Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *D. H. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 85

Tribunal File Number: GE-15-3877

BETWEEN:

D. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

TMK IPSCO Canada Ltd.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: May 12, 2016

DATE OF DECISION: June 27, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant attended the hearing of his appeal via videoconference from Edmonton. The Appellant's representatives, Justin Morvay and Tyler Raymond, of the University of Ottawa's Employment Insurance Litigation Clinic, attended the hearing via videoconference from Ottawa. The Added Party, the Appellant's former employer TMK IPSCO Canada Ltd. (TMK IPSCO), was represented by H. M. (Mr. H. M.), Plant Manager, who attended the hearing via teleconference.

INTRODUCTION

[1] The Appellant made an initial application for regular employment insurance benefits (EI benefits) and indicated he had been dismissed from his employment on August 24, 2015. The Respondent, the Canada Employment Insurance Commission (Commission) investigated the reason for separation from employment and determined the Appellant lost his job by reason of his own misconduct. On September 25, 2015, the Commission advised the Appellant that he would not be paid EI benefits because he had lost his job as a result of his own misconduct.

[2] On October 15, 2015, the Appellant requested the Commission reconsider its decision, denying the allegations by his employer. The Commission maintained its original decision and, on November 27, 2015, the Appellant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal).

[3] The hearing was held by videoconference and teleconference because of the fact that credibility might be a prevailing issue and because the forms of hearing respect the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] Whether the Appellant is disqualified from receipt of EI benefits because he lost his employment as a result of his own misconduct.

THE LAW

[5] Subsection 30(1) of the *Employment Insurance Act* (EI Act) provides that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

> (a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or
>
> (b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

[6] Subsection 30(2) of the EI Act stipulates that the disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

[7] The terms “employment” and “loss of employment” are defined in section 29 of the EI Act. Subsection 29(a) of the EI Act provides that for the purposes of sections 30 to 33, “employment” refers to any employment of the claimant within their qualifying period or their benefit period.

[8] Subsection 29(b) of the EI Act provides that for the purposes of sections 30 to 33, “loss of employment” includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers.

EVIDENCE

[9] The Appellant made an initial application for EI benefits on August 28, 2015 (GD3-3 to GD3-16). On his application, the Appellant declared that his last day of work was August 24, 2015, and selected “Dismissed or Suspended” to indicate the reason he was no longer working. With his application, the Appellant completed a Questionnaire regarding his dismissal (GD3-9 to GD3-10), in which he indicated that he was dismissed from his position as a building electrician

because his employer accused him of committing a safety violation which he described as "switched off power but no lock" (GD3-9). The Appellant did not agree that he had committed the safety infraction, and stated that no one was injured, nor was there any property that was or could have been damaged.

[10] A Record of Employment (ROE) was provided by TMK IPSCO (GD3-17), which indicated the Appellant had been employed from January 18, 2014 to August 24, 2015, and gave the reason for separation as "K" or "Other" and included the following statement under "Comments": "Discharged for violation company safety program".

[11] On September 18, 2015, an agent of the Commission spoke with a representative for the employer regarding the reason the Appellant was no longer working for TMK IPSCO, and documented their conversation in a Supplementary Record of Claim (GD3-18). The agent noted the employer's statements that the Appellant was dismissed because he had violated a safety rule, namely he did not perform a lock out/try out (the process of locking out the equipment and testing it to see that the power is disconnected) on a piece of equipment. According to the employer, the Appellant had a prior incident with the same situation in November 2014, for which he received a 3-day suspension. The employer further stated that the procedure is set out in the employer's written safety procedures.

[12] The employer provided additional documentation to the Commission (GD3-19 to GD3-26), including:

(a) The 2014 Safety Pledge signed by the Appellant and the Plant Manager on February 20, 2014 (GD3-20). The pledge included numerous commitments to the employer's safety and environmental rules and regulations, and to the Appellant's personal safety and the safety of those around him.

(b) The Employee Counselling Record for the incident on November 24, 2014 that resulted in a 3-day suspension imposed upon the Appellant for a "Lock out Tag out" violation (GD3-21). The incident was described as follows:

"On 11/24/2014, an employee was cutting a piece off of a full length pipe at the Hem Saw. D. H. was locked out performing maintenance on C3

conveyor. The employee finished the cut and kicked the pipe from conveyor C2 onto skid ST2 which is located north of C3. As he did so, and the pipe was rolling down ST2, D. H. entered the area at the east end of skid ST2 to retrieve a cover which had fallen under ST2 on the north side of C3 conveyor, and could have been struck by the pipe that was rolling down the skid.

D. H. was rushing to complete the task and had to retrieve the cover to do so. He did not communicate properly to another employee to let him know that he was entering the area and did not lock out C2 conveyor as his main purpose for entering the area was not to perform maintenance work."

The Corrective Action was described as follows:

"Violation of TMK IPSCO's Cardinal Rules – Failure to follow Lockout procedures. Three day unpaid suspension to be served November 25, 2014 through November 27, 2014. Future occurrences will result in further discipline up to and including discharge of employment."

The Appellant signed the Counseling Record on November 25, 2014.

(c) The incident report for the incident that occurred on August 24, 2015 that resulted in the Appellant's termination (GD3-22). The incident was described as follows:

"On August 24th 2015 at 7:40am the employee was observed by the EHS Specialist to be inside the pass line at STS on the south side of the C9 conveyer. EHS went to verify LOTO (lock out/try out) had been completed. Lock out had not been completed. Upon speaking with the employee and the production Lead Hand, it was found that he had had no communication with the employees inside the facility to notify them that he had to check a proximity sensor on the C9 conveyer. The employee stated that he had turned the power box for the C9 conveyer to the off position; however he had not applied his personal lock before he entered the area. He failed to follow EDM-LOTL-009.

Failure to Lock Out as per EDM-LOTL-009 4.3 the Authorized Employee, before turning off C4 Disconnect OR C4-MDP01 and C9 Disconnect OR C9-MDP01 shall notify affected employees in the work area that power will be shut off, the reason for the shut down and that the equipment will be locked."

In light of the Appellant's prior violation, the action to be taken was a 1-week unpaid suspension without pay, followed by termination of employment.

(d) The Notice of Disciplinary Action (Termination of Employment) issued to the Appellant on August 28, 2015 (GD3-23). The notice refers to the August

24, 2015 incident as the Appellant's "second violation of TMK IPSCO's – Cardinal Rules – Life Threatening Program" and failure to follow lock out procedures.

(e) A copy of LOTO-009, which specifies the employer's lock out procedure for Conveyor C9 (GD3-24 to GD3-26).

[13] On September 24, 2015, the agent telephoned the Appellant about the reason he was dismissed from his job and documented their conversation in a Supplementary Record of Claim (GD3-27). The agent noted the Appellant's statements that he was dismissed for a safety violation, and his further statements that he did shut down a conveyor, but didn't have a lock with him so he shut down the electrical box which shut down the whole thing. The Appellant admitted that it is a "cardinal rule" to put a lock on the switch, but stated that it is a rule for production staff and he is a maintenance person. According to the Appellant, it took him two minutes to do what he had to do without locking the switch and, while the proper thing to do would have been to get the lock and put it on, there was no scenario where anything could have happened.

[14] By letter dated September 25, 2015 (GD3-28 to GD3-29), the Commission advised the Appellant that he would not receive EI benefits because he lost his employment at TMK IPSCO on August 24, 2015 as a result of his own misconduct.

[15] On October 15, 2015, the Appellant requested the Commission reconsider its decision (GD3-30 to GD3-37), stating that he made a decision using his best discretion on one of many jobs in his busy daily schedule. The Appellant attached a 6-page letter to his request, in which he set out a detailed description of the sequence of events and why he used his judgment and discretion instead of following the employer's lock out safety policy.

[16] On October 29, 2015, an agent of the Commission telephoned the Appellant about his request for reconsideration, and documented their conversation in a Supplementary Record of Claim (GD3-38). The agent noted the Appellant's confirmation that he was dismissed following a safety violation. The agent further noted that the Appellant disagreed with his termination, stating that he used his discretion not to put the lock on the switch because he works in

maintenance and the safety policies were designed for production workers. According to the Appellant, he was not aware of the employer's expectation he use the lock in the situation, the rules change all the time and he wasn't sure what was allowed or not, so he made a judgment call. He did not leave the area and did not feel like there were any problems or safety concerns. The Appellant further stated that he did not agree with the 3-day suspension for the prior incident, but signed off on it in order to get back to work.

[17] The Commission maintained its original decision of September 24, 2015 that the Appellant was disqualified from receipt of EI benefits because he lost his employment at TMK IPSCO as a result of his own misconduct (GD3-39 to GD3-40).

[18] The Appellant appealed to the Tribunal on November 27, 2015 (GD2).

[19] On January 14, 2016, after being added as a party to this appeal, the employer provided additional documentation (GD8-1 to GD8-28), including:

(a) copies of safety, operational and quality procedure reviews conducted between April -June 2015, ***all*** signed by the Appellant (GD8-2 to GD8-21);

(b) the training sign-in sheet (GD8-22) for the review of the Edmonton Safety Policy (at GD3-23) on August 12, 2015, signed by the Appellant;

(c) the employer's Cardinal Safety Rules policy, which was reviewed and signed by the Appellant on September 16, 2014 (GD8-25). Just above the Appellant's signature, the policy states that an employee who violates any of the Cardinal Safety Rules (of which the failure to follow lock out procedures is one such rule) will be subject to discipline, up to and including termination.

(d) Minutes from the January 6, 2016 tool box talk on "Taking Safety Personally", which the employer indicated is typical of the safety talk conducted at the start of each shift and which the employer stated demonstrates the level of its commitment to safety (GD3-26 to GD3-28).

AT THE HEARING:

Testimony of the Appellant

[20] The Appellant testified that the procedure for locking out Conveyor C9 is set out in the employer's LOTO-009 policy at GD3-24 to GD3-26. The Appellant stated that he followed steps 1 and 2 of the 5-step protocol set out in article 4.0 of the LOTO-009 policy, and then he shut off the power to the conveyor. According to the Appellant, the power disconnect was outside of the building at the end of the conveyor, and he could see the panel for the disconnect at all times (although he was on the other side) and no one could come into the area without him seeing them. As well, the plant was not in operation at the time, even though all of the day-shift employees were on site at the time. The Appellant stated that he did not follow step 3 of the protocol because there were no employees around; did not follow step 4 of the protocol because there was no possibility anyone from C4 could come into this area; and did not follow step 5 because he wasn't going into the mechanical area of the conveyor. The Appellant admitted that the steps he took were not "perfect compliance" with the employer's lock out protocol, but stated that he followed the safety procedures that were required given that nobody was around, and further stated that there was no real danger to anybody as a result of the steps he took.

[21] The Appellant testified that, on August 24, 2015, he did a visual inspection of the area and noticed something on the C9's proximity sensor and wanted to get a better look at it. According to the Appellant, he wanted to see if there was any damage to the sensor or repair needed. Upon inspection, it was just a piece of plastic, so the Appellant removed it, turned the conveyor back on and went back inside the building. The Appellant stated there was no danger in what he did because with C9 shut off, there was no possibility anything could have run or started.

[22] The Appellant testified that the incident came to the employer's attention because "the safety lady approached me later and asked me why I was in the area that wasn't locked out." According to the Appellant, he explained that he'd shut off the conveyor and had just entered the area temporarily.

[23] When asked why he didn't put a lock on for the disconnect, the Appellant stated he was there at the time "on a visual", and just wanted to see what he was dealing with before proceeding with a lock out. But when he looked at the sensor and saw it was just a piece of plastic, the Appellant felt he didn't need a lock-out to shut down the system to do any further repairs.

[24] When asked if this was his first infraction, the Appellant answered: "No." The Appellant testified that, nine (9) months earlier, he had failed to lock out when he was working on a conveyor upstream. In that case, he was working on a sensor underneath a motor, which he had to remove and replace. The Appellant stated that "swapping the sensor" isn't really mechanical, but removing the cover is. According to the Appellant, another employee came into the area to cut pipe and was cutting on the saw when the cover the Appellant was putting on fell off. The Appellant had to go down and get the cover and, while he did that, a piece of pipe came rolling towards him as he was walking away. The Appellant stated that he got a suspension for not locking out the conveyor the pipe came rolling out on, which was upstream of the conveyor the Appellant was working on. The Appellant identified the document at GD3-21 as the letter he signed in connection with the 3-day suspension over this incident. According to the Appellant, he was not rushing to complete the job, but he did want to get out of the area so the plant could start running again.

[25] The Appellant testified that he locked out "at least twice a day" between the disciplinary incident on November 24, 2014 and the final incident on August 24, 2015, all without any issues or warnings from the employer.

Cross-examination of the Appellant by the Employer

[26] When the Appellant was asked by Mr. H. M. if there were any other steps that should have been followed in connection with the incident on August 24, 2015, the Appellant said he didn't feel he had to do anything else because he was "just on a visual, having a look". Mr. H. M. then asked the Appellant to read article 2.1 of the lock out procedure in LOTL- 009 (at GD3-24). The Appellant read as follows:

> "This procedure applies only if authorized personal are performing any normal operating or maintenance procedures on Conveyor C9 and the outside skid ST5."

The Appellant was asked if he was an "authorized personnel" and he responded: "No". The Appellant was then asked if he was "performing any normal operating or maintenance procedures" and he responded: "No, because I was just doing a visual". Mr. H. M. then pointed out that the Appellant took the steps required to fix the problem, which was maintenance, and that he didn't do what he was supposed to do.

[27] The Appellant was asked to read article 6.1 of LOTO-009, namely the "Cardinal Rules" of the lock out procedure for conveyor C9 (at GD3-26). The Appellant read as follows:

> "Always use your own lock on the lock box."

The Appellant was asked if he followed this cardinal rule and he responded: "No."

[28] When asked to explain the purpose of a lock-out, the Appellant stated that it is to shut down the operation of a system so it can't function, and further stated that the procedure is done for the safety of an employee or employees in the area.

[29] When asked how he knew that someone could not have come around the corner and activated the disconnect, the Appellant stated that he was "within sight of it". When asked how far away the Appellant was from the disconnect, the Appellant stated that he was about 10 feet away, not within arm's reach, but the Appellant reiterated that he could see it at all times. When asked if it was possible for a pipe to be sent down C4 onto C9 even if C9 is disconnected without power, the Appellant stated: "Yes. A pipe could come down about 3 feet or so." Mr. H. M. then asked if the purpose of the lock-out procedure was to prevent a pipe from coming down and striking an employee, and the Appellant responded: "Yes."

[30] The Appellant was asked to read the first sentence of the incident report at GD3-22. The Appellant read as follows:

> "On August 24th 2015 at 7:40am the employee was observed by the EHS Specialist to be inside the pass line at ST5 on the south side of the C9 conveyer."

When asked if he disputed this statement, the Appellant said: "I didn't see her."

[31] The Appellant was asked about his previous lock out procedure violation involving conveyor C3 and, in particular, what the lock out procedure was for working on C3. The

Appellant responded: “I don’t know that I looked at the SOP (standard operating procedure) for that one.” Mr. H. M. then stated: “If you’re working on C3, you have to lock-out C2 and C3 just to prevent a pipe roll, as can happen on C9”. Mr. H. M. referred the Appellant to the April 14, 2015 Training Sign-In Sheet at GD8-5, and noted that the topic for training that day was “LOTO-016 Rev 3 to LOTO 003 Rev 3”. Mr. H. M. stated that these two lock out procedures were thoroughly reviewed with all the employees in attendance, and asked the Appellant if he was in attendance at the April 14, 2015 training session, to which the Appellant responded: “Yes”. When asked why his C3 infraction took place a mere four (4) months later, the Appellant stated: “As far as I know, I was fine with lock out on C3. I didn’t remember the upstream part.”

[32] When asked if he was in a hurry and taking a shortcut instead of following proper lock-out procedures on both infractions, the Appellant stated:

(a) With the C3 infraction, he was just trying to get the job done and “get out of there”, and that he just thought the employee was using the saw and didn’t think the employee would kick the pipe out. According to the Appellant, the upstream/downstream part of the lock-out procedure “was new to me”.

(b) With respect to the C9 infraction, he was just there “for a visual” and then removed the plastic so, in his mind, no lock-out was necessary.

[33] When asked if he violated the LOTO-009 procedures, the Appellant stated that he didn’t have them in his hands at the time, but had seen them. The Appellant stated: “As far as I knew, I could shut down for a visual prior to doing a lock out.” The Appellant further stated that he followed procedures to the best of his recollection and did his own assessments of situations.

[34] The Appellant was then asked where employees can find the lock out procedures, and stated that they can be found at the operating stations on every conveyor. When asked why he didn’t take “two minutes to check the procedure”, the Appellant stated that he didn’t feel the need to do so because he had just done a visual, saw something, shut the conveyor off to take a closer look, saw a piece of plastic, removed it, and upon seeing that no repair was required, determined no lock out was necessary and turned the conveyor back on.

[35] The Appellant was asked to read the "Corrective Action" section of the Employee Counselling Report from the November 24, 2014 discipline incident (at GD3-21). The Appellant read as follows:

> "Violation of TMK IPSCO's Cardinal Rules – Failure to follow Lockout procedures. Three day unpaid suspension to be served November 25, 2014 through November 27, 2014. Future occurrences will result in further discipline up to and including discharge of employment."

When asked how he could possibly say he didn't think he'd be terminated if he had a further lock out violation (see GD2-7 to GD2-8), the Appellant stated that he didn't remember this part of the Corrective Action until he saw it in the appeal docket sent to him.

Testimony of Mr. H. M. on behalf of the Employer

[36] Mr. H. M. testified that the standard policies the Appellant pledged to follow on September 16, 2014 (see GD8-25) and the TMK IPSCO Canada Safety Policy (at GD8-23) have not changed "ever". Mr. H. M. stated that they were put in place when the plant opened in 2012 and have been in effect throughout. Mr. H. M. further stated that the employer reviews its policies regularly to see if they can be "improved" and that the machine-specific safety policies are updated when the machine is updated or re-tooled. In every case, each and every employee is made aware of any policy changes when they are implemented.

[37] When asked if there was any danger in what the Appellant did on August 24, 2015, Mr. H. M. stated that a pipe or even multiple pipes could have come down from C4 to C9. According to Mr. H. M. , while the pipe(s) wouldn't have travelled the full length of the conveyor because the power was off, they could have travelled far enough to injure the Appellant or another person in the area and/or damage the equipment. Mr. H. M. stated that, while the Appellant may have taken some steps, he didn't take all the steps necessary to secure the area before attending to the work he was doing. Mr. H. M. further stated that the Appellant was "just lucky that day" because "anything is possible", which is why employees are trained to follow the safety policies and avoid taking such chances with their safety or the safety of others.

SUBMISSIONS

[38] The Appellant submitted that his conduct, while "arguably" a breach of one of the employer's safety policies, did not amount to misconduct within the meaning of the EI Act for the following reasons:

(a) The Appellant didn't disregard the employer's lock out policy, he just failed to achieve "perfect compliance" with the policy. The Appellant took the right mentality into the situation when he took the steps he did to make the area safe at a time when there was no one working there, and he was trying to deal with a workplace problem as efficiently as possible so as to prevent a loss of productivity for the employer;

(b) The Appellant had only two (2) incidents – and they were nine (9) months apart - in his twenty (20) months at TMK IPSCO, during which time he did many lock outs without any issues or warnings. The Appellant's behavior wasn't willful because it was not habitual and there is no established pattern of failure to follow lock-out procedure.

(c) The Appellant did not reasonably think he could have been fired for failing to follow the LOTO-009 lock out procedure on August 24, 2015. The clauses in the employer's materials providing that violations will be subject to discipline up to and including termination are "boiler plate clauses" and imply that discipline other than termination is possible.

[39] The Commission submitted that the Appellant's decision to not follow the lock out procedures was for convenience and it was in violation of the safety pledge he made and the employer's various safety policies. It doesn't matter if, in the Appellant's estimation, there was no real danger involved. Safety rules are in place for a reason and the Appellant was aware of the lock out rule and chose not to follow it. The Appellant's failure to follow the LOTO-009 lock out procedure constituted misconduct within the meaning of the EI Act because he was aware of the safety rule, he made a deliberate choice not to follow the safety rule and, since he had been

suspended once before for also not following the safety rule, he knew he could be disciplined for his actions, up to and including termination.

[40] The employer, as Added Party, adopted the Commission's submissions with respect to the Appellant's willful disregard of the lock out policy. The employer also submitted that the purpose of the lock out procedure is to prevent someone from being accidentally injured and, therefore, it is one of the employer's "Cardinal Rules", which means it is of paramount importance. The Appellant knew he should have locked-out and didn't do so. It is not up to the Appellant to decide if anything bad *could* have happened. Rather, the Appellant should have followed the policy, which is the only way to ensure there would be no problems.

ANALYSIS

[41] Section 30 of the EI Act disqualifies a claimant from receiving benefits if the claimant has lost their employment as a result of misconduct.

[42] The onus is on the Commission to show that the claimant, on the balance of probabilities, lost his employment due to his own misconduct (*Larivee A-473-06, Falardeau A-396-85*).

[43] In order to prove misconduct, it must be shown that the employee behaved in a way other than he should have and that he did so willfully, deliberately, or so recklessly as to approach willfulness: *Eden A-402-96*. For an act to be characterized as misconduct, it must be demonstrated that the employee knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility: *Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06, Lock 2003 FCA 262*; and that the conduct will affect the employee's job performance, or will be detrimental to the interests of the employer or will harm, irreparably, the employer-employee relationship: *CUB 73528*.

What is the conduct that led to the Appellant's dismissal?

[44] The Commission's evidence, obtained from the employer, is that the Appellant lost his job at TMK IPSCO because he failed to follow the lock out procedure in LOTO-009 while at

work on conveyor C9 on August 24, 2015. This incident occurred after the Appellant had previously been suspended for a similar incident, namely his failure to follow lock out protocol on November 24, 2014, at which time the Appellant was warned: "Future occurrences will result in further discipline up to and including discharge of employment" (GD3-21).

[45] In his statements to the Commission (at GD3-27 and GD3-38) and at various points during his testimony at the hearing, the Appellant conceded that he was terminated for failing to follow the employer's lockout safety procedures in LOTO-009 on August 24, 2015. The Appellant has provided various ***justifications*** for his breach of policy, but has acknowledged that he breached the employer's safety policy, and that it was his breach of policy that led to his dismissal. At the hearing, the Appellant's representatives submitted that the Appellant's conduct was only "arguably" a breach of policy – because he followed the first 2 steps of the lock out procedure (at GD3-24) and simply did not achieve "perfect compliance" of the protocol. However, the Tribunal notes that the "STARTING LOCK OUT" steps the Appellant claims to have followed were:

> 4.1 The Authorized Employee shall evaluate the equipment to be serviced.
>
> 4.2 At no time shall any employee put their body and/or body parts into an energized line.

The steps the Appellant admits he ***did not follow*** were:

> 4.3 The Authorized Employee shall notify employees in the work area before locking out C4 Disconnect and C9 Disconnect and the reason for the shut-down.
>
> 4.4 Lock out C4 Disconnect and C9 Disconnect with the designated locks. Keep all keys in the designated lock box near this area. Attach your personal lock to the lock box.
>
> 4.5 Try to operate Conveyors 4 on Operation Station 03 (ANLR-OP03) and Conveyor C9 on Operation Station 08 (C9-OP08) to ensure that the machine or equipment is isolated from the energy source.

The Tribunal also notes that the Appellant followed none of the five (5) "RESTORATION TO NORMAL" steps (GD3-26).

[46] It is plain and obvious that the first two steps are preliminary at best, and that the heart of the lock out procedure – and the most important part of the process – are the remaining three

steps, which the Appellant did not complete. The Tribunal therefore finds that the Appellant breached the employer's lock-out safety policy while at work on August 24, 2015.

[47] The Appellant also conceded that he was disciplined previously for failing to follow the employer's lock out safety policy, although he stated that he did not agree with the 3-day suspension imposed upon him and only signed the prior discipline letter in order to get back to work (GD3-38).

[48] The Tribunal finds that the Appellant lost his job because, after receiving a written warning from the employer on November 24, 2014 for a breach of lock out safety policy, the Appellant again breached the employer's lock out safety policy on August 24, 2015.

Does that conduct constitute "misconduct" within the meaning of the EI Act?

[49] Having found that the Appellant breached the employer's lock out safety policy, the Tribunal must now determine if that breach is misconduct for purposes of the EI Act.

[50] The Tribunal considered the consistent and unequivocal statements by the employer's representative regarding the importance and universal application of their safety policies given the nature of the equipment in the TMK IPSCO's plant and the potential for serious injury in the workplace. Safety on the job and in the workplace is clearly a paramount concern at TMK IPSCO, and this is made abundantly clear to the employees in many ways. The requirement for employees to sign safety "pledges" is just one way the employer emphasizes this. The Tribunal noted the provisions in the 2014 Safety Pledge signed by the Appellant on February 20, 2014 (GD3-20) that he would take personal responsibility to:

> "*always put safety first in completing my duties*",
>
> "*comply with all safety and environment rules and regulations*",
>
> "*never sacrifice or compromise safety to perform a job quicker or easier*" and to "*insist on a total commitment to safety excellence from myself and all my colleagues*."

[51] There is also no question that the lock out safety policies are one of the most important aspects of workplace safety at TMK IPSCO. The Tribunal notes that there are, in fact, only five (5) safety policies that are designated "Cardinal Rules" in the policy sheet signed by the Appellant on September 16, 2014 (GD8-25):

- Disregard for utilizing the proper PPE (personal protective equipment)
- Failure to follow Lockout procedures
- Violation of the Company's Drug Free Workplace policy
- Failure to report an incident within the shift it occurs
- Bypassing, overriding, or otherwise interefering with a safety device or process.

[52] The inclusion of the lock-out safety policy as a "Cardinal Rule" signifies its critical importance to the employer and, indeed, to safety in the workplace. The Appellant knew what he should have done when he was working on conveyor C9 on August 24, 2015 (see GD3-27 and his testimony), and the fact that he stated he complied with the lock out protocol many times *("at least twice a day"*) between the first and second incidents only serves to underline the Appellant's knowledge of the significance of this particular policy.

[53] The Tribunal next considered the Appellant's documented discipline history. While the Appellant did not explain why he disputed the 3-day suspension imposed upon him for the November 24, 2014 incident, the Tribunal cannot ignore the fact that it was for substantially the same conduct (albeit involving different conveyors), namely "Violation of TMK IPSCO's Cardinal Rules – Failure to follow Lockout procedures" (GD3-21). At that time, the Appellant was explicitly told that "Future occurrences will result in further discipline up to and including discharge of employment" (GD3-21). Given that the November 24, 2014 incident was both a reminder of the critical importance of locking out (a "Cardinal Rule") and a warning as to the consequences of violating the rule, it is not plausible to suggest the Appellant did not know that he could lose his employment if he failed to follow the lock out procedure in LOTO-009 on August 24, 2015. The second incident took place only nine (9) months after the November 24, 2014 incident and, even more compellingly, only four (4) months after the review training the

Appellant attended for LOTO-009 on April 14, 2015 (see Training Sign-in Sheet at GD8-6) and only two (2) days after the comprehensive Edmonton Safety Policy review the Appellant attended on August 12, 2015. In light of all of these circumstances, the Tribunal finds that the Appellant knew, or ought to have known, that dismissal was a real possibility for any further incident involving a failure to follow the lock out procedure.

[54] The Tribunal notes that the Federal Court of Appeal has held that violation of a workplace policy can constitute misconduct (*Vo 2013 CAF 235*), and that such behavior can be "misconduct" within the meaning of the EI Act if the conduct is reckless and shows a lack of concern with respect to the employer (*Parsons 2005 FCA 248; Murray A-245-96).*

[55] The Tribunal then considered the numerous justifications the Appellant provided for his conduct on August 14, 2015, namely that he did all that was required to make the area safe based on his assessment of the situation. However, by the Appellant's own admission, a pipe could have been sent down C4 onto C9 even if C9 was disconnected without power. The Tribunal accepts the evidence of Mr. H. M. that this could have caused injury to the Appellant or another employee and/or damage to equipment. Moreover, the Tribunal agrees with the employer's submission that it was not up to the Appellant to substitute his judgment for the employer's stablished safety procedures, and finds that it was more likely that the Appellant simply did not want to bother with the lock-out protocol after deciding he could do what he had to do quickly and with little or no likelihood of a problem. Given his prior discipline history, not to mention his extensive and on-going training in the employer's safety policies and lock out procedures, this conduct was extremely reckless in the Appellant's circumstances. Additionally, given the potential for injury to himself or a co-worker, and/or damage to equipment in the area, shows a serious lack of concern towards TMK IPSCO's employees and its business operations.

[56] The Tribunal is supported in its analysis by the Federal Court's ruling that it is not necessary for there to be wrongful intent for behavior to amount to misconduct under the EI Act. It is sufficient that the act or omission complained of be made "willfully", i.e. consciously, deliberately or intentionally: *Caul 2006 FCA 251; Pearson 2006 FCA 199; Bellavance 2005 FCA 87, Johnson 2004 FCA 100; Secours A-352-94; and Tucker A-381-85*.

[57] In the present case, the Tribunal finds that the Appellant's knowledge of the employer's lock out policy made his act of breaching that policy after being disciplined for a prior breach of that policy so reckless as to approach willfulness; that given the importance of safety protocols to the Appellant's position in maintenance at the TMK IPSCO plant, it irreparably harmed the employer-employee relationship; and that the Appellant ought to have known this could lead to his dismissal. The Tribunal therefore finds that the Appellant's conduct in breaching TMK IPSCO's lock out policy on August 14, 2015 was misconduct within the meaning of subsection 30(1) of the EI Act.

CONCLUSION

[58] The Tribunal finds that the Appellant lost his employment at TMK IPSCO by reason of his own misconduct. The Tribunal therefore finds that the Appellant is subject to an indefinite disqualification from EI benefits pursuant to section 30 of the EI Act.

[59] The appeal is dismissed.

Teresa M. Day
Member, General Division - Employment Insurance Section