio Web de la Oficina de Apelaciones.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Desempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); <https://raaciap.floridajobs.org/>. Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y el número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

ENPÒTAN – DWA DAPÈL: Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat nou poste sa a ba ou. Si 20^{yèm} jou a se yon samdi, yon dimanch oswa yon jou konje, jan sa defini lan F.A.C. 73B-21.004, depo an kapab fêt jou aprè a, si se pa yon samdi, yon dimanch oswa yon jou konje. Si desizyon an diskalifye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

Yon pati ki te gen yon rezon valab pou li pat asiste seyans lan gen dwa mande pou yo ouvri ka a ankò; fòk yo bay rezon yo pat ka vini an epi fè demann nan sou sitwèb sa a, <https://iap.floridajobs.org/> oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat yo pwodui nimewo konfirmasyon an se va dat yo prezante demann nan pou reouvre kòz la sou Sitwèb Apèl la.

Yon pati ki te asiste seyans la epi ki pat satisfè desizyon yo te pran an gen dwa mande yon revizyon nan men Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); <https://raaciap.floridajobs.org/>. Si ou voye l pa lapòs, dat ki sou tenb la ap dat ou depoze apèl la. Si ou depoze apèl la sou yon sitwèb, ou fakse li, bay li men nan lamen, oswa voye li pa yon sèvis mesajri ki pa Sèvis Lapòs Lèzetañini (*United States Postal Service*), oswa voye li pa Entènèt, dat ki sou resi a se va dat depo a. Pou evite reta, mete nimewo rejis la (*docket number*) avèk nimewo sekirite sosyal moun k ap fè demann lan. Yon pati k ap mande revizyon dwe presize nenpòt ki

alegasyon erè nan kad desizyon abit la, epi bay baz reyèl oubyen legal pou apiye alegasyon sa yo. Yo p ap pran an konsiderasyon alegasyon erè ki pa byen presize nan demann pou revizyon an.

Any questions related to benefits or claim certifications should be referred to the Claims Information Center at 1-800-204-2418. An equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Voice telephone numbers on this document may be reached by persons using TTY/TDD equipment via the Florida Relay Service at 711.
